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

RALPH S. JANVEY, IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK, LTD., ET AL.	§	
Plaintiff,	§	
V.	§	CIVIL ACTION NO. 3:09-CV-00724-N
JAMES R. ALGUIRE, ET AL.	§	
Defendants.	§	

FORMER EMPLOYEES' RESPONSE TO RECEIVER'S APPLICATION FOR PRELIMINARY INJUNCTION AND WRIT OF ATTACHMENT

Michael J. Stanley
Texas Bar No. 19046600
Stanley Frank & Rose, LLP
7026 Old Katy Road, Suite 259
Houston, Texas 77024
(713) 980-4381
(713) 980-1179 – Fax

Attorneys for Former Employees

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Cases

Federal Statutes

Texas Statutes

Louisiana Statutes

Secondary Authorities

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

RALPH S. JANVEY, IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK, LTD., ET AL.	§	
Plaintiff,	§	
V.	§	CIVIL ACTION NO. 3:09-CV-00724-N
JAMES R. ALGUIRE, ET AL.	§	
Defendants.	§	

FORMER EMPLOYEES' RESPONSE TO RECEIVER'S APPLICATION FOR PRELIMINARY INJUNCTION AND WRIT OF ATTACHMENT

TO THE HONORABLE COURT:

The "Former Employees"[1] file this response to Receiver's Application for Preliminary Injunction and Writ of Attachment. Exhibits are attached and are hereinafter incorporated by reference.[2] In support of their response, the Former Employees would show the Court the following:

---

[1] "Former Employees" as used in this Response refers to the 43 former employees represented by Stanley, Frank & Rose, LLP in this action and includes: Mark Groesbeck, Lupe Northam, Donald Miller, Teral Bennett, Hank Mills, Ron Clayton, James Fontenot, Miguel Valdez, Claudia Martinez, Grady Layfield, John Schwab, Michael Word, Charles Jantzi, Gary Haindel, Susana Cisneros, Tim Parsons, Gerardo Meave-Flores, Steven Hoffman, John Fry, Aymeric Martinoia, Louis Perry, Ryan Wrobleske, Carol McCann, Shawn Morgan, Raymond Deragon, Robert Barrett, Susana Anguiano, Donna Guerrero, Abraham Dubrovsky, Janie Martinez, Miguel Garces, J. D. Perry, Lori Bensing, Rolando Mora, Marty Karvelis, Anthony Makransky, Brent Simmons, Don Cooper, Rodney Hadfield, Jason LeBlanc, David Whittemore, Dirk Harris and Spencer Murchison.

[2] The Former Employees also incorporate by reference, the responses submitted by other former Stanford employees being filed in response to the Receiver's Application for Preliminary Injunction and Writ of Attachment. The arguments and evidence submitted in those responses further support the Former Employees' response.

ARGUMENTS & AUTHORITIES

I. THERE MUST BE A CLEAR SHOWING OF EVIDENCE TO SUPPORT A PRELIMINARY INJUNCTION.

A prejudgment asset freeze is not available in a case simply because the potential equitable award is likely to exceed available assets. See *Newby v. Enron Corporation*, 188 F.Supp.2d 684, 707-08 (S.D.Tex. 2002). Pre-judgment attachment is a particularly harsh, oppressive remedy. *S.R.S. World Wheels v. Enlow*, 946 S.W.2d 574, 575 (Tex.App.-Fort Worth 1997, orig. proceeding); *Carpenter v. Carpenter*, 476 S.W.2d 469, 470 (Tex.Civ.App.-Dallas 1972, no writ). As a result, the statutes and rules governing this remedy must be strictly followed. *S.R.S. World Wheels*, 946 S.W.2d at 575; *Carpenter*, 476 S.W.2d at 470.

A preliminary injunction is an extraordinary equitable remedy and will not issue as a matter of right. *Winter v. Natural Resources Defense Council, Inc.*, 129 S.Ct. 365, 375 (U.S. 2008). "The decision to grant a preliminary injunction is to be treated as the exception rather than the rule." *See Cherokee Pump & Equipment, Inc. v. Aurora Pump*, 38 F.3d 246, 249 (5th Cir.1994) (quoting *Mississippi Power & Light v. United Gas Pipe Line Co.*, 760 F.2d 618, 621 (5th Cir.1985)).

As an extraordinary remedy, a preliminary injunction is to be granted only when the movant carries the burden of persuasion by a clear showing. *Black Fire Fighters Association v. City of Dallas*, 905 F.2d 63, 65 (5th Cir.1990) (quoting *Holland American Insurance Co. v. Succession of Roy*, 777 F.2d 992, 997 (5th Cir.1985)); *see also Canal Authority of the State of Florida v. Callaway*, 489 F.2d 567, 572-73 (5th Cir.1974) (Noting that each of all four elements must be demonstrated by a clear showing); *see also Hoover v. Morales*, 164 F.3d 221, 224 (5th Cir.1998); *Clark v. Prichard*, 812 F.2d 991,

993 (5th Cir. 1987) (The party seeking such relief must satisfy a cumulative burden of proving each of the four elements enumerated before a preliminary injunction can be granted).

An application for a writ of attachment must be supported by the affidavit of a person having knowledge of relevant facts. TEX.R. CIV. P. 592. "The application and any affidavits shall be made on personal knowledge and shall set forth such facts as would be admissible in evidence..." *Id.* The validity of a writ of attachment does not depend on the truthfulness of the allegations, but on compliance with the statute in making the affidavit. *21 Turtle Creek Square, Ltd. v. New York State Teachers' Ret. Sys.*, 425 F.2d 1366, 1369 (5th Cir.1970) (applying Texas law).

II. THE RECEIVER HAS FAILED TO OFFER COMPETENT EVIDENCE.

A. The Receiver must present evidence against each Defendant – it cannot "lump" claims and parties.

The Receiver should not be permitted to get around its evidentiary burdens in seeking relief by "lumping" a group of individuals together as defendants and then "dumping" a handful of inadmissible documents into its brief. For each of the Former Employees, the Receiver has an obligation to present sufficient evidence supporting an injunction as to each. *GE Capital Commerical, Inc. v. Wright and Wright, Inc.*, 2009 WL 1148235 (N.D. Tex 2009) (holding that evidence may be sufficient to support all four elements required for preliminary injunction as to one Defendant and yet be insuffient as to remaining Defendants).

In *Newby v. Enron Corporation*, 188 F.Supp.2d 684 (S.D.Tex. 2002) individual plaintiffs attempted the same approach as the Receiver does here, grouping all individuals together under allegations specific as to only one defendant, Andrew Fastow. *See id.*

The *Enron* plaintiffs sought a temporary restraining order and preliminary injunction against Enron Corporation and certain individual officers of Enron. The United States District Court for the Southern District of Texas noted that the plaintiffs relied primarily on an affidavit of a former SEC enforcement attorney. *See id.* at 707-08. The court found that the evidence applied to Fastow but did not support an injunctive order freezing the assets of the other defendants. *Id.* While examining the supporting affidavit and evidence the court noted:

> **This affidavit does not distinguish among the defendants on the basis of their involvement in the alleged securities violations, their trades, or their present or future risk of asset concealment or dissipation. Nor do the pleadings and submissions distinguish among the individual defendants on the basis of their current activities or present or future risk of asset concealment or dissipation. A careful review of the record does not disclose the necessary showing that the individual defendants will remove the assets from the reach of the plaintiffs, so as to cause irreparable injury absent an asset freeze.**
>
> *Id.* at 708.

The court concluded:

> **. . . while it [the court] has the authority to consider the injunctive order requested, the record does not support a temporary restraining order that would 'freeze' the proceeds of three years of stock trades by the twenty-nine individuals whose roles and participation in Enron's financial matters varied, without allegations or evidence that each, or any, defendant has, or is likely to, conceal the stock sales proceeds or profits or place them beyond the reach, absent immediate judicial intervention.**
>
> *Id.* at 693.

A recent case from the Northern of District of Texas also underscored the need for a court to look at evidence of claims against individuals – not a group – when injunctive relief freezing assets is sought. In *GE Capital Commercial, Inc. v. Wright and Wright, Inc.*, 2009 WL 1148235 (N.D.Tex. 2009), Justin Prather, a former senior vice-president of GE Capital Commercial and GE Capital Financial, orchestrated a series of fraudulent

schemes soliciting money from investors. *Id.* at 4. Upon discovery of the fraudulent schemes, suit was filed to recover money Prather transferred to accounts held by Prather, Wright and Buchanan. *Id.* Plaintiffs filed a motion for preliminary injunction to freeze the accounts of defendants Prather, Wright and Buchanan. *Id.* After examining the evidence, the Northern District court found that Prather did not receive the money in good faith, but that the remaining defendants received the transfers in good faith because they too had fallen victim to Prather's conduct. *Id.* The court stated:

> **That Remaining Defendants may have been foolish, negligent, or even grossly negligent in their dealings with Prather is insufficient to establish that they were a party to the fraud. At best, Plaintiffs' evidence establishes that Remaining Defendants *may have been* complicit in Prather's fraud. Although this evidence is sufficient to establish *some* likelihood of success on the merits of Plaintiffs' money had and received claim against Remaining Defendants, a mere likelihood is insufficient to meet the required burden. Plaintiffs are required to establish a *substantial* likelihood of success on the merits, and the court is not convinced that they have met their burden as to Remaining Defendants.**
>
> *Id.* at 4.

GE Capital went on to find that because both plaintiffs and the Remaining Defendants fell victim to Prather's fraudulent schemes, the remaining defendants received the funds in good faith. *See id.*

B. The Receiver's evidence is inadmissible.

The "evidence" offered by the Receiver is not admissible for a variety of reasons. Virtually all of the exhibits are hearsay for which no exceptions apply. Most of the exhibits are irrelevant to the claims against the Former Employees since they are communications between, and about, others. To the extent that the Court determines some of the exhibits are relevant for one purpose or that a hearsay exception applies to

one of the parties, they should be admitted only as to a particular party and should be deemed inadmissible against the other parties pursuant to FRE 105.

When the evidence is evaluated in the proper light, the Court will plainly see that there are only a few exhibits that have anything to do with any of the Former Employees.[3] For the vast majority of the Former Employees, there is simply no evidence in support of the injunction against them. For the scant few that are referenced in the emails, a quick review of the "evidence" will confirm there is insufficient evidentiary support for the extraordinary remedy of a prejudgment attachment.

For the convenience of the Court, the Former Employees' objections to the Receiver's evidence are set forth in the following table:

Exh	Document	Objections
2	Unauthored Spreadsheet	Lack of **Authentication**. FRE 901
3	Email from Jason Green to Allen Stanford	Lack of **Authentication**. FRE 901 **Hearsay**. FRE 801 **Irrelevant**. FRE 402 **Not admissible against Former Employees** even if admissible to others. None of the Former Employees are parties to, identified or referenced in this document. This document does not implicate the Former Employees in any actions, and it does

[3] Only five exhibits relate to some of the individual Former Employees: Exhibit 16 (Robert Barrett); Exhibits 17, 23 (Mills); and Exhibit 28 (Groesbeck). Exhibit 24 was sent to several Former Employees, but it was merely a meeting announcement. The Receiver's evidentiary burden is not satisfied by attaching an email that mentions a defendant's name. Exhibits 16, 17, 23, 24 and 28 do not show a likelihood of success on the merits and cannot warrant prejudgment attachment against these different defendants.

Far from incriminating, the Exhibits, in general, show that the financial advisors did engage in due diligence, making a number of inquiries about SIB. Many exhibits show that financial advisors asked for and received information from upper management. Moreover, Exhibit 17 – a questionnaire to a client of Former Employee Hank Mills – actually contradicts many of the allegations in the Receiver's motion about the "representations" made by the financial advisors. In this exhibit, Mill's client responds to the SEC's 2005 questionnaire by stating, among others, that "They urged me to do my own due diligence." When asked: "What did you understand you were investing in," the investor replied "an uninsured certificate of deposit in an international bank." When asked "Did anyone tell you that funds invested in the CD Program were insured against loss," the answer was "No." Exh. 17 to the Receiver's Motion

		not establish that an injunction freezing the Former Employee's accounts is justified. FRE 105
4	Neal Clement email	See objections to Exh. 3
5	OIG Report	Hearsay, hearsay within hearsay, and **hearsay within hearsay within hearsay**. The Report is replete with out of court statements (hearsay 1) that were contained in heavily redacted email and letters (hearsay 2) that are summarized in the OIG Report (hearsay 3). FRE 801 Redactions make the document incomplete and, in many instances, unintelligible. (See, OIG Report at 96-98,111, 130, 133-136, 145, 146, 148, 149, and 186 copies of which are attached to this Response as Appendix 1). The document should not be admitted until a **complete copy** with referenced exhibits is produced. FRE 106 Lack of **authentication.** Even two of the three authors' names are redacted from the signature page. FRE 901 **Not admissible against Former Employees** even if admitted as to others. The OIG report does not mention the Former Employees. FRE 105 **Confusion and prejudice** outweigh any probative value as to the actions of the Former Employees. Many of the actions referenced in the Report took place when many of the Former Employees were not working for Stanford. For example, the Examination Report referenced at page 85 of the Report (and referred to in the Receiver's motion), took place in 2002, long before many of the Former Employees started working for Stanford. Similarly, the 1998 Matter Under Inquiry took place more than a decade ago. While the OIG's investigation asks important questions about why the SEC acted the way it did, it is not relevant to the issues concerning the prejudgment attachment of assets in this action. FRE 403. This record is a private document that has been redacted. The first page of the Report states that "Recipients of this report should not disseminate or copy it without the Inspector General's approval." The OIG did not have a duty to report on whether the Former Employees acted wrongfully, engaged

		in fraudulent transfers or were involved in a Ponzi scheme. Rather, the OIG was charged with investigating the "SEC's Response to Concerns Regarding Robert Allen Stanford's Alleged Ponzi Scheme." OIG Report at p. 28. The Report reflects many contradictory statements from anonymous witnesses. These circumstances indicate a lack of trustworthiness and the Report is **not admissible** under FRE 803(8) as a hearsay exception.
6	Sadler Affidavit	**Lack of personal knowledge**. Everything Mr. Sadler bases his "knowledge" on is derived from **hearsay** – what he has seen or been told out of court. FRE 602, FRE 801 The statement that the Former Employees are "justly indebted to the Receiver" is not fact but merely a **conclusory statement**.[4] FRE 602 The statement that the Receiver "will probably lose his debt unless this writ of attachment is issued" is **conclusory**, **speculative** and assumes facts that have not been established. FRE 602
7	Unsigned agreement with David Nanes	**Hearsay**. FRE 801 **Lack of authentication**. FRE 901 **Irrelevant** to the assertions against the Former Employees. Even if the unsigned document could be admitted against Nanes, it is not admissible against the Former Employees who are not mentioned in this document. FRE 402, 403, 105.

[4] A district court should be wary of issuing an injunction based solely upon allegations and conclusory affidavits submitted by a movant. *Atari Games Corp. v. Nintendo of America, Inc.*, 897 F.2d 1572, 1575 (Fed.Cir. 1990); *American Passage Media Corp. v. Cass Communications*, 750 F.2d 1470 (9th Cir. 1985)(reversing grant of preliminary injunction of alleged antitrust violations based on conclusory affidavits); 11A Wright & Miller, Federal Practice & Procedure § 2949, at 215 (2d ed. 1995) ("All affidavits should state the facts supporting the litigant's position clearly and specifically. Preliminary injunctions frequently are denied if the affidavits are too vague or conclusory to demonstrate a clear right to relief under Rule 65."). Further, an affidavit that is merely a recitation of the requirements for an injunction is insufficient to support a request for injunctive relief. *Blango v. Thornburgh*, 942 F.2d 1487 (10th Cir. 1991); *Muhammad v. U.S.*, 2008 WL 4426882 (10th Cir. 2008).

In *SEC v. Sharp Capital, Inc.*, 2001 WL 169722 (N.D.Tex. 2001), a case in which Ralph Janvey was the receiver, the court ruled that the assertions contained in declarations were incompetent and inadmissible evidence because the statements were "conclusory or hearsay." Generally, a court may consider statements in an affidavit only if they are made on personal knowledge and are sworn to be true and correct. *See* FED. R. CIV. P. 56(e). Where the movant's burden has been to show only a fact issue – a much lighter burden than what the Receiver must do here – unsupported allegations or affidavits setting forth ultimate or conclusory facts and conclusions of law are insufficient to defeat a motion for summary judgment. *See Clark v. America's Favorite Chicken Co.*, 110 F.3d 295, 297 (5th Cir. 1997).

		Irrelevant as to any issues the Receiver needs to establish for an injunction against the Former Employees. FRE 402.
8	Email between James Davis, Laura Pendergest, Jason Green and others	**This email does not relate to the Former Employees.** See objections to Exh 7.
9	Fax from Billy Hall to Mark Burke	Neither the sender nor the recipient is a party to this action. Lack of **Authentication**. FRE 901 **Hearsay**. FRE 801 **Irrelevant.** FRE 402
10	Unsigned letter from Vanderver to Hall	**Hearsay**. FRE 801 Lack of **Authentication**. FRE 901 **Irrelevant** to the Former Employees who are not mentioned in this document and, even if the document was admitted as to Vanderver, it is not admissible against the Former Employees. FRE 402, 105
11	Letter from SEC to Jay Comeaux	**Hearsay**. FRE 801 **Irrelevant** to the allegations of a Ponzi scheme. The letter discuss various disclosures, procedures and failures of SGC, but does not mention a Ponzi scheme or fraudulent conveyances. FRE 402 The document is not signed by anyone at SGC, despite the apparent line for them to do so. Lack of **Authentication**. FRE 901 Even if the document was admissible against Comeaux or SGC, **there is no evidence that the Former Employees had seen this letter** and the document is not admissible against the Former Employees. FRE 105.
12	Email from Suzanne Hamm to Jason Green, Chuck Volmer	**Hearsay**. FRE 801 Even if the document was admissible against parties to the email, **there is no evidence that the Former Employees had seen this letter** and the document is not admissible against the Former Employees. FRE 105.
13	Email from McDaniel to Rodrigues-Tolentino	**Hearsay.** FRE 801 **Relevance**. There is no evidence that the Former Employees were aware of this question asked by

		another employee, nor does this email reflect on the actions of the Former Employees. The documents is irrelevant and should be excluded as to the Former Employees. FRE 402, 105.
14	Affidavit from process server regarding David Nanes	**Relevance.** The inability of the Receiver to serve an unrelated defendant is irrelevant to the freeze on the Former Employees' accounts, or even the ultimate issues in this litigation. FRE 402. Given that it appears from the affidavit that nobody has been seen living at the address since November 2009, the inability to serve Nanes at that address is probative of nothing.
15	Email from Doug Shaw to Jay Comeaux	**Relevance.** The email does not concern the Former Employees and was not sent to them. If it has any relevance, it can only be admitted against the other parties. FRE 402, 105. **Hearsay.** The comment about money lost because of "the Tidwell article" is hearsay, as is the entire communication between Shaw and Commeaux. FRE 801.
16	Email from Comeaux to Rigby, forwarding an email from Barrett to Comeaux	**Relevance**. The email purports to be from an employee to Comeaux letting him know that a customer made a CD withdrawal. It is not relevant to the sale of the CD, the use of CD proceeds or any transfers which the Receiver says are fraudulent. To the extent that it has any relevance, it should not be admitted against any parties other than those involved in the communication. FRE 402, 105. **Hearsay**. The email thread is hearsay itself, and contains additional hearsay ("Robert and I were notified that this account was being withdrawn...") FRE 801.
17	Anonymous SEC questionnaire completed by a client of Hank Mills and Tiffany Angelle	**Hearsay.** FRE 801 The document contains many redactions and is **incomplete**. A complete copy of the document should be used, particularly since the incomplete version fails to identify the author of the documents. FRE 106. There is a lack of **authentication**. The source of this document, and who has seen it, is unknown. FRE 901.
18	SIB Presentation	**Lack of authentication**. The author(s) and source of this document are unknown. FRE 901

		Relevance. It is unknown when this document was made, who it was shown to, or if anyone relied upon it. FRE 402
19	Untitled chart	**Lack of authentication**. The author(s) and source of this document are unknown. FRE 901 **Relevance.** This document appears to be irrelevant to any of the issues before this Court on the preliminary injunction. FRE 402
20	Memo from Poppell	**Lack of authentication**. There is no evidence anyone received this memo, or if it was ever sent. FRE 901. **Hearsay**. FRE 801 **Relevance**. This memo purports to be dated in 2005. For the many Former Employees that were hired after this date, the memo is irrelevant and does not show they had notice of an informal inquiry. The exhibit should not be admissible as to any employees hired after May 27, 2005. FRE 402, 105
21	NASD letter to Poppell	**Lack of authentication.** FRE 901 **Hearsay.** FRE 801 **Relevance.** The letter is addressed to Poppell. There is no evidence that it was sent or forwarded to the Former Employees or that they otherwise had notice of this letter. As such, it is irrelevant to the action against the employees. Alternatively, any probative value of this exhibit is outweighed by the confusion and prejudice against the Former Employees since they were not parties to this letter. FRE 402, 403 The exhibit is further **irrelevant** because the issues relate to the adequacy of specific disclosures made in the sales literature, not fraudulent transfers or an alleged Ponzi scheme. These matters were, apparently, brought to the Compliance Department's attention and subsequently addressed. This is inadmissible evidence of **other crimes or wrongs** of SGC. FRE 402, 404
22	Email from Chuck Vollmer	**Hearsay**. FRE 801 **Relevance**. This is inadmissible and irrelevant to the Former Employees who were not copied on this

		email. FRE 402, 105
23	Email from Barrios to Mills	**Relevance**. This document is irrelevant to the issues in this litigation, particularly for those Former Employees who did not receive the email. FRE 402, 105.
24	Email from Pam Thomas	**Relevance**. This document is irrelevant to the issues in this litigation, particularly for those Former Employees who did not receive the email either because they were not working in the Houston office or they were not working for SGC at the time of the meeting. FRE 402, 105. **Hearsay**. To the extent that this exhibit is being offered for the truth of the matter (a meeting that discussed the SEC questionnaire), it is hearsay. It is further inadmissible because it does not establish if the meeting actually took place, who attended or what was discussed. FRE 801
25	Undated, unsigned draft letter	**Lack of authentication.** It is an unsigned draft from an unknown author. FRE 901 **Hearsay.** FRE 801 **Relevance.** There is no evidence presented that this letter was sent to any of the Former Employees. It appears to be a draft response to an inquiry on matters that are not at issue in this litigation. FRE 402, 105. To the extent that this relates to evidence of **other crimes or wrongs** of SGC, it should not be admissible against the Former Employees in this case. FRE 404, 403
26	Email from Poppell	**Hearsay**. The email also contains additional hearsay. FRE 801 **Relevance**. This was not sent to the Former Employees and should not be admitted as to them. FRE 402, 105
27	Email from Whitaker to Green	**See objections to Exh. 26**
28	Email from Kuhrt to Groesbeck	**Relevance**. This email should not be admissible against any of the other Former Employees that were not aware of it. FRE 402, 105
29	Declaration of Van Tassel regarding David Nanes compensation	**Relevance.** This Declaration is irrelevant to any issues involving the Former Employees. At best, it is only relevant to David Nanes. FRE 402, 105
30	Declaration of Scarazzo	**Relevance**. This Declaration is irrelevant as it does

		not cure any of the objections to the exhibits. At best, it establishes that the exhibits came from records of Stanford, but that does not make the documents admissible against former Stanford employees.

In addition to the above objections, the Declarations provided by Sadler and Van Tassel are lacking for further reasons. Sadler's Declaration (Receiver Exh. 6) asserts that the Accountholders are justly indebted to the Receiver "as set forth in detail in the attached Van Tassel Declaration." Van Tassel, however, could not defend the amounts as just or owing. For example, in the brief deposition that defendants were allowed of Van Tassel[5], she admitted that her calculations:

- Contain amounts that may be overstated. *Van Tassel at 38.*
- Are based upon the gross amount attributed to the employees, not the actual amounts paid to them (i.e., the numbers include taxes and other withholdings). *Van Tassel at 34, 109-10;*
- Include the full amount of loans made to employees, even if the indebtedness was extinguished according to the terms of the loan agreement. Although she had documents that reflected the actual amounts owing on the loans, she used the larger number based on the original loan amount because she was asked to use the original loan amount by the Receiver. *Van Tassel at 68-70, 110-12, 117*
- Fail to give credit to the employees for any amounts that are owed to them. *Van Tassel at 46*
- Do not take into consideration any amounts the Former Employees invested in the CDs and lost. She did acknowledge that many of the financial advisors had invested in the CDs themselves and were "net losers." *Van Tassel at 39-40, 118-119*

[5] A deposition of Van Tassel was taken on May 6, 2010. Ms. Van Tassel's firm has worked on behalf of the Stanford Receiver for over a year, has had up to 100 people at a time working on the case and has received over $12 million in fees. *Van Tassel at 89, 105.* Defendants were permitted, collectively, only a three hour examination of Ms. Van Tassel and were not given the underlying documents Ms. Van Tassel accessed and relied upon. Notwithstanding these constraints, Van Tassel made a number of important admissions, most notably that she has not traced a single penny of CD money to the accounts frozen by the Receiver. *Van Tassel at 120-121.*

- Ignore the damages to frozen accounts as the Former Employees have not been able to manage accounts for more than a year (while the market has greatly increased). *Van Tassel at 83-84, 86-88.*

Given this, and the fact that the underlying data supporting the attempted attachment have not been made available, the Court should not accept the conclusory statements concerning the indebtedness of the Former Employees.

III. THE RECEIVER HAS NOT ESTABLISHED A CLEAR SHOWING OF SUBSTANTIAL LIKELIHOOD OF SUCCESS OR IRREPARABLE HARM.

A. Receiver cannot show substantial likelihood of success when its claims have not been properly pleaded.

The Receiver has not pleaded its causes of action with the required specificity and has never alleged specific facts supporting its claims of fraudulent transfer against each Former Employee. The Receiver cannot establish a likelihood of success without even having properly met the pleading requirements under the Federal Rules.[6]

B. The Receiver does not establish it is entitled to a preliminary injunction under TUFTA.

The Receiver requests relief under the Texas Uniform Fraudulent Transfer Act ("TUFTA") and under traditional equity principles. To be entitled to a preliminary injunction under TUFTA, the Receiver must not only make a clear showing of likelihood of success for its claim against Former Employees, there must be a **substantial** likelihood of success. *GE Capital Commercial, Inc. v. Wright and Wright Inc.*, 2009 WL 1148235 (N.D. Tex. 2009) (citing the standard that mere likelihood of success is insufficient to meet required burden for a preliminary injunction under TUFTA) (emphasis added). For

[6] The Former Employees' motion to dismiss the Receiver's suit for, *inter alia*, failure to state a claim and failure to plead fraud with particularity is currently pending before this Court. (Doc. 211, filed 1/15/2010). The arguments raised in that motion concerning the insufficiency of the Receiver's pleadings demonstrate the failure of the Receiver at pleading, much less proving, the underlying fraud.

a number of reasons, Receiver has not met its burden of showing a substantial likelihood of success in proving that payments were fraudulent under TUFTA.

1. Proof of a Ponzi Scheme: The Receiver Has Failed In Its Burden.

The Receiver's claims against the Former Employees are predicated upon the assertion that there was a Ponzi scheme *ab initio*, and that the transfers to the Former Employees were in furtherance of that scheme. "A Ponzi scheme is a fraudulent investment scheme where money from new investors is used to pay profits on the money contributed by earlier investors, ***without the operation of an actual revenue-producing business*** other than the raising of new funds by finding more investors." *S.E.C. v. Cook*, 2001 WL 256172 at fn 1 (N.D.Tex. 2001) (emphasis added). While the Receiver in the instant case liberally uses the label "Ponzi scheme," it is less forthcoming with substantive details and factual support about the alleged scheme.

The evidence submitted by the Receiver with its Motion for Preliminary Injunction, even if it was all admissible, falls short of establishing a Ponzi scheme and subsequent fraudulent transfers to hundreds of employees. When the rules of evidence are applied to the submission, the Receiver has nothing.

On the other hand, the Receiver's expert provides evidence that contradicts the assertion that Stanford was nothing but a Ponzi scheme. These new details add to the growing body of evidence that there were real investments made with the CD proceeds and that Stanford was operating a revenue-producing business, although the Former

Employees and investors may have been mislead about the financial stability of the business by those in control.[7]

In short, Ms. Van Tassel has testified:

Allen Stanford controlled SFG along with his "close band of confidantes" Jim Davis and Laura Pendergest Holt. *Declaration of Karyl Van Tassel filed as Doc. 18 on 7/28/2009 in SEC v. Stanford International Bank, et al.*, Case No. 03-CV-0298-N (hereinafter "2009 Declaration") at ¶18.

Stanford Group Company generated revenue from its brokerage services. *Van Tassel at 15.*

In 2005, 2006 and 2007, the assets of Stanford Group Company exceeded its liabilities. *Van Tassel at 13-14*

When money came in to SIB from investors, it was actually put into banks and investments were made with the money. *Van Tassel at 122*

SIB had accounts with hundreds of millions of dollars in investments. *Van Tassel at 117.*

"Tier II" had at least $889 million at the end of 2007. "Tier III" was by far the most significant financially. *2009 Declaration at ¶ 18-19.* "Tier III" included private equity deals where actual investments were made. *Van Tassel at 122*

At the end of 2007, assets between $6.5 billion - $7.5 billion were reflected on the books of the Stanford related companies. *Van Tassel at 117.*

---

[7] Additional details about the operation of Stanford are set forth in the Former Employees' Motion to Dismiss, Doc 211, at pages 3-10 and are incorporated here by reference.

The market declined in 2008 and there were significant CD redemptions. This drop in the market combined with CD redemptions resulted in a drop in SIB's asset value. *Van Tassel at 117*

Redemption payments of approximately $2 billion were made from January 1, 2008 through February 2009. *2009 Declaration at ¶ 39, Van Tassel at 118.*

Misinformation regarding SIB's financial strength, profitability, capitalization, investment strategy, investment allocation and the value of the investment portfolio was given to the Stanford financial advisors. *2009 Declaration at ¶ 11*

The financial advisors believed that SIB had invested the funds in equities and that there was liquidity. The financial advisors were told that SIB had invested in equities, fixed income, alternative investments and metals. *Van Tassel at 118-120.*

Van Tassel's deposition is the only discovery that has been afforded in this litigation, so the picture of what happened at Stanford is incomplete. What is clear, however, is that the matter is far different from Madoff and other Ponzi schemes where no investments were made and there were no revenue-generating activities. At this stage of the litigation, the Receiver has failed to establish, with evidence, that this was a Ponzi scheme.

2. Without proof of a Ponzi scheme, the Receiver cannot show a substantial likelihood of success of proving that payments to Former Employees were made with intent to hinder, delay or defraud.

The Receiver relies heavily upon the "Ponzi presumption" that courts have recognized upon proof of a Ponzi scheme. It uses the presumption in an attempt to eviscerate Defendants' defenses, although no evidence has been presented. This argument is a house of cards, built on presumption stacked upon presumption. The Receiver has

neither pleaded nor proven meaningful details of a Ponzi scheme. The Receiver argues that when there is a Ponzi scheme, it does not matter that Former Employees lacked knowledge of any fraud or that they received payments in good faith. This argument, which Former Employees dispute, still requires the Receiver to plead and prove the Ponzi scheme. Until it does so, the Receiver is not entitled to any presumption in its favor and should not be permitted to a prejudgment freeze of assets.

C. The Receiver fails to show irreparable harm.

The Receiver has completely failed to meet his burden to establish a risk of irreparable harm. The standard for the Receiver is a clear showing of immediate irreparable injury. *See ECRI v. McGraw-Hill, Inc.*, 809 F.2d 223, 225 (3rd Cir. 1987); *see also Newby v. Enron Corporation*, 188 F.Supp.2d 684, 707 (S.D.Tex. 2002) (citing to *Sugar Busters, LLC v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999) for the proposition that plaintiff must make a clear showing that there exists a substantial threat of irreparable injury if the order is not granted). A prejudgment asset freeze is not available in a case simply because the potential equitable award is likely to exceed available assets. *See id.*

1. The IRAs are Exempt

One third of the frozen accounts are IRAs. Doc. 393 at Exhibit 2. No amount from the IRAs would be subject to collection by the Receiver under the laws of Texas or Louisiana, the states where Former Employees are located. Consequently, no irreparable harm results from releasing those accounts. Additionally, Van Tassel acknowledged that she was not aware of any evidence that money in Former Employees IRA accounts came from the sale of CDs or commissions earned from CD investments. *Van Tassel p. 121 lines 9-15* The Receiver has not done any analysis to determine this. *Id.*

Retirement accounts are exempt under Texas law. TEX. PROP. CODE §42.0021(a)("...a person's right to the assets held in or to receive payments, whether vested or not, under any stock bonus, pension, profit-sharing, or similar plan, including a retirement plan for self-employed individuals, and under any annuity or similar contract purchased with assets distributed from that type of plan, and under any retirement annuity or account described by Section 403(b) of the Internal Revenue Code of 1986, and under any individual retirement account or any individual retirement annuity...is exempt from attachment, execution, and seizure for the satisfaction of debts unless the plan, contract or account does not qualify under the applicable provisions of the Internal Revenue Code of 1986."). Courts in Texas construe the scope of exemptions liberally with most doubts about the existence of an exemption resolved in favor of the debtor claiming the exemption. *In re Swift*, 129 F.3d 792, 795 (5th Cir. 1997), citing *Stephenson v. Wixom*, 727 S.W.2d 747, 749 (Tex.App.—Fort Worth, 1987).

Louisiana law also protects IRA funds from collection. *See Mexic v. Mexic*, 808 So.2d 685, 692 (La. App. 1st Cir. 2001) (holding that exempt status of IRA is governed by LSA-R.S. 13:3881, as amended by 1999 La. Acts, No. 63). The applicable Louisiana statute states as follows:

> *"D. (1) Except as provided in Paragraph 2 of this Subsection, the following shall be exempt from all liability for any debt except alimony and child support: all pensions, all tax-deferred arrangements, annuity contracts, and all proceeds of and payments under all tax-deferred arrangements and annuity contracts, as defined in Paragraph 3 of this Subsection.*
>
> * * * *
>
> *(3) The term "tax-deferred arrangement" includes all individual retirement accounts or individual retirement annuities of any variety or name, whether authorized now or in the future in the Internal Revenue Code of 1986, or the corresponding provisions of any future United States income tax law, including balances rolled over from any other tax- deferred arrangement as defined herein.*

money purchase pension plans, defined benefit plans, defined contribution plans, Keogh plans, simplified employee pension (SEP) plans, simple retirement account (SIMPLE) plans, Roth IRAs, or any other plan of any variety or name, whether authorized now or in the future in the Internal Revenue Code of 1986, or the corresponding provisions of any future United States income tax law, under which United States income tax on the tax-deferred arrangement is deferred. The term "annuity contract" shall have the same definition as defined in R.S. 22:912(B)."

LSA-R.S. 13:3881 (as amended by 1999 La. Acts, No. 63).

There is no basis for freezing these accounts and the Receiver has failed to show it would be harmed from their release.

2. No evidence that the Former Employees will dissipate assets to avoid a judgment

The Receiver argues that the Court should grant a preliminary injunction because each and every one of the 329 former Stanford financial advisors is likely to fraudulently transfer or dissipate the funds currently in their Pershing accounts. The Receiver must show that **each** defendant is likely to dissipate the assets that may satisfy the equitable remedies the Receiver has asserted, absent intervention by the Court. *Newby v. Enron Corporation*, 188 F.Supp.2d 684, 707 (S.D.Tex. 2002) (emphasis added). The only evidence offered by Receiver, however, relates to one Defendant, David Nanes. No evidence is presented concerning the remaining defendants. Accordingly, there is no showing of irreparable harm.

In *Newby v. Enron Corporation*, 188 F.Supp.2d 684 (S.D.Tex. 2002), the Court noted that the plaintiffs did not provide the necessary showing of evidence that all the individual defendants would remove assets from the reach of plaintiffs so as to cause irreparable harm absent an asset freeze. *See id.* at 708. The U.S. Southern District Court focused on the fact that the plaintiffs' only specific suggestion of a risk of concealment of assets was with regard to Andrew S. Fastow. *See id.* The plaintiffs in *Enron* attempted

the same approach as the Receiver does here, grouping all individuals together under allegations specific as to only one defendant. *See id.* *Enron* found that the evidence applied to the risk of further fraudulent transfers as to Fastow could not be applied to the remaining defendants. *Id.*

PRAYER FOR RELIEF

For these reasons, Former Employees request that the Court sustain their objections to Receiver's submitted evidence and deny Receiver's application for preliminary injunction and alternative request for writ of attachment concerning Former Employees' frozen accounts. Former Employees also respectfully request any further relief in law or equity to which they may be found justly entitled.

Respectfully submitted,

STANLEY FRANK & ROSE, LLP

BY: /s/

Michael J. Stanley
Texas Bar No. 19046600
7026 Old Katy Road, Suite 259
Houston, Texas 77024
(713) 980-4381
(713) 980-1179 – Fax

Attorney for Defendants Mark Groesbeck, Lupe Northam, Donald Miller, Teral Bennett, Hank Mills, Ron Clayton, James Fontenot, Miguel Valdez, Claudia Martinez, Grady Layfield, John Schwab, Michael Word, Charles Jantzi, Gary Haindel, Susana Cisneros, Tim Parsons, Gerardo Meave-Flores, Steven Hoffman, John Fry, Aymeric Martinoia, Louis Perry, Ryan Wrobleske, Carol McCann, Shawn Morgan,

Raymond Deragon, Robert Barrett, Susana Anguiano, Donna Guerrero, Abraham Dubrovsky, Janie Martinez, Miguel Garces, J. D. Perry, Lori Bensing, Rolando Mora, Marty Karvelis, Anthony Makransky, Brent Simmons Don Cooper, Rodney Hadfield, Jason LeBlanc, David Whittemore, Dirk Harris and Spencer Murchison

CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Federal Rules of Civil Procedure a true and correct copy of the above and foregoing document was served via ECF on counsel of record on this the 10th day of May, 2010.

/s/
Michael J. Stanley