

09-10761

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

RALPH S. JANVEY,

Plaintiff – Appellant–Cross-Appellee,

v.

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

Defendants – Appellees-Cross-Appellants

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

Defendants – Appellees

Consolidated with
09-10765

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

Plaintiff – Appellant

v.

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

Defendants – Appellees

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

BRIEF OF APPELLANT RALPH S. JANVEY

BAKER BOTTS L.L.P.
Kevin M. Sadler
Joseph R. Knight
Susan Dillon Ayers
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
(512) 322-2589
(512) 322-2501 (Facsimile)

ATTORNEYS FOR PLAINTIFF – APPELLANT –
CROSS-APPELLEE

Appellant Ralph S. Janvey, in his capacity as court-appointed Receiver for the Stanford Group of Companies (“the Receiver”) submits this Appellant’s Brief and shows the following:

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Eugene B. Wilshire
Jacalyn D. Scott
WILSHIRE & SCOTT, P.C.
3000 One Houston Center
1221 McKinney Street
Houston, Texas 77010
Attorneys of Record for the Hunton Parties

David B. Reece
Mike Post
U.S. SEC
100 F Street, NW, Rm 9404
Washington, DC 20549
Attorneys of Record for the SEC

John J. Little
Stephen Granberry Gleboff
LITTLE PEDERSEN FANKHAUSER
901 Main Street, Suite 4110
Dallas, Texas 75202
Court Appointed Examiner

Ben L. Krage
Charlie E. Gale
KRAGE & JANVEY LLP
2100 Ross Ave., Suite 2600
Dallas, Texas 75201
Attorneys of Record for Court Appointed Receiver

Ross D. Kennedy
BRACEWELL & GIULIANI LLP
711 Louisiana St., Suite 2300
Houston, Texas 77002
Attorney of Record for Christopher Allred and Patricia A. Thomas

Gene R. Besen
SONNENSCHNEIN NATH & ROSENTHAL, LLP
2000 McKinney Ave, Ste 1900
Dallas, Texas 75201-1858
Attorney of Record for Jay Stuart Bell, Gregory Alan Maddux, David Jonathan Drew, Andrew Rudolph Bernardo Jones, Carlos Felipe Pena, Johnny David Damon, Bernabe Williams

M. David Bryant, Jr.
COX SMITH MATTHEWS, Inc.
1201 Elm Street, Suite 3300
Dallas, Texas 75720

Mark Joseph Barrera
Deborah Daywood Williamson
COX SMITH MATTHEWS, Inc.
112 East Pecan St., Suite 1800
San Antonio, Texas 78205
Attorneys of Record for Divo Haddad Milan and Singapore Puntamita Pte. Ltd.

Michael J. Quilling
Brent Jason Rodine
Marcie Lynn Schout
QUILLING, SELANDER, CUMMISKEY & LOWNDS
2001 Bryan Street, Suite 1800
Dallas, Texas 75201

Attorneys of Record for Gaines D. Adams, Nen Family Trust, Jeff P. Purpera, Jr., Cheray and Luther Hodges, Eric and Jennifer Tucker, Robert and Alice Greer, Michael and Betty Wheatley, Mississippi Polymers, Inc., J. Michael Gaither, Geneva and Robert Palmer, J. Russell Mothershed, The Second Amended and Restated Robert A. Houston Revocable Trust, Robert A. Houston, Angel Delio Nieuw, Maria Nieuw-Cael, Country Hill Investments, N.A., Murfield Investments, Inc., Phillip E. Marrett, George R. Grave, III, Thomas H. Turner, Daneco B.V., DNX Capital, IRM Investments, Inc., Stichting Particulier Fonds El Tributo

Ruth Brewer Schuster
THE GULF LAW GROUP PLLC
1201 Connecticut Ave NW
Suite 500
Washington , DC 20036

Attorney of Record who purports to represent Stanford Int'l Bank, Ltd., Stanford Group Co., Stanford Capital Management, LLC and R. Allen Stanford

David M. Finn
MILNER & FINN
2828 N Harwood
Suite 1950 LB 9
Dallas , TX 75201

Attorney of Record for James M. Davis

Jeffrey M Tillotson
LYNN TILLOTSON PINKER & COX LLP
2100 Ross Ave
Suite 2700
Dallas , TX 75201

Attorney of Record for Laura Pendergest-Holt

Hank Mills
2623 Kleinert Avenue
Baton Rouge, LA 70806

Attorney of Record for Hank Mills

Jeffrey Tew
TEW CARDENAS LLP
Four Seasons Tower 15th Floor
1441 Brickell Avenue
Miami, FL 33131

Attorney of Record for Maria Villanueva

Bradley W. Foster
Matthew G. Nielsen
ANDREWS KURTH LLP
1717 Main Street, Suite 3700
Dallas, Texas 75201

Attorneys of Record for James R. Alguire, Victoria Anctil, Sylvia Aquino, Jonathan Barrack, Norman Blake, Nigel Bowman, Charles Brickley, Neal Clement, Jay Comeaux, Patrick Cruickshank, Arturo R. Diaz, Matthew Drews, Thomas Espy, Attlee Gaal, Patricia Herr, Charles Hughes, James LeBaron, Trevor Ling, Michael Mansur, Lawrence Messina, Trenton Miller, Scott Notowich, Monica Novitsky, Saraminta Perez, Elside Prieto, Judith Quinones, Leonor Ramirez, Nelson Ramirez, Steve Robinson, Rocky Roys, Al Trullenque, Tim Vanderver, Pete Vargas, Maria Villanueva, Charles Vollmer, Andrea Berger, Doug Shaw

James Scott Annelin
ANNELIN & GASKIN
2170 Buckthorne Place, Suite 220
Woodlands, Texas 77380

Attorney of Record for HMS&B, Ltd.

Jeffrey J. Ansley
BRACEWELL & GIULIANI, LLP
1445 Ross Avenue, Suite 3800
Dallas, Texas 75202

Attorney of Record for Roberto Ulloa

Phillip W. Preis
PREIS GORDON A PLC
450 Laurel St., Suite 2150
Baton Rouge, LA 70801-1817

Attorney of Record for Joseph Becker, Terry Beven, Kenneth Bird, James Brown, Murphy Buell, John C. Busceme, Virginia Buscheme, Robert Bush, Gene Causey, Joseph Chustz, Darrell Courville, William Dawson, Deborah Dougherty, Gwen Fabre, Richard Feucht, Joan Feucht, Kendall Forbes, Deborah Forbes, Lynn Gildersleeve, Willa Mae Gildersleeve, Robert V. Gildersleeve, Gordon C. Gill, Robert Graham, Jason Graham, Benton B. Johnson, William Bruce Johnson, Jennifer Savoic, Dennis Kirby, Kerry R. Kling, Teresa Michelle Lamke, Don Landers, Laura Lee, Troy Lillie, Ron Marsten, Susan Marsten, Billie Ruth McMorris, Ronald McMorris, Virginia McMorris, Thomas Moran, Arthur Ordoyne, Bennie O'Rear, Claudia O'Rear, Mary Ann Paternostro, Larry Perkins, Charles Sanchez, Mamie Sanchez, Thomas Slaughter, Larry Smith, James Stegall, Carol Stegall, Walter Stone, Terry Tullis, Ron Valentine, Anthony Ventrella, Olivia Sue Warnock, Arthur Waxley, Charles White, Kenneth Wilkewitz, Matha Witmer, Bruce Stone, Sharon Witmer, Martha Johnson, John B. Buscheme

Monica L. Luebker
Parker D. Young
Russell William Hubbard
FIGARI & DAVENPORT
3400 Bank of America Plaza
901 Main Street, LB 125
Dallas, Texas 75202-3796

Attorneys of Record for Eduardo Najera and Jennifer Najera

Kevin M. Lemley
ALLEN LAW FIRM PC
212 Center Street, 9th Floor
Little Rock, AR 72201

Attorney of Record for Bobby G. Wilkerson

Kendall Kelly Hayden
COZEN O'CONNOR
2300 Bankone Center
1717 Main Street
Dallas, Texas 75201

Attorney of Record for James Ronald Lawson

Brett Feinstein
STRATTON & FEINSTEIN PA
407 Lincoln Road, Suite 2A
Miami Beach, FL 33139
Attorney of Record for Marie Nieves

Rodney Acker
Barton Wayne Cox
Ellen B. Sessions
FULBRIGHT & JAWORSKI
2200 Road Avenue, Suite 2800
Dallas, Texas 75201
Attorneys of Record for Pershing LLC

James B. Greer
Joseph A. Hummel
Kenneth C. Johnston
KANE RUSSELL COLEMAN & LOGAN PC
1601 Elm Street, Suite 3700
Dallas, Texas 75201

Attorneys of Record for Regions Bank, as Trustee for LPFA II City Plaza Project
Series 2008 and II City Plaza LLC

Ashlea Brown
NEWLAND & ASSOCIATES PLLC
10 Corporate Hill Dr., Suite 330
Little Rock, AR 72205
Attorney of Record for Hannah Kay Peck

Benjamin D. Reichard
James R. Swanson
Lance C. McCardle
FISHMAN HAYGOOD PHELPS WALMSLEY WILLIS & SWANSON LLP
201 St. Charles Avenue, 46th Floor
New Orleans, LA 70170-4600
Attorneys of Record for Numa L. Marquette and Gail G. Marquette


Bart Wulff
SHACKELFORD MELTON & MCKINLEY
3333 Lee Parkway, Tenth Floor
Dallas, Texas 75219

Attorney of Record for James G. Denison, Kathy R. Denison

For additional interested parties please see the attached *Appendix A*.

Respectfully submitted,

BAKER BOTTS L.L.P.

Kevin M. Sadler w/permission
Kevin M. Sadler by 

STATEMENT REGARDING ORAL ARGUMENT

Oral Argument will crystallize the parties' positions and assist this Court in establishing the rule of law that will govern claims in this Circuit for recovery and distribution of money stolen pursuant to a Ponzi scheme. The Receiver contends that all obtainable funds belong to the Receivership Estate for distribution to all fraud victims pro rata. Thus, the Receiver maintains that an investor who cashed out one week before the receivership should recover the same percentage of his investment as an investor who attempted to cash out one week after the receivership. But the Appellees argue that investors who cashed out before the receivership should recover 100% of their investment — even though they were paid with money stolen from other investors — while those who attempted to cash out later should divide the scheme's meager leftovers. Oral argument will assist the Court in determining which of these rules is more consistent with precedent in analogous cases and with equitable principles that govern receiverships such as this.

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STATEMENT OF JURISDICTION

I. Asserted Bases for District Court Subject Matter Jurisdiction

The underlying case is ancillary to a securities fraud case filed by the SEC against numerous Stanford defendants, *SEC v. Stanford Int'l Bank, Ltd.*, No. 3-09-CV-0298-N, in the United States District Court for the Northern District of Texas. Jurisdiction is based on 15 U.S.C., sections 77v(a) and 78aa and also on 28 U.S.C., section 754.

II. Basis for Court of Appeals's Jurisdiction

This is an appeal from the denial in part of a preliminary injunction pursuant to 28 U.S.C., section 1292(a)(1).

III. Filing Dates Establishing Timeliness of Appeal

The district court signed the challenged order on August 4, 2009. R. 477-79. The Receiver filed his notice of appeal on August 6, 2009. R. 480-81.

STATEMENT OF THE ISSUES

1. Does the Receiver for a Ponzi scheme have a viable claim for disgorgement of money paid to some investors before the scheme collapsed when (i) the money purports to be return of the investors' principal, but (ii) the money was, in fact, stolen from other investors?
2. Which of the following rules of distribution will the Court adopt to govern this and future Ponzi-scheme receiverships in this Circuit?

- (A) A pro rata rule, which seeks to return to each investor the same percentage of his or her investment in the Ponzi scheme; or
- (B) A first-come, first-serve rule, which allows investors who cash out shortly before court intervention to recover 100% of their investments while those who attempt to cash out a few days later receive virtually nothing?

STATEMENT OF THE CASE

This case is ancillary to an equity receivership arising out of a multi-billion dollar fraudulent investment scheme. The district court authorized the Receiver to freeze over 30,000 investor accounts while financial professionals determined whether the accounts contain proceeds of the fraudulent activity. Once these reviews were complete, the Receiver named several hundred investors as relief defendants, seeking disgorgement of Ponzi-scheme proceeds that were stolen from thousands of other investors and paid to the relief defendants under the guise of returned principal plus interest.

The Receiver requested a preliminary injunction that would effectively maintain the existing freeze over the relief defendants' Stanford investment accounts until the Receiver's claims for disgorgement are adjudicated. On July 31, 2009, the district court determined that, as a matter of law, the Receiver has no claim against the relief defendants for disgorgement of stolen

money they received as purported return of their invested principal. Based on this determination, the district court denied most of the Receiver's application for a preliminary injunction. In particular, the district court issued an injunction that freezes the relief defendants' accounts only to the extent of purported interest paid to them above the amounts of their principal investments.

The district court stayed the effect of its ruling for ten days to allow the Receiver to request relief from this Court before the relief defendants could disperse the funds in question. On August 9, 2009, this Court granted the Receiver's Motion to Extend Injunction, imposing an account freeze on both principal and interest while it decides this appeal.

STATEMENT OF RELEVANT FACTS

I. The Stanford companies and their too-good-to-be-true CDs

This appeal involves pure questions of law. The following undisputed facts are of record. In addition, most of these facts have been confirmed by Stanford's Chief Financial Officer, James Davis, who has pleaded guilty to his role in running the Stanford Ponzi scheme. A copy of the plea agreement is attached as Appendix B, and the Receiver requests that this Court take judicial notice of the facts recited in it. *See, e.g., Scholes v. Lehman*, 56 F.3d 750, 762 (7th Cir. 1995) (fraudulent conveyance case approving judicial notice of facts in defendant's plea agreement); *In re Fin. Federated Title & Trust, Inc.*, 347 F.3d 880, 883 n.2, 892

(11th Cir. 2003) (affirming equitable lien against property purchased with fraudulently obtained funds and noting that lower court took judicial notice of plea agreement of one of the conspirators).

The Stanford companies (“Stanford”) were a sprawling web of more than 130 entities across 14 countries, all controlled by Allen Stanford. R. 298, 302. Although the companies offered a full range of brokerage and investment services, their core objective was to sell certificates of deposit (“CDs”) issued by Stanford International Bank Limited in Antigua (the “Bank”). *Id.* The companies achieved this objective by promising above-market returns on the CDs and falsely assuring investors that the CDs were backed by safe, liquid investments. R. 298, 303; Case no. 3:09-cv-298-N, Doc. 1 at ¶¶ 2, 3, 8.¹

The Bank was nothing like a typical commercial bank. It did not offer checking accounts and did not, in the normal course, make loans. R. 302. It had one principal product line — certificates of deposit — and one principal source of revenue — investor purchases of CDs. R. 298, 302. Substantially all of the funds funneled into each of the Bank’s operating and money-market accounts were proceeds from the sale of Bank CDs. R. 298, 307-08. These same accounts were

¹ This Court granted motions by both the appellant and appellees to supplement the record with documents from related cases pending in the same the district court. However, the supplemental record has not yet been certified. This brief will cite to documents to be included in the supplemental record by their Docket Number in the district court.

then the source of CD proceeds paid out to customers, such as the relief defendants, who redeemed their CDs before court intervention. R. 298, 308.

For almost 15 years, the Bank represented that it consistently earned high returns on its investment of CD purchases, ranging from 12.7% in 2007 to 13.93% in 1994. Case no. 3:09-cv-298-N, Doc. 12-36 at 345; Doc. 13-9, SEC App. 670; Doc. 13-49 at 1030. Since 1994, the Bank claimed that it never failed to hit targeted investment returns in excess of 10%. Case no. 3:09-cv-298-N, Doc. 12-42 at 407. The Bank claimed that its diversified portfolio of investments lost only \$110 million or 1.3% in 2008. Case no. 3:09-cv-298-N, Doc. 12-56 at 540-41. During the same period the S&P 500 lost 39% and the Dow Jones STOXX Europe 500 Fund lost 41%. *Id.*

The Bank offered significantly higher rates on its CDs than conventional banks and disproportionately large commissions to Stanford financial advisors who sold CDs. Case no. 3:09-cv-298-N, Doc. 12-55 at 531, 533; Doc. 13-9 at 669. On November 28, 2008 the Bank quoted a rate of 5.375% on a 3-year flex CD, while comparable U.S. banks' CDs paid under 3.2%. Case no. 3:09-cv-298-N, Doc. 12-56 at 541. The Bank paid a 1% commission to Stanford financial advisors on the sale of each CD. Case no. 3:09-cv-298-N, Doc. 13-9 at 669.

In its 2007 annual report, the Bank represented that its portfolio was allocated in the following manner: 58.6% equity, 18.6% fixed income, 7.2%

precious metals and 15.6% alternative investments. Case no. 3:09-cv-298-N, Doc. 13-32 at 871. In fact, approximately 80% of the Bank's investment portfolio, the so-called Tier III portfolio, was in unknown assets under the apparent control of Allen Stanford and James Davis. Case no. 3:09-cv-298-N, Doc. 12-4 at 31, 586. And purported "earnings" on Bank investments were actually fabricated monthly by Jim Davis and persons working at his direction and under his supervision. App. B at 12-15. The earnings figures were pegged at whatever amount was needed to give the Bank acceptable financial performance and capital ratios for regulatory purposes. App. B at 14-15. In other words, earnings — at least for the last three years and probably longer — were fictitious "plugged" numbers. *Id.*

The forensic analysis of cash flows for 2008 through February 17, 2009 indicates that funds from sales of new Bank CDs were used to make purported interest and redemption payments on pre-existing CDs. R. 298, 303-04, 314-15. The Bank had to use CD sale proceeds for these redemptions because it did not have sufficient assets, reserves and investments to cover the liabilities for redemptions and interest payments. R. 303-04. "Although [the Bank] received some returns on investments, these amounts were miniscule in comparison to the obligations." R. 298, 304. In other words, the Bank operated as a massive Ponzi scheme. *See* BLACK'S LAW DICTIONARY 975 (abridged 8th ed. 2005) (defining a Ponzi scheme as "[a] fraudulent investment scheme in which money contributed by

later investors generates artificially high dividends or returns for the original investors”).

At the inception of the Receivership on February 16, 2009, the total principal amount of outstanding Bank CDs was approximately \$7.2 billion (U.S.), according to Bank records. R. 298, 303. This \$7.2 billion reflects a liability on the books of the Bank, as it is owed to the investors. *Id.* Although the Bank financial statements reflect investments valued at \$8.3 billion (classified as assets) as of December 31, 2008, the combined assets of all Stanford Entities (the Bank included) actually have a total value of less than \$1 billion. *Id.* The Bank is insolvent and apparently has been for a considerable time. *Id.* The billions of dollars bilked from Bank CD investors paid for lavish Stanford offices, an ultra-luxurious lifestyle for Stanford principals and their families, a fleet of aircraft, political contributions, athletic sponsorships, speculative “investments,” and the list goes on.

II. The lawsuit and preliminary orders

The SEC filed suit against Allen Stanford, the Bank, and other Stanford companies on February 16, 2009. Case no. 3:09-cv-298-N, Doc. 1. At the SEC’s request, the district court issued a temporary restraining order. Case no. 3:09-cv-298-N, Doc. 8. Among other things, this order restrained the defendants and anyone in “active concert or participation with them” from “making any

payment or expenditure of funds belonging to or in the possession, custody, or control of Defendants.” *Id.* at ¶ 5. It also restrained all financial institutions from disbursing any funds or securities in regard to any account “in the name, on behalf or for the benefit of Defendants.” *Id.* at ¶ 6.

The district court also signed an order appointing the Receiver, which grants the Receiver broad powers to “[p]erform all acts necessary to conserve, hold, manage, and preserve the value of the Receivership Estate, in order to prevent any irreparable loss, damage, and injury to the Estate.” Case no. 3:09-cv-298-N, Doc. 10 at ¶ 5(g). The order specifically authorizes the Receiver to take possession of all assets “of, or in the possession or under the control of, the Receivership Estate,” and also “all sums of money now or hereafter due or owing to the Receivership Estate.” *Id.* at ¶ 5(b). Anticipating that additional parties could later be joined as “relief defendants,” the district court further ordered all financial institutions to prohibit the withdrawal, transfer or other disposal of any funds “held by or on behalf of any . . . relief defendant in any account maintained in the name of or for the benefit of any . . . relief defendant.” *Id.* at ¶ 12(a). All of these provisions likewise appear in the Amended Receivership Order. Case no. 3:09-cv-298-N, Doc. 157 at ¶¶ 5(b), (g), 15(a).

On March 2, 2009, the district court signed an Agreed Preliminary Injunction against the Stanford defendants. Case no. 3:09-cv-298-N, Doc. 80.

This order extended the TRO's prohibition against any disbursement of funds or securities in regard to any account "in the name, on behalf or for the benefit of the Entity Defendants." *Id.* at 4, ¶ V. The injunction did not modify the Receiver's powers or other restrictions on Stanford accounts set forth in the Receivership Order.

As a result of the Receivership Order and the Agreed Preliminary Injunction, all Stanford investor accounts were frozen at Pershing LLC ("Pershing"), JP Morgan Clearing Corp. ("JP Morgan") and SEI Private Trust Company ("SEI"), each of which contracted with one or more Stanford companies to provide account services for Stanford customers. Case no. 3:09-cv-298-N, Doc. 176-2, at 33-81; Doc. 321 at 2-3. On March 27th, the district court adopted procedures for the Receiver's review of the investor accounts and release of any accounts that did not appear to include proceeds of the fraudulent CDs. Case no. 3:09-cv-298-N, Doc. 239. By late June, more than 97% of investor accounts had been released from the freeze orders. Case no. 3:09-cv-298-N, Doc. 528, 529.

On June 29, the district court ordered the Receiver to complete the account review process within five weeks. Case no. 3:09-cv-298-N, Doc. 533 at 1. The court specified that all remaining account freezes would expire at noon on August 3, unless the Receiver asserted claims against the account owners and obtained injunctive relief in connection with those claims. *Id.* at 2.

III. The claims at issue on appeal

Between June 22 and July 28, 2009, the Receiver filed the claims that led to this appeal. R. 55; 69; 201. The Receiver has named as relief defendants several hundred investors who redeemed their CDs for cash before the Receivership. R. 55; 69; 201. It is beyond dispute that the cash used to make these redemptions was stolen from other Stanford investors. R. 298, 303-04, 307-08, 314-15; *see also* App. B at 14 (describing the Bank as “a massive Ponzi scheme whereby CD redemptions ultimately could only be accomplished with new infusions of investor funds”). The Receiver seeks disgorgement of this cash so that the money, along with other assets of the Receivership Estate, can be distributed pro rata to all victims of Stanford’s fraud. To facilitate this equitable claim, the Receiver asked the district court for a temporary injunction that would continue the freeze on relief defendants’ accounts at Pershing, J.P. Morgan and SEI until the claim was finally determined. R. 265.

On July 31, the district court held a hearing on the requested injunction. The court concluded as a matter of law that the Receiver could not prevail on any claim for “return of principal” on the redeemed CDs. R. 477-78; Tr. 47-48. Accordingly, the court froze the relief defendants’ accounts going forward only to the extent of interest payments made to the relief defendants on top of their invested principal. R. 477. But on August 11, this Court extended the account

freeze on both purported principal and interest while the Court considers this appeal.

The freeze that has been in place since the Receivership was instituted has insured that hundreds of millions of stolen investor dollars will actually be available for distribution to Stanford claimants upon final adjudication of the Estate's right to them. The continuation of this freeze is necessary for the same reason. If these funds are released, they will be dispersed worldwide and only recovered, if at all, at great cost – perhaps prohibitive cost – to the Estate.

SUMMARY OF THE ARGUMENT

The claims in this case are based in equity. But there is nothing equitable about a rule that favors a few hundred Ponzi scheme investors who cashed out before court intervention over 20,000 others who did not. The relief defendants may be “innocent” because they did not realize Stanford was a sham; but they are no more innocent than any other investor. The relief defendants may have contractual claims against Stanford for return of the money they paid to purchase CDs; but these claims have no justifiable priority over the identical claims of every other investor. No one – not a relief defendant, not the SEC, and not the Examiner – has come forward with a single case holding that compensation to equally innocent victims with equally valid claims should be based on who was

quick enough, or lucky enough, to receive a pay-off with stolen money before the Ponzi scheme was revealed.

In contrast, the Receiver's claims for disgorgement of stolen money paid to the relief defendants are well-rooted in equitable principles and established case law. For example, even when investor funds can be traced to a particular investor, or were held in a segregated investor account, this Court has held that the broad powers of a district court presiding over an equity receivership allow the court to distribute the funds to all victims pro rata instead of returning them to their original owner. Courts across the country have specifically recognized the district court's power to order relief defendants to disgorge ill-gotten proceeds of an unlawful scheme so they can be shared equally with all victims. The district court erred in concluding that it lacked the power to accomplish this exact same result on the Receiver's claims for disgorgement here.

The propriety of disgorgement flows from the undisputed fact that Stanford was hopelessly insolvent when the relief defendants sought redemption of their CDs. Because Stanford was a Ponzi scheme, it did not hold onto the relief defendants' cash and was able to "return" their CD investments only by looting the more recent purchases of other innocent investors. Equity cannot tolerate this result. Equity demands equal compensation for those from whom the relief defendants' proceeds were stolen. This Court should therefore reverse the district

court's order in part and maintain the existing account freeze until the Estate's claims for the account assets is finally determined.

STANDARD OF REVIEW

The district court's order is subject to *de novo* review because it is based entirely upon a legal conclusion that the Receiver contends is mistaken.

“To obtain a preliminary injunction, a plaintiff must establish: (1) a substantial likelihood of success on the merits; (2) a substantial threat that it will suffer irreparable injury absent the injunction; (3) that the threatened injury outweighs any harm the injunction might cause the defendants; and (4) that the injunction will not impair the public interest.” *Enrique Bernat F., S.A. v. Guadalajara, Inc.*, 210 F.3d 439, 442 (5th Cir. 2000) (citing *Sugar Busters L.L.C. v. Brennan*, 177 F.3d 258, 265 (5th Cir. 1999)). “Because these four elements constitute mixed questions of fact and law, [this Court] review[s] the district court's factual findings for clear error, but [this Court applies] *de novo* review to its legal conclusions.” *Id.* (citing *Sunbeam Prods., Inc. v. West Bend Co.*, 123 F.3d 246, 250 (5th Cir. 1997)).

The district court's order is based entirely on the first element. The court concluded that the Receiver is unlikely to prevail on his claims solely because the law precludes a receiver from recovering stolen investor money if, prior to the receivership, the Ponzi scheme has already paid the stolen money to

other investors, purportedly in return of their own invested principal. R. 477-78.

In fact, the court strongly suggested that, if the law authorizes such a recovery, then the Receiver would be entitled to a freeze order to ensure that he could recover all of the money to which the Estate was entitled:

I don't think your arguments are stupid and it's a big pot of money and if you're correct about the law, then Mr. Janvey is absolutely righteous in trying to pull money into the Receivership to be passed out. He's doing just exactly what he was appointed to do.

The fact that I may disagree with you about the law doesn't necessarily mean that I'm right. And if Mr. Janvey and you are correct about the law, then by all means you ought to be glomming onto these assets and sweeping them back into the pot to be distributed to everybody else.

Tr. at 29-30. The district court emphasized that it was not weighing equities or exercising its discretion in any respect other than determining the law:

If I deny injunctive relief because of a mistaken view of the law, [the Fifth Circuit] consider[s] that to be abusing my discretion. It's not an issue of weighing equities, do I just weigh them differently from you. If I'm wrong on the law, I think they view that as sufficient basis for reversing me.

That's their call, of course, and I am not presuming to tell them what to do. But here I think there is a relatively crisp legal question that's presented.

Tr. at 47. Finally, the district court recognized that if the account freeze is lifted, there is great danger that the money will "wander off" where the Receiver cannot recover it. Tr. at 30. All of these comments and paragraph 2 of the written order

(R. 477-78) make clear that the district court denied the Receiver's request for injunctive relief based solely on its legal conclusion that the Receiver cannot recover purported return of principal as a matter of law.

As the district court suggested, "a decision based on erroneous legal principles is subject to *de novo* review." *Enrique Bernat*, 210 F.3d at 442; *see also Martin's Herend Imports, Inc. v. Diamond & Gem Trading*, 195 F.3d 765, 772 (5th Cir. 1999) ("An order granting or denying a preliminary injunction will be reversed only upon a showing that the district court abused its discretion, but legal determinations are subject to plenary review on appeal.") (internal quotations omitted).

Accordingly, if this Court concludes that the Receiver's claim for disgorgement of purported principal is legally viable, the Court should reverse the district court's order in part and issue an injunction continuing the existing freeze over the relief defendants' accounts at Pershing, J.P. Morgan and SEI until the claims are finally adjudicated. Alternatively, at a minimum, this Court should reverse the order in part and remand it for the district court to reconsider the Receiver's motion with instructions that the Receiver has stated a legally viable claim for disgorgement of purported principal that was "returned" only by illegally diverting funds invested by others.

ARGUMENT AND AUTHORITIES

The analysis in this case starts with two undisputed legal principles. First, case law universally supports a pro rata distribution of Estate assets; investor claimants must share equally in Estate assets and losses after a Ponzi scheme collapses. *See e.g., SEC v. Infinity Group Co.*, 226 Fed. Appx. 217, 219 (3d Cir. 2007). As the Supreme Court explained in the original Ponzi scheme case, “equality is equity” among “equally innocent victims.” *Cunningham v. Brown*, 265 U.S. 1, 13 (1924).

Second, relief defendants may be joined in an equitable proceeding to facilitate the recovery of Estate funds. *See SEC v. Colello*, 139 F.3d 674, 676-77 (9th Cir. 1998) (“[A]mple authority supports the proposition that the broad equitable powers of the federal courts can be employed to recover ill gotten gains for the benefit of the victims of wrongdoing, whether held by the original wrongdoer or by one who has received the proceeds after the wrong.”). No wrongdoing by a relief defendant need be alleged. *See Colello*, 139 F.3d at 676; *CFTC v. Kimberlynn Creek Ranch*, 276 F.3d 187, 191-92 (4th Cir. 2002); *SEC v. Elfindepan*, No. 1:00-CV-00742, 2002 WL 31165146, at *4 (M.D.N.C. Aug. 30, 2002). Courts can order disgorgement or other equitable relief against a relief defendant if “that person: (1) has received ill-gotten funds; and (2) does not have a

legitimate claim to those funds.” *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998); *SEC v. Egan*, 856 F. Supp. 401, 402 (N.D. Ill. 1993).

The question for this Court is how to apply these undisputed principles to the following basic scenario. Suppose two individuals invest \$100,000 each in one-year CDs issued by a Ponzi scheme. The first makes his investment in January 2008, the second in January 2009. When the first CD matures in January 2009, the Ponzi scheme is insolvent. It does not have the first investor’s funds on hand or any of its own assets to redeem the investment. The scheme is able to redeem the first investor’s CD only by diverting the second investor’s money to the first. The scheme collapses in February 2009, leaving behind virtually no money to redeem the second investor’s CD.

The appellees are in the position of the first investor. They see nothing wrong with the first investor retaining the full amount of principal that was “returned” to him by stealing money from the second investor. They advocate a rule of distribution by happenstance – whoever is lucky enough to cash out before the scheme collapses gets to keep the money and whoever is not so lucky gets nothing. The Receiver contends that the first investor has no legitimate claim to money stolen from the second, that equity requires both investors to be treated equally, and that happenstance is an indefensible principle of distribution.

I. The Receiver is likely to prevail on the merits of his claims against the relief defendants for disgorgement of Ponzi scheme proceeds.

The district court's sole basis for finding that the Receiver is unlikely to prevail on the merits is erroneous. The Receiver has stated a legally viable, factually compelling claim against the relief defendants for disgorgement of money that the Bank paid to them in furtherance of a fraudulent scheme.

A. Fifth Circuit precedent supports the Receiver's claims.

This Court has embraced the rule of pro rata distribution in two closely analogous cases. *See United States v. Durham*, 86 F.3d 70 (5th Cir. 1996); *SEC v. Forex Asset Mgmt. LLC*, 242 F.3d 325 (5th Cir. 2001). The rationale for these decisions supports disgorgement claims against investors who cashed out of a Ponzi scheme at the expense of other investors shortly before court intervention.

In *Durham*, this Court approved a pro rata distribution of funds that could be traced to a particular investor. After the FBI seized the assets of a fraudulent scheme, there was approximately \$83,000 available for distribution to defrauded depositors. *Durham*, 86 F.3d at 72. The vast majority of this money came from one depositor, Claremont Properties. *See id.* at 72 n.3 (“An FBI Special Agent traced \$70,000 of Claremont’s payments that were deposited and never withdrawn.”). The government supported Claremont’s claim for return of its own money. *Id.* at 73. But the trial court rejected Claremont’s claim to this \$70,000

and instead distributed only \$16,740.83 to Claremont as its pro rata share of the available receivership assets. *Id.* at 72.

This Court affirmed the pro rata distribution of Claremont's deposit, explaining:

The lower court in this case chose not to impose a constructive trust in Claremont's favor because it seemed inequitable to allow Claremont to benefit merely because the defendants spent the other victims' funds first. Claremont would obtain a preferred claim over funds if the court were to impose the constructive trust. To the district court, all the victims were in equal positions and should be treated as such.

Id. at 73. *Durham* cannot be distinguished from this case on the mere fact that Claremont's deposit had not yet been returned to it, whereas the relief defendants cashed out shortly before the scheme collapsed. A disproportionate distribution from an insolvent Ponzi scheme is just as inequitable the day before court intervention as the day after.

In fact, Claremont's claim for his \$70,000 was a stronger claim than the relief defendants' claim for CD proceeds here. At least Claremont was seeking return of its own money. When the relief defendants' CDs matured, the Bank no longer held their money. The Bank redeemed the relief defendants' CDs by stealing money from other innocent investors. If equity required Claremont to share its own deposit with all victims of the fraudulent scheme, then equity even more strongly requires the relief defendants to share their purported CD

redemptions with the very investors from whom the cash to pay those redemptions was stolen.

In *Forex*, this Court approved a pro rata distribution of funds that were segregated in a separate account consisting solely of one couple's investment. The receivership estate owed approximately \$2.5 million to Forex investors and lacked sufficient funds to repay them in full. *Forex*, 242 F.3d at 328. Under the district court's pro rata distribution plan, each investor would receive back approximately 33% of his investment. *Id.* But one investor couple, the Whitbecks, objected to this plan on the ground that most of their \$900,000 investment sat in a separate, segregated account that held nothing but the Whitbecks' investment. They argued that they were entitled to return of all money in this account because, after all, it was their money.

But this Court rejected the Whitbecks' arguments and affirmed the district court's pro rata distribution plan. This Court stated that *Durham* could not be distinguished on the basis that the Whitbecks' investment was segregated into its own account rather than comingled with other investors' funds. *Id.* at 331. The dispositive equitable principle remained the same — “the facts did not support a remedy that would elevate the Whitbecks' claim above the other victims.” *Id.*

Forex is analytically indistinguishable from this case. The Receiver is seeking to recover assets held in segregated accounts in the relief defendants'

names but subject to Stanford's control. *See* Case no. 3:09-cv-298-N, Doc. 321 at 2-3 (finding that “[w]ith limited exceptions, Pershing and J.P. Morgan could execute transactions in the accounts only upon Stanford’s instructions, rather than the [investors’] instructions”). The relief defendants are claiming rights to the contents of these segregated accounts, just like the Whitbecks. But the mere fact that the Bank transferred funds to Stanford accounts in the relief defendants’ names “[does] not support a remedy that would elevate the [relief defendants’] claim above the other victims.” *Forex*, 242 F.3d at 331.

Even if the investment accounts at issue here were not subject to Stanford’s exclusive control, the *Forex* rationale cannot tolerate a first-come, first-served rule of distribution. If the Whitbecks were not absolutely entitled to return of “their own money,” which sat in a segregated account and was never comingled with other investors’ money, then the relief defendants cannot be entitled as a matter of law to retain money that was transferred to them only because Stanford stole it from later investors.

Based on these Circuit precedents, this Court should modify the preliminary injunction to freeze the relief defendants’ accounts until the Receiver’s claims are finally adjudicated. Alternatively, this Court should remand the injunction issue to the district court to reconsider its decision with instructions that the relief requested by the Receiver is legally viable.

B. The Receiver’s claim for disgorgement falls well within the district court’s discretion to administer an equity receivership.

The Receiver acknowledges that *Forex* and *Durham* were based, in part, upon deference to the trial court’s discretion. But that does not diminish their significance for this case. In fact, that is the very point of this appeal — the district court erred in failing to recognize that its discretion to fashion an appropriate equitable remedy supports the Receiver’s claim for disgorgement of stolen funds and pro rata distribution of such funds to all Stanford victims. *See, e.g., SEC v. Great White Marine & Recreation, Inc.*, 428 F.3d 553, 556 (5th Cir. 2005) (“It is a recognized principle of law that the district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership.”) (internal quotations omitted); *SEC v. First Pac. Bancorp.*, 142 F.3d 1186, 1193 (9th Cir. 1998) (district court “has broad equitable powers to fashion appropriate relief for violations of the federal securities laws”) (internal quotations omitted); *SEC v. Am. Bd. of Trade, Inc.*, 830 F.2d 431, 438 (2d Cir. 1987) (district court may “grant ancillary relief . . . where necessary and proper to effectuate the purposes of” the securities laws).

As a matter of logic and sound policy, the district court erred in concluding that a Ponzi scheme can put stolen money beyond the reach of these broad equitable powers merely by transferring it to a few lucky investors before the scheme collapses. Based upon the rationale of *Forex* and *Durham*, this Court

should hold that the Receiver's claims for disgorgement fall within the district court's discretion to fashion an equitable distribution plan.

C. Cases from other Circuits support the Receiver's claims

Courts in other circuits have recognized that investors in a Ponzi scheme are properly named as relief defendants and are subject to disgorgement if they received proceeds from the scheme. *See, e.g., SEC v. George*, 426 F.3d 786, 798–99 (6th Cir. 2005).² In *George*, the SEC brought an enforcement action

² Case law amply supports the power of a receiver to seek disgorgement of tainted funds from relief defendants who receive proceeds from a Ponzi scheme. *See SEC v. JT Wallenbrock & Assocs.*, 440 F.3d 1109, 1117 n.15 (9th Cir. 2006) (company that was used as an instrument of a Ponzi scheme ordered to disgorge all proceeds of the scheme); *SEC v. Cross Fin. Servs.*, 908 F. Supp. 718, 730-32 (C.D. Cal. 1995) (relief defendant accused of no wrongdoing ordered to disgorge proceeds of Ponzi scheme received in return for services to defendants); *CFTC v. Bolze*, No. 3:09-CV-88, 2009 WL 1313249, at *2 (E.D. Tenn. Apr. 1, 2009) (relief defendant, a corporation not accused of misconduct, ordered to disgorge funds received from operators of Ponzi scheme); *CFTC v. Foreign Fund*, 549 F. Supp. 2d 1005, 1008 (M.D. Tenn. 2008) (relief defendant ordered to disgorge proceeds from Ponzi scheme); *CFTC v. Foreign Fund*, No. 3:04-0898, 2007 WL 1850007, at *5 (M.D. Tenn. June 25, 2007) (relief defendant, a corporation not accused of misconduct, ordered to disgorge customer funds received from operator of fraudulent scheme; additional relief defendant not accused of misconduct, an employee of fraudulent scheme's operator, ordered to disgorge full amount of customer funds received); *SEC v. Chem. Trust*, No. 00-8015-CIV, 2000 WL 33231600, at *11-12 (S.D. Fla. Dec. 19, 2000) (relief defendant not accused of wrongdoing but ordered to disgorge Ponzi proceeds received from both defendants and relief defendants controlled by defendants); *SEC v. Better Life Club of Am., Inc.*, 995 F. Supp. 167, 184 (D.D.C. 1998) (relief defendants not accused of wrongdoing ordered to disgorge Ponzi proceeds received from defendant as gifts or as part of sham transactions); *SEC v. Infinity Group Co.*, 993 F. Supp. 324, 331-32 (E.D. Pa. 1998) (relief defendants against whom no wrongdoing was alleged, including wife of one defendant and two trusts for which wife was trustee, ordered to disgorge cash and assets that represented ill-gotten gains from Ponzi scheme), *aff'd*, 212 F.3d 180 (3d Cir. 2000). *See also, SEC v. AmeriFirst Funding, Inc.*, Civil Action No. 3:07-cv-1188-D, 2008 WL 1959843, at *5-6 (N.D. Tex. May 5, 2008) (relief defendant not accused of wrongdoing but whose principal was involved in the fraud ordered to disgorge consulting fees paid out of fraudulent proceeds); *SEC v. Dowdell*, No. Civ.A.3:01CV00116, 2002 WL 31357059, at *4-5 (W.D. Va. Oct. 11, 2002) (relief defendants accused of no wrongdoing and who received residential property purchased with Ponzi proceeds enjoined from drawing on lines of credit secured by the property).

against the operators of a Ponzi scheme and named several investors as relief defendants. *Id.* at 788. The court-appointed receiver estimated that available funds would allow investors to recover only 42 percent of their original investments. *Id.* at 791. In order “[t]o consolidate the remaining funds,” the district court granted summary judgment to the SEC against the relief-defendant investors and ordered them to disgorge any proceeds they had received from the scheme. *Id.* The court of appeals affirmed, reasoning that because “the SEC showed that the money [the relief defendants] received from the scheme came not from profits on their investments but from the investments of others,” they “received ill-gotten funds and had no legitimate claim to those funds.” *Id.* at 798.

The Sixth Circuit rejected the relief defendants’ argument that they should only be required to disgorge false profits and should be permitted to keep any amount up to the value of their original investment. *Id.* at 799. According to the court, *all proceeds* received by the investors, including the return of their principal investment, were subject to disgorgement:

Hundreds of other investors were victimized by this scheme, yet they will recover only 42 percent of the money they invested, not the 100 percent to which the relief defendants claim to be entitled. . . . [T]he use of a *pro rata* distribution has been deemed especially appropriate for fraud victims of a “Ponzi scheme” As the Supreme Court explained in the litigation that gave the Ponzi scheme its name, “equality is equity” as between “equally innocent victims.” *Cunningham v. Brown*, 265 U.S. 1, 13 (1924). . . . Under these

circumstances, [the relief defendants] may not receive a disproportionate share of the recovered investor funds, only the same pro rata share that other investors may receive.

George, 426 F.3d at 799 (internal quotation and citation omitted).

Another circuit court recently employed a similar analysis in refusing to allow an investor to receive back an investment check that had not yet cleared at the time of the receivership. *See SEC v. Infinity Group Co.*, 226 Fed. Appx. 217 (3d Cir. 2007). The receiver for the Ponzi scheme in *Infinity* recovered sufficient assets to pay back only 55% of each investment in the scheme. 226 Fed. Appx. at 218. But Roberts claimed a right to 100% of his \$30,000 investment. Roberts made this investment just before the SEC initiated the receivership, and Roberts's check was still subject to a three-day bank hold when *Infinity's* accounts were frozen. Accordingly, the Ponzi scheme never gained access to Roberts's money.

But Roberts's arguments failed to persuade the Third Circuit. In particular, the Third Court refused to accept a rule of distribution that was based upon timing and chance rather than equity:

According to Roberts, the bank policy on which he relies wound up depriving [*Infinity*] of access to his funds solely by reason of the date on which [*Infinity*] deposited his check. The mere fact that it did so just two days before its account was frozen does not give Roberts equitable priority over the thousands of other victims of [*Infinity's*] fraud. Accordingly, the District Court determined that there is no equitable basis to distinguish between early investors and those, like Roberts, who

invested shortly before [Infinity's] account was frozen, and that all investors should thus be treated the same.

Id. at 219. As in *Infinity*, the timing of the relief defendants' CD redemptions does not give them equitable priority over thousands of other Stanford victims. There is no equitable basis to distinguish between early investors whose CDs matured just before the receivership and later investments whose CDs matured after the scheme was shut down.

As shown above, the relief defendants in this case all received proceeds from a Ponzi scheme — money paid by other investors to purchase their own fraudulent CDs. The relief defendants here are thus indistinguishable from the relief defendants in *George* and the late investor in *Infinity*. In fact, the argument for equitable relief is even stronger here, because other investors — those not lucky enough to receive proceeds before the Stanford fraud was discovered — will receive a much smaller percentage of their initial investment than the pro rata distributions in *George* and *Infinity*. See R. 299, 303 (“At the inception of the U.S. Receivership on February 16, 2009, the total principal amount of outstanding SIB CDs was approximately \$7.2 billion (U.S.), according to SIB records. ...[B]ased on my analysis to date, the combined assets of all Stanford Entities (SIB included) for which we have financial records have a total value of less than \$1 billion.”). The maxim “equality is equity” applies with even greater urgency in this case.

D. The relief defendants cannot establish a legitimate right to cash that Stanford stole from other investors.

Not only were the relief defendants' CDs redeemed with ill-gotten cash, but the relief defendants have no "legitimate claim" to the funds in question. In practice, once it is proven that distributions were made from Ponzi scheme proceeds, the courts shift the burden to the relief defendant to establish a legitimate right to retain the funds, such as a right to compensation for services that were *not in furtherance of the scheme*:

Alternatively, the Relief Defendants contend that the district court could not proceed against them as nominal defendants because they have asserted an ownership interest in the funds through Samuel Kingsfield's testimony during the preliminary injunction hearing that the funds were received as compensation for his services. We agree that receipt of funds as payment for services rendered to an employer constitutes one type of ownership interest that would preclude proceeding against the holder of the funds as a nominal defendant. However, a claimed ownership interest must not only be recognized in law; it must also be valid in fact. Otherwise, individuals and institutions holding funds on behalf of wrongdoers would be able to avoid disgorgement (and keep the funds for themselves) simply by stating a claim of ownership, however specious.

Kimberlynn Creek Ranch, 276 F.3d at 192; *see Cavanagh*, 155 F.3d at 136; *SEC v. Cherif*, 933 F.2d 403, 414 n.11 (7th Cir. 1991); *SEC v. Milan Capital Group, Inc.*, No. 00 CIV 108 DLC, 2000 WL 236374, at *3 (S.D.N.Y. March 1, 2000). None

of the relief defendants rendered any services to Stanford, and none has any legitimate right to the CD proceeds that he or she has received.

The relief defendants' only claim to the funds is based upon their CD contracts with the Bank, which entitle them to return of their purchases, plus interest. But this claim actually cuts the other way because every Stanford investor has the exact same contractual claim, including the investors whose cash was stolen to pay the relief defendants. Because every investor has an equal claim to a portion of the money held in the relief defendants' accounts, this claim supports a pro rata rule of distribution, not a rule of first-come, first-served.

In addition, the relief defendants' contractual claims cannot support the distinction drawn by the district court between principal and interest. If these contractual claims were a legitimate way to distinguish between lucky investors who redeemed their CDs before court intervention and the unfortunate masses who did not, then the relief defendants would also be entitled to keep interest payments that were made to them with stolen money. By maintaining the account freezes to the extent of such interest payments, however, the district court recognized that the Receiver is likely to prevail on his claim for disgorgement of interest payments. Because the relief defendants' claim for such interest payments pursuant to their CD contracts is not "legitimate," their claim for stolen principal is an equally

illegitimate basis for preferring the relief defendants' claims over those of every other investor.

For these reasons the relief defendants are not entitled to retain money that they received from the Stanford defendants, and which was stolen from other investors. The Receiver is entitled to exclusive possession and control of those funds, to be used for the benefit of all Stanford claimants. *George*, 426 F.3d at 798 (investors in Ponzi scheme had no legitimate claim to payments from the scheme); *Kimberlynn Creek Ranch*, 276 F.3d at 190-92 (relief defendant had no legitimate claim to gratuitously transferred proceeds of securities fraud); *Cavanagh*, 155 F.3d at 137 (donee of proceeds from securities fraud had no legitimate claim to the funds); *Colello*, 139 F.3d at 676 (relief defendant who received proceeds of fraud had no legitimate claim to the funds); *SEC v. China Energy Savings Tech., Inc.*, No. 06-cv-6402, 2009 WL 1940794, at *8 (E.D.N.Y. July 6, 2009) (relief defendants had no legitimate claim to proceeds of securities fraud); *SEC v. Byers*, No. 08 Civ. 7104, 2009 WL 33434, at *4 (S.D.N.Y. Jan. 7, 2009) (occupants had no legitimate claim to house whose mortgage was paid with proceeds of securities fraud); *CFTC v. Nations Invs., LLC*, No. 07-61058-CIV, 2008 WL 4376887, at *6 (S.D. Fla. Aug. 25, 2008) (relief defendants had no legitimate claim to proceeds of fraud used to pay off their home equity loans); *SEC v. AmeriFirst Funding, Inc.*, Civil Action No. 3:07-cv-1188-D, 2008 WL 1959843, at *5 (N.D. Tex. May 5,

2008) (relief defendant had no legitimate claim to proceeds of securities fraud despite having provided consulting services to defendant); *FTC v. Holiday Enters, Inc.*, Civil Action No. 1:06-cv-2939-CAP, 2008 WL 953358, at *12 (N.D. Ga. Feb. 5, 2008) (relief defendant had no legitimate claim to properties purchased with proceeds of fraud); *CFTC v. Foreign Fund*, No. 3:04-0898, 2007 WL 1850007, at *5, 7 (M.D. Tenn. June 25, 2007) (relief defendants who did not dispute receipt of proceeds from Ponzi scheme had no legitimate claim to the funds); *FTC v. Transnet Wireless Corp.*, 506 F. Supp. 2d 1247, 1273 (S.D. Fla. 2007) (relief defendant had no legitimate claim to proceeds of fraud); *CFTC v. Schiera*, No. CV05-2660 CAS, 2006 WL 4586786, at *6 (S.D. Cal. Dec. 11, 2006) (same); *CFTC v. Int'l Berkshire Group Holdings, Inc.*, No. 05-61588, 2006 WL 3716390, at *10 (S.D. Fla. Nov. 3, 2006) (same); *CFTC v. Valko*, No. 06-60001, 2006 WL 2582970, at *6 (S.D. Fla. Aug, 16, 2006) (same); *SEC v. Cavanagh*, No. 98-Civ-1818-DLC, 2004 WL 1594818, at *31-32 (S.D.N.Y. July 16, 2004) (same); *SEC v. Renaissance Capital Mgmt., Inc.*, No. 9:00-cv-01848-TCP, 2003 WL 23353464, at *4 (E.D.N.Y. Aug, 25, 2003) (relief defendant did not have legitimate claim to funds obtained from investors by fraud, despite the fact that the transfer of funds constituted repayment of a loan); *Elfindepan*, 2002 WL 31165146, at *6-7 (relief defendants who obtained proceeds of fraud pursuant to a separate fraudulent transaction had no legitimate claim to the funds); *SEC v. Lybrand*, 200 F. Supp. 2d

384, 398 (S.D.N.Y. 2002) (relief defendants who received proceeds of illegal securities sales had no legitimate claim to the funds); *SEC v. Chem. Trust*, No. 00-8015-CIV, 2000 WL 33231600, at *11 (S.D. Fla. Dec. 19, 2000) (relief defendant had no legitimate claim to proceeds of Ponzi scheme); *CFTC v. IBS, Inc.*, 113 F. Supp. 2d 830, 855 (W.D.N.C. 2000) (relief defendants had no legitimate claim to funds obtained from investors by fraud); *Milan Capital Group*, 2000 WL 236374, at *3 (recipient of funds fraudulently obtained from investors had no legitimate claim to the funds); *SEC v. Antar*, 15 F. Supp. 2d 477, 533 (D.N.J. 1998) (relief defendants who received proceeds of fraudulent stock offering did not have legitimate claim and “should not be permitted to retain funds derived from the multifarious frauds” when “their enrichment came at the expense of defrauded investors”); *SEC v. Cavanagh*, 1 F. Supp. 2d 337, 386 (S.D.N.Y. 1998) (relief defendants had no legitimate claim to proceeds of securities fraud); *SEC v. Infinity Group*, 993 F. Supp. 324, 331 (E.D. Pa. 1998) (same); *SEC v. Antar*, 831 F. Supp. 380, 401–02 (D.N.J. 1993) (same).

II. The Receiver has established the other elements of his claim for a preliminary injunction.

Although the proceedings below and the district court’s conclusions focused on the issue of likely success on the merits, the evidence strongly supports the other elements of the Receiver’s request for injunctive relief. In fact, the relief defendants’ accounts have been frozen since last February precisely because there

is a substantial threat that the Receivership Estate will suffer irreparable injury absent the freeze, this threatened injury outweighs the harm of maintaining the freeze, and the freeze serves the public interest.

A. There is a substantial threat of irreparable harm to the Receivership Estate absent the account freeze.

The relief defendants' accounts at Pershing, JP Morgan and SEI have been frozen since February for good reason. The Receivership Estate claims ownership of the account assets. But the Estate has precious little resources, and if the relief defendants are permitted to transfer Estate funds out of the accounts, the cost of retrieving them after the Receiver's right to them is finally adjudicated would be substantial, if not prohibitive.

The district court was sensitive to this risk even in the context of the short amount of time it would take to perfect this appeal. *See* Tr. at 30 (offering to extend the account freeze until the Receiver could request temporary relief from this Court and stating "I don't want it to become moot because all of the money has wandered off where you can't get it before you have an opportunity to present that argument").

Other receivership courts frequently impose account freezes in similar circumstances to support the equitable remedy of disgorgement. *See SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005). The purpose of an asset freeze is to preserve the status quo by preventing dissipation and diversion of

assets. *SEC v. Infinity Group Co.*, 212 F.3d 180, 197 (3d Cir. 2000). In this way, the freeze “preserve[s] funds for the equitable remedy of disgorgement.” *ETS Payphones*, 408 F.3d at 734; *see also SEC v. Unifund SAL*, 910 F.2d 1029, 1041 (2d Cir. 1990) (asset freeze designed “to facilitate enforcement of any disgorgement remedy that might be ordered”).

This includes asset freezes against relief defendants. *See Cavanagh*, 155 F.3d at 136; *Cherif*, 933 F.2d at 414; *Byers*, 2009 WL 33434, at *2–3; *CFTC v. Bolze*, No. 3:09-CV-88, 2009 WL 1313249, at *7 (E.D. Tenn. April 1, 2009); *Amerifirst Funding*, 2008 WL 282275, at *1, *vacated in part on other grounds sub nom.*, *Whitcraft v. Brown*, 570 F.3d 268, 270 (5th Cir. 2009); *Elfindepan*, 2002 WL 31165146, at *4–5; *Milan Capital*, 2000 WL 236374, at *1, 3; *IBS*, 113 F. Supp. 2d at 852–53, *aff’d sub nom.*, *Kimberlynn Creek Ranch.*, 276 F.3d at 189; *SEC v. Heden*, 51 F. Supp. 2d 296, 299 (S.D.N.Y. 1999); *SEC v. Pinez*, 989 F. Supp. 325, 345 (D. Mass. 1997); *SEC v. Certain Unknown Purchasers*, No. 81 Civ. 6553, 1983 WL 1343, at *1 (S.D.N.Y. July 25, 1983).

This long and consistent line of cases confirms that an account freeze is warranted under the circumstances of this case. An account freeze properly preserves proceeds of the Ponzi scheme until their ownership can be determined. Issuing such a freeze is a routine exercise of “the court’s broad equitable powers to afford relief to defrauded investors.” *Elfindepan*, 2002 WL 31165146, at *6.

B. The threatened injury outweighs any harm to the relief defendants that may be caused by continuing the account freeze.

By establishing the first element of his claim for an injunction – likelihood of success on the merits – the Receiver has established that the threatened injury to the Estate vastly outweighs any harm to the relief defendants. The harm to the relief defendants is minimal because they have no legitimate claim to the money in the accounts. As the *Elfindepan* court recognized, “[p]arties in possession of such funds who do not have a legitimate ownership interest and who are given notice of the freeze *are not prejudiced by such a freeze* as they are not deprived of their own property.” 2002 WL 31165146, at *6 (emphasis added).

In addition, the account freeze merely preserves the status quo, insuring that the funds will be available to whomever prevails in the competing claims for ownership. See *ETS Payphones*, 408 F.3d at 734; *Infinity Group*, 212 F.3d at 197. But the converse is not true. If the account freeze is not extended, then the relief defendants could ultimately retain the funds even if the Estate prevails on its disgorgement claims, either by moving the funds beyond the Receiver’s reach or by making recovery cost prohibitive. The balance of equities heavily favors maintenance of the status quo.

C. The injunction will serve, not impair, the public interest.

This element is more applicable here than in most cases. The Receiver seeks to recover the funds at issue not for himself, but for the thousands

of Stanford investors who stand to recover but pennies on their lost investment dollars. The public interest is served by the pro rata rule, not by a rule of preference and chance that allows early investors to keep money stolen from later ones.

More than 20,000 investors received little or no proceeds from the fraud and are not named as relief defendants. *See* Case no. 3:09-cv-298-N, Doc. 529 at 1 (stating that 20,416 Stanford CD owners with Pershing accounts had been released from the asset freeze as of June 25, 2009). Their only hope for compensation is a distribution of Receivership assets. If the relief defendants are allowed to keep proceeds from the fraud, despite having no legitimate right to them, then the relief defendants will enjoy unfair preferential treatment at the expense of the thousands of other investors who were not so lucky.

If, instead, the relief defendants are ordered to disgorge the proceeds, all investors — including the relief defendants — will share equally in what remains of the Stanford assets. Far from treating the relief defendants unfairly, the Receiver's plan *avoids* a callous disregard for tens of thousands of other investors. Equity should not shut its eyes to the suffering of thousands in order to preserve the preferential treatment of a few. At a bare minimum, the public interest and the rights of Stanford's 20,000 victims supports a temporary account freeze that will insure meaningful relief for all if the Receiver ultimately prevails on his claims.

CONCLUSION

For all of these reasons, the Receiver prays that this Court reverse the district court's order in part and issue an injunction continuing the existing freeze over the relief defendants' accounts at Pershing, J.P. Morgan and SEI until the Receiver's claims against the relief defendants are finally adjudicated. Alternatively, at a minimum, this Court should reverse the order in part and remand it for the district court to reconsider the Receiver's motion with instructions that the Receiver has stated a legally viable claim for disgorgement of purported principal that was "returned" only by illegally diverting funds invested by others. The Receiver further prays for such additional relief to which he may be entitled.

Respectfully submitted,

BAKER BOTTS L.L.P.

Kevin M. Sadler w/ permission by
Kevin M. Sadler
Texas State Bar No. 17512450
Joseph R. Knight
Texas State Bar No. 11601275
Susan Dillon Ayers
Texas State Bar No. 24028302
98 San Jacinto Blvd, Suite 1500
Austin, Texas 78701
(512) 322-2589
(512) 322-2501 (Facsimile)

**ATTORNEYS FOR APPELLANT—CROSS-
APPELLEE, RALPH S. JANVEY**

CERTIFICATE OF SERVICE

I certify that a copy of Brief of Appellant Ralph S. Janvey in both paper and electronic form was served by certified mail, return receipt requested, on this 10th day of September 2009, to the following counsel of record:

Eugene B. Wilshire
Jacalyn D. Scott
WILSHIRE & SCOTT, P.C.
3000 One Houston Center
1221 McKinney Street
Houston, Texas 77010

David B. Reece
Mike Post
U.S. SEC
100 F Street, NW, Rm 9404
Washington, DC 20549

John J. Little
Stephen Granberry Gleboff
LITTLE PEDERSEN FANKHAUSER
901 Main Street, Suite 4110
Dallas, Texas 75202

Ross D. Kennedy
BRACEWELL & GIULIANI LLP
711 Louisiana St., Suite 2300
Houston, Texas 77002

Bradley W. Foster
Matthew G. Nielsen
ANDREWS KURTH LLP
1717 Main Street, Suite 3700
Dallas, Texas 75201

Gene R. Besen
SONNENSCHN NATH & ROSENTHAL, LLP
2000 McKinney Ave, Ste 1900
Dallas, Texas 75201-1858

M. David Bryant, Jr.
COX SMITH MATTHEWS, INC.
1201 Elm Street, Suite 3300
Dallas, Texas 75720

Mark Joseph Barrera
Deborah Daywood Williamson
COX SMITH MATTHEWS, INC.
112 East Pecan St., Suite 1800
San Antonio, Texas 78205

Michael J. Quilling
Brent Jason Rodine
Marcie Lynn Schout
QUILLING, SELANDER, CUMMISKEY
& LOWNDS
2001 Bryan Street, Suite 1800
Dallas, Texas 75201

Hank Mills
2623 Kleinert Avenue
Baton Rouge, LA 70806

James Scott Annelin
ANNELIN & GASKIN
2170 Buckthorne Place, Suite 220
Woodlands, Texas 77380

Jeffrey J. Ansley
BRACEWELL & GIULIANI, LLP
1445 Ross Avenue, Suite 3800
Dallas, Texas 75202

Phillip W. Preis
PREIS GORDON A PLC
450 Laurel St., Suite 2150
Baton Rouge, LA 70801-1817

Monica L. Luebker
Parker D. Young
Russell William Hubbard
FIGARI & DAVENPORT
3400 Bank of America Plaza
901 Main Street, LB 125
Dallas, Texas 75202-3796

Kevin M. Lemley
ALLEN LAW FIRM PC
212 Center Street, 9th Floor
Little Rock, AR 72201

Kendall Kelly Hayden
COZEN O'CONNOR
2300 Bankone Center
1717 Main Street
Dallas, Texas 75201

Brett Feinstein
STRATTON & FEINSTEIN PA
407 Lincoln Road, Suite 2A
Miami Beach, FL 33139

Ruth Brewer Schuster
THE GULF LAW GROUP PLLC
1201 Connecticut Ave NW
Suite 500
Washington , DC 20036

Jeffrey Tew
TEW CARDENAS, LLP
1441 Brickell Avenue
Four Seasons Tower
Miami, FL 33131

Rodney Acker
Barton Wayne Cox
Ellen B. Sessions
FULBRIGHT & JAWORSKI
2200 Road Avenue, Suite 2800
Dallas, Texas 75201

James B. Greer
Joseph A. Hummel
Kenneth C. Johnston
KANE RUSSELL COLEMAN & LOGAN PC
1601 Elm Street, Suite 3700
Dallas, Texas 75201


Ashlea Brown
NEWLAND & ASSOCIATES PLLC
10 Corporate Hill Dr., Suite 330
Little Rock, AR 72205

Benjamin D. Reichard
James R. Swanson
Lance C. McCardle
FISHMAN HAYGOOD PHELPS WALMSLEY
WILLIS & SWANSON LLP
201 St. Charles Avenue, 46th Floor
New Orleans, LA 70170-4600

Bart Wulff
SHACKELFORD MELTON & MCKINLEY
3333 Lee Parkway, Tenth Floor
Dallas, Texas 75219

David M. Finn
MILNER & FINN
2828 N Harwood
Suite 1950 LB 9
Dallas , TX 75201

Jeffrey M Tillotson
LYNN TILLOTSON PINKER & COX LLP
2100 Ross Ave
Suite 2700
Dallas , TX 75201

Kevin M. Sadler w/permission by

Kevin M. Sadler

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 8,437 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).
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Kevin M. Sadler *with permission by*
Kevin S. Sadler
Attorney for Appellant–Cross-Appellee
Ralph S. Janvey

Dated: September 10, 2009

INDEX OF APPENDICES

- TAB A List of additional interested persons
- TAB B Stanford's Chief Financial Officer's, James M. Davis, Plea Agreement

A

1. The first part of the document discusses the importance of maintaining accurate records of all transactions.

2. It is essential to ensure that all data is entered correctly and consistently.

3. Regular audits should be conducted to verify the accuracy of the information.

4. The second part of the document outlines the procedures for handling discrepancies.

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6. The final section provides a summary of the key findings and recommendations.

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09-10761

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

RALPH S. JANVEY,

Plaintiff – Appellant–Cross-Appellee,

v.

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

Defendants – Appellees-Cross-Appellants

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

Defendants – Appellees

Consolidated with
09-10765

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

Plaintiff – Appellant

v.

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

Defendants – Appellees

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

APPENDIX A

BAKER BOTTS L.L.P.
Kevin M. Sadler
Joseph R. Knight
Susan Dillon Ayers
98 San Jacinto Blvd., Suite 1500
Austin, Texas 78701
(512) 322-2589
(512) 322-2501 (Facsimile)

ATTORNEYS FOR PLAINTIFF – APPELLANT–
CROSS-APPELLEE

| |
|--|
| JOEL HENRY ORY |
| DORRIS AND LULA BURCHETT TRUST AND DORRIS BURCHETT AND LULA BURCHETT |
| BARBARA MILLER OSTROW |
| HENRY A. MENTZ III |
| JAMES H. STEGALL |
| JAMES H. STEGALL AND CAROL H. STEGALL |
| EUGENE D. GAUTHREAUX |
| SUE CHRIS GAUTHREAUX |
| PHYLLIS ETCHEISON TRUST AND PHYLLIS ETCHEISON |
| PATRICIA A. THOMAS |
| KAVBEL CORP LIMITED |
| RA AND FARALL D. CANNING TRUST A AND RA CANNING AND FARALL D. CANNING |
| RA AND FARALL D. CANNING TRUST C AND RA CANNING AND FARALL D. CANNING |
| MICHAEL A TEAGUE |
| JONATHAN IVESTER |
| BONNIE CAPSUTO AND ALLEN CAPSUTO |
| AYG INVESTMENT, LTD. |
| CARL M. WEBB III |
| DICK COPELAND REV TRUST AND DICK COPELAND |
| DICK COPELAND TRUST AND DICK COPELAND |
| EFRAIN DOS SANTOS MARQUEZ |
| PHILIP M. PELTZ |
| STEVEN RIGER AND LINDA RIGER |
| YOLANDA A. VALDES |
| YOLANDA A. VALDES REVOCABLE TRUST AND YOLANDA A. VALDES |
| DAVID TOPP AND DORA TOPP |
| SHANNON S. BUNDICK |
| BENNIE M. O'REAR |
| BENNIE M. O'REAR AND CLAUDIA P. O'REAR |
| CHARLES B. THOMSEN AND LOIS ANN THOMSEN |
| D. LEE SEAGER |
| LINDA R. SEAGER |
| JESUS GALARZA MARTIN AND MARIA ESPERANZA MARTELO DE GALARZA |
| RENEE LEVINE |
| DAVID M. BLAKE AND DIANE M. BLAKE |
| THOMAS W. SCHERER AND VIRGINIA A. SCHERER CRUT, THOMAS W. SCHERER AND VIRGINIA A. SCHERER |
| VIRGINIA A. SCHERER |
| DENNIS L. KIRBY |
| HOWARD BISSELL III |
| EARL L. CROSBY |
| CATHERINE M. BRENNAN |
| WILLIAM RONALD VAN DELL AND LORI G. VAN DELL |
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| LEJEUNE T. MILLS AND GILBERT C. MILLS |
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| |
|--|
| DR. RICHARD RATHBONE PR |
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| RAY A. BALLANTYNE |
| RAY A. BALLANTYNE AND KAREN BALLANTYNE |
| VAHLE, INC. |
| BRIAN U. LONCAR AND SUE A. LONCAR |
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| SHARON J. WITMER AND WALTER BRUCE STONE |
| WALTER BRUCE STONE |
| RISIA TOPP WINE |
| BURNELL WILLIAMS |
| ERIKA TERESA HERRO |
| TIMOTHY R. AND SANDRA E. MOORE FAMILY L. P AND TIMOTHY R. MOORE AND SANDRA E. MOORE |
| GERARD A. DOWD |
| MELVIN WIDES REVOCABLE TRUST AND MELVIN WIDES |
| EISEMANN DEFINED BENEFIT PLAN |
| EISEMANN LIMITED |
| MICHAEL L. EISEMANN AND LINDA G. EISEMANN |
| BETTE JO HEASLIP |
| TERRY N. TULLIS |
| HUTCH INVESTMENTS LLC |
| CINDY DOLESHEK |
| HANNAH K. PECK |
| PECK FAMILY TRUST AND PECK FAMILY |
| GARY W. MCKILLIPS AND ANNE H. MCKILLIPS |
| FRANK MASSAD AND JO ANN MASSAD |
| LYDA D. TYMIAK |
| LYDA D. TYMIAK FAMILY TRUST AND LYDA D. TYMIAK |
| SAMUEL R. MOORE AND MARTHA W. MOORE |
| RONALD R. MARSTON |
| RONALD R. MARSTON AND SUSAN D. MARSTON |
| JOHN BUSCEME AND VIRGINIA B. BUSCEME |
| JOHN C. BUSCEME |
| MARK STEPHENS AND JO LYNN STEPHENS |
| DIVO MILAN HADDAD |
| INFINITUM TRUST AND DIVO MILAN HADDAD |
| MARIA DE LOURDES MARTINEZ DE SIDNEY AND MARIE ROCHELLE SIDNEY MARTINEZ |
| MARIE ROCHELLE SIDNEY MARTINEZ |
| MARIE ROCHELLE SIDNEY MARTINEZ AND DIVO MILAN HADDAD |
| ALFREDO PARRA DAVILA |
| STEVEN SILVERMAN TRUST AND STEVEN SILVERMAN |
| BARRY L. RUPERT AND CAROL S. RUPERT |
| LOUISE A. HARDIN LIVING TRUST AND LOUISE A HARDIN |

| |
|---|
| ANGELO A. PATERNOSTRO AND MARY ANN PATERNOSTRO |
| THERESA M. JAMAIL |
| SCOTT L. CLARK REV TRUST AND SCOTT L. CLARK |
| ROBERT APPELMAN |
| ABM REVOCABLE TRUST AND ALVARO BUENDIA |
| ALVARO BUENDIA |
| CLAUDIA GALLAGHER AND CLAUDE MAYALL AND ANNE MAYALL |
| RAMON MALCA |
| BRUCE E. MCLEOD |
| AMARA TRUST |
| DOCTORS DIAGNOSTICS IMAGING |
| ERIC A. ORZECK |
| DEWAYNE WASHINGTON REV TRUST AND DEWAYNE WASHINGTON |
| NANCIANN EAMES |
| RICHARD D. EAMES |
| RICHARD DENNIS EAMES AND NACIANN EAMES |
| JANE M. PRIDGEN AND ROBERT GRAY MATLOCK |
| JASON SCOTT GRAHAM |
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| GROVEMILL HOLDINGS LIMITED |
| EDWARD F. BLIZZARD AND CYNTHIA H. BLIZZARD |
| FRANCIS NEZIANYA |
| WILLIAM S. FLORES JR. AND MARY G. FLORES |
| ELECTRI INTERNATIONAL |
| RICHARD AND DARLENE MCBRIDE |
| HMS AND B, LTD |
| DARIO FALLAS AND PAOLA FALLAS |
| HECTOR JOSE PEREZ MORA AND RAFAEL JESUS PEREZ PERDOMO |
| HECTOR PEREZ MORA |
| RONALD B. YOKUBAITIS AND CAROLYN M. YOKUBAITIS |
| EMMA LEE LEFEBVRE |
| LARRY N. SMITH |
| MURPHY BUELL |
| STEPHEN M. BINGHAM |
| ROSA MARIBEL OYERVIDES |
| CHARLES L. WHITE |
| MELVIN MICHEL MARGULES BENHAMOU |
| MELVIN MICHEL MARGULES BENHAMOU AND ESTELLE ESTHER BENHAMOU |
| EDWARD C. DWECK |
| ALLEN SCHWARTZ |
| THE ANTHONY JOSEPH ANTINORI TRUST AND ANTHONY JOSEPH ANTINORI AND STEVEN JAMES ANTINORI |
| THE STEVEN JAMES ANTINORI TRUST AND STEVEN JAMES ANTINORI |
| MARIA GUADALUPE MENDOZA AND GUILLERMO HOLMQUIST |

| |
|---|
| MARIA GUADALUPE MENDOZA ROMERO |
| MARIA SOCORRO CELIA ROMERO DE MENDOZA AND MARIA GUADALUPE MENDOZA |
| ADRIANA RAMOS |
| EDUARDO SERRANO BERRY |
| HECTOR TROCATT AND ADRIANA RAMOS |
| JOSE ANTONIO VIGORENA |
| JOSE ANTONIO VIGORENA AND ADRIANA RAMOS |
| JAMIE COHEN BENREY AND SUSANA PEREZ DE COHEN |
| GENE CAUSEY |
| KENNETH W. DOUGHERTY |
| TERESA MEMUN DE ALFIE |
| FRANKLIN HOWARD STANSEL |
| VINETA P. STANSEL AND HOWARD STANSEL |
| WESTERN INTERNATIONAL ADVISOR CORP, LTD. |
| WESTERN INTERNATIONAL ADVISOR CORP, LTD. S.A. |
| WESTERN INTERNATIONAL FINANCIAL CORP, LTD. |
| WESTERN INTERNATIONAL FINANCIAL CORP, LTD. S.A. |
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| THE AMH TRUST AND MARY L. HOLMES |
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| THE JLH TRUST AND THE JNH TRUST |
| THE JNH TRUST |
| THE KEH TRUST |
| THE MAH TRUST |
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| THURSTON WATTS JR. AND CHERYL B. WATTS |
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| LYNN G. GILDERSLEEVE |
| ROBERT GILDERSLEEVE JR. TRUST AND ROBERT GILDERSLEEVE JR. |
| ROBERT V. GILDERSLEEVE JR. |
| WILLA MAE GILDERSLEEVE |
| WILLA MAE GILDERSLEEVE AND LYNN G. GILDERSLEEVE |
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| GEORGE BUR ANNISON AND DIANE B. ANNISON |
| REUEL L. ANDERSON |
| REUEL L. ANDERSON JR. |
| JAMIE/NICKY CARR INS. TRUST AND JAMIE CARR AND NICKY CARR |
| BARBARA RATHBONE AGENCY |
| BARBARA V. RATHBONE |
| BARBARA V. RATHBONE CRT AND BARBARA V. RATHBONE |
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| GATITA BLANCA |
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| CORPORATE HEALTHCARE MANAGEMENT DEF BEN PL AND CORPORATE HEALTHCARE MANAGEMENT |
| PINOT HOLDINGS LIMITED |

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| STEVEN J. BRADING AND SHARON K. BRADING |
| BORDEAUX INVESTMENTS I C.V. |
| BORDEAUX INVESTMENTS III C.V. |
| BORDEAUX INVESTMENTS IX C.V. |
| BORDEAUX INVESTMENTS X C.V. |
| PROVENCE MANAGEMENT STICHTING I AND BORDEAUX INVESTMENTS I C.V. |
| PROVENCE MANAGEMENT STICHTING III AND BORDEAUX INVESTMENTS III C.V. |
| PROVENCE MANAGEMENT STICHTING IX AND BORDEAUX INVESTMENTS IX C.V. |
| PROVENCE MANAGEMENT STICHTING X AND BORDEAUX INVESTMENTS X C.V. |
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| RONALD E. WELLS SR. AND LUTHER D WELLS |
| JAMES STANLEY HARRIS |
| CECILIA VAISMAN VDA. DE CZUKERBERG |
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| R AND T CHERNY SISTERS INC. |

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| MATEO LICHI S. AND LUISA DE LICHI AND JAIME LICHI COHEN AND REBECA LICHI COHEN AND JACOBO LICHI COHEN AND SARA LICHI COHEN |
| MATEO LICHI S. AND LUISA DE LICHI AND JAIME LICHI COHEN AND REBECA LICHI COHEN AND JACOBO LICHI COHEN AND SARA LICHI COHEN AND EDITH BOGUSKY BEAUJON |
| ARACELI DOMINGUEZ DE VALERO TRUST AND ARACELI DOMINGUEZ DE VALERO AND RAFAEL DOMINGUEZ JR. |

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| CAROLYN CRANSTON |
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| GARY D. MAGNESS IRREVOCABLE TRUST |
| GARY MAGNESS |
| GMAG LLC |

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| REGIONS BANK AS TRUSTEE FOR LPFA II CITY PLAZA PROJECT SERIES 2008 AND II CITY PLAZA LLC |
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| JURGEN KURT WAGENTROTZ ERNST |
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| CATALYST PRIVATE EQUITY PARTNERS (ISREAL) II L.P. |
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| BRUCE THOMPSON |
| COMPANIA MEXICANA DE AVIACION S.A. DE C.V. |
| ANTONY MANSOUR AND REHAN MANSOUR |
| ANTONY MANSOUR |
| JOSEPHINE MERY AND FRANCOISE SOLANGE MERY |
| JOSEPHINE MERY |
| BRETT LANDES |
| MANSURA ENTERPRISES CV |
| EDWARD HYLTON JONES |
| EDWARD HYLTON JONES AND SHIRLEY GLORIA JONES |
| GEORGE JOSEPH ROLLAR |
| GEORGE JOSEPH ROLLAR AND DOLORES MAY PAYER ROLLAR |
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| GALO ENRIQUE VILLAMAR VILLAFUERTE |
| PERFORMANCE CONTRACTORS INC. |
| AGNETA LAURIN |
| HANS LAURIN AND AGNETA LAURIN |
| HANS LAURIN |
| CLAUDIO ENRIQUE HERNANDEZ VILLALOBOS |
| CORPORACION NACIONAL DE INVERSIONES SA DE CV |
| INVERSIONES VARMOL TRUST |
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| RITA MEIER KNUDSON REVOCABLE TRUST |
| INTERNATIONAL PETROCHEMICAL SALES LIMITED |
| TRIMECA |
| TRIMECA TRUST |
| TRIMECA (TRABAJOS INDUSTRIALES Y MECANICOS) |
| ELEVEN TWENTY-TWO LLC |
| ALGICA S.A. |
| AIRS LTD. |
| NAIRC B.V. |
| NAIRC-NETHERLANDS ANTILLEAN INSURANCE AND REINSURANCE COMPANY |
| NAIRC-NETHERLANDS ANTILLEAN INSURANCE |

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| AYALA TRUST |
| KRIMICH LTD. |
| CELINA TRUST |
| WALDMAN, LTD. |
| ELENA TRON DE ZEPEDA CARRANZA |
| ARCHIE TRUST |
| RADOK INVESTMENTS LIMITED |
| FLEX, LTD. |
| MALTON OVERSEAS LTD. |
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| COFFEY OVERSEAS LIMITED |
| NETFIELDIC TRUST |
| CURRICHI FOUNDATION |
| CRAYFORD HOLDINGS LIMITED |
| DEBORAH S. FORBES |
| STICHTING PARTICULIER FONDS EL TRIBUTO |
| DONEGAN, LTD. |
| INVHERNAR, INC. AND RODRIGO HERNANDEZ |
| SALBUR INVERSIONES C.A. |
| FAYHILL INTERNATIONAL |
| FARISTON OVERSEAS LTD. |
| NUNVAV INC. |
| JONATHAN ROYE FARCHEG AND RODOLFO ROYE SOUTOU |
| RODOLFO ROYE SOUTOU AND LOURDES FARCHEG DE ROYE AND JONATHAN ROYE AND ALEXANDER ROYE |
| RODOLFO ROYE SOUTOU |
| ANCAR FUTURE TRUST |
| INTERMEDIA LTD. |
| OSCAR VILLARREAL AND OSCAR HUMBERTO VILLARREAL AGUERO |
| PINGYI HE OR RUILIAN WU DE HE |
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| ARTURO ORTEGA GONZALEZ AND MARIA CAROLINA ORTEGA GONZALEZ AND GERMAN LUIS ORTEGA GONZALEZ |
| ARTURO ORTEGA GONZALEZ |
| TA TRUST |
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| DEMETER A.V.V. |
| GLOBAL ADVISORS C.A. |
| ANIROC HOLDING LTD. |
| AL TRULLENQUE |
| ANDREA BERGER |
| ARTURO R. DIAZ |
| ATTLEE GAAL |
| CHARLES BRICKEY |
| CHARLES HUGHES |
| CHARLES JANTZI |

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| CHARLES VOLLMER |
| CLAUDIA MARTINEZ |
| DANIEL HERNANDEZ |
| DAVID HAGGARD |
| DAVID NANES |
| DONALD MILLER |
| DOUG SHAW |
| ELSIDA PRIETO |
| GARY HAINDEL |
| GERARDO MEAVE-FLORES |
| GRADY LAYFIELD |
| HANK MILLS |
| JAMES FONTENOT |
| JAMES LEBARON |
| JAMES R. ALGUIRE |
| JAY COMEAUX |
| JOHN SCHWAB |
| JONATHAN BARRACK |
| JUDITH QUINONES |
| LAWRENCE MESSINA |
| LEONOR RAMIREZ |
| LUPE NORTHAM |
| MANUEL MALVAEZ |
| MARIA VILLANUEVA |
| MARIE BAUTISTA |
| MARK GROESBECK |
| MATTHEW DREWS |
| MICHAEL MANSUR |
| MICHAEL WORD |
| MIGUEL VALDEZ |
| MONICA NOVITSKY |
| NEAL CLEMENT |
| NELSON RAMIREZ |
| NIGEL BOWMAN |
| NORMAN BLAKE |
| PATRICIA HERR |
| PATRICK CRUICKSHANK |
| PETE VARGAS |
| ROBERTO A. PENA |
| ROBERTO PENA |
| ROBERTO ULLOA |
| ROCKY ROYS |
| RON CLAYTON |
| SARAMINTA PEREZ |
| SCOTT NOTOWICH |
| STEVE ROBINSON |
| STEVE SLEWITZKE |
| SUSANA CISNEROS |
| SYLVIA AQUINO |
| TERAL BENNETT |
| THOMAS ESPY |
| TIFFANY ANGELLE |

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| TIM PARSONS |
| TIM VANDERVER |
| TONY PEREZ |
| TRENTON MILLER |
| TREVOR LING |
| VICTORIA ANCTIL |
| WALTER RICARDO |

B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CLERK, U. S. DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
FILED

8/29/09

MICHAEL N. MILBY, CLERK
BY DEPUTY *[Signature]*

UNITED STATES OF AMERICA

§
§
§
§
§
§

v.

Criminal No. H-09-335

JAMES M. DAVIS

PLEA AGREEMENT

The United States of America, by and through its United States Attorney for the Southern District of Texas and the Fraud Section of the Criminal Division of the Department of Justice, the defendant, James M. Davis, and the defendant's counsel, David Finn, have entered into the following plea agreement (the "Agreement") pursuant to Rule 11(c)(1)(B) of the Federal Rules of Criminal Procedure:

The Defendant's Agreement

1. (a) The defendant agrees to plead guilty to Counts One, Two and Three of the Information. Count One charges the defendant with conspiracy to commit wire, mail and securities fraud, in violation of 18 United States Code, Section 371. Count Two charges the defendant with mail fraud, in violation of 18 United States Code, Section 1341. Count Three charges the defendant with conspiracy to obstruct an SEC proceeding, in violation of 18 U.S.C. § 371. By entering this

TRUE COPY / CERTIFY
ATTEST: 8/29/09
DAVID J. BRADLEY, Clerk of Court
By *[Signature]*
Deputy Clerk

Agreement, the defendant waives any right to have the facts that the law makes essential to the punishment of Counts One, Two or Three either charged in the Information, proved to a jury or proven beyond a reasonable doubt.

(b) The defendant agrees that the facts of this case support the following Sentencing Guidelines calculation:

| | |
|---|----|
| Section 2B1.1(a) – Base offense level for wire fraud: | 7 |
| Section 2B1.1(b)(1)(K) – Loss of more than \$400 million | 30 |
| Section 2B1.1(b)(2)(B)– More than 250 victims | 6 |
| Section 2B1.1(b)(9)(C, D) – Substantial part of scheme committed outside United States and otherwise used sophisticated means | 2 |
| Section 2B1.1(b)(14)(B) – Affecting safety and soundness of financial institution and endangering solvency or financial security of 100 or more victims | 4 |
| Section 3B1.3 – Abuse of position of trust | 2 |
| Section 2B1.1(b)(14)(C) – Combination of enhancement for more than 250 victims and enhancement for safety and soundness of financial institution and endangering the solvency or security of 100 or more victims, equals 10, therefore reduced to 8 | -2 |
| Section 3E1.1(a, b) – Acceptance of responsibility | -3 |
| Total Offense Level – Adjusted | 46 |

(c) The defendant further agrees to recommend at the time of sentencing that the Sentencing Guidelines provide a fair and just resolution based on the facts of this case, and that no downward departure or variances are appropriate other than the reduction for acceptance of responsibility discussed in Paragraph

Thirteen and the potential for a downward departure based on substantial assistance pursuant to U.S.S.G. § 5K1.1 as discussed in Paragraph Seven.

Punishment Range

2. The statutory penalty for the violation of Title 18, United States Code, Section 371, in Counts One and Three, is not more than five years imprisonment and/or a fine of up to \$250,000.00. The statutory penalty for the violation of Title 18, United States Code, Section 1341, in Count Two, is not more than twenty years imprisonment and/or a fine of up to \$250,000.00. Additionally, on all three counts, the defendant may receive a term of supervised release after imprisonment of up to three (3) years. Title 18 U.S.C. §§ 3559(a)(4) and 3583(b)(2). Defendant acknowledges and understands that if he should violate the conditions of any period of supervised release which may be imposed as part of his sentences, then defendant may be imprisoned for the entire term of supervised release, not to exceed two years, without credit for time already served on the term of supervised release prior to such violation. Title 18 U.S.C. §§ 3559(a)(4) and 3583(e)(3). Defendant understands that he cannot have the imposition or execution of the sentence suspended, nor is he eligible for parole.

Mandatory Special Assessment

3. Pursuant to 18 U.S.C. § 3013(a)(2)(A), immediately after sentencing the defendant will pay to the Clerk of the United States District Court a special assessment in the amount of \$100.00 per count of conviction. The payment will be by cashier's check or money order payable to the Clerk of the United States District Court, c/o District Clerk's Office, P.O. Box 61010, Houston, Texas 77208, Attention: Finance.

Fine and Reimbursement

4. The defendant understands that under the *United States Sentencing Commission Guidelines Manual* (hereafter referred to as "*Sentencing Guidelines*" or "U.S.S.G."), the Court is permitted to order the defendant to pay a fine that is sufficient to reimburse the United States for the costs of any imprisonment or term of supervised release, if any is ordered.

5. The defendant agrees that because the offenses of conviction occurred after April 24, 1996, restitution is mandatory without regard to Davis's ability to pay and that the Court must order Davis to pay restitution for the full loss caused by his criminal conduct pursuant to Title 18, United States Code, Section 3663A, provided, however, that the United States agrees that the value of any property returned to victims through the forfeiture and remission process shall be credited against any

order of restitution.

6. The defendant agrees to make complete financial disclosure by truthfully executing a sworn financial statement (Form OBD-500) prior to sentencing if he is requested to do so. In the event that the Court imposes a fine or orders the payment of restitution as part of the defendant's sentence, the defendant shall make complete financial disclosure by truthfully executing a sworn financial statement immediately following his sentencing.

Cooperation

7. The parties understand that the Agreement carries the potential for a motion for departure pursuant to U.S.S.G. § 5K1.1. The defendant understands and agrees that whether such a motion is filed will be determined solely by the United States. Should the defendant's cooperation, in the sole judgment and discretion of the United States, amount to "substantial assistance," the United States reserves the sole right to file a motion for departure pursuant to U.S.S.G. § 5K1.1. The defendant agrees to persist in his guilty plea through sentencing and to cooperate fully with the United States. The defendant understands and agrees that the United States will request that sentencing be deferred until his cooperation is complete.

8. The defendant understands and agrees that the term "fully cooperate" as used in this Agreement includes providing all information relating to any criminal activity known to the defendant. The defendant understands that such information

includes both state and federal offenses arising therefrom. In that regard:

- (a) The defendant agrees that this Agreement binds only the United States Attorney for the Southern District of Texas, the Fraud Section of the Criminal Division of the Department of Justice and the defendant; it does not bind any other United States Attorney or any other component of the Department of Justice.
- (b) The defendant agrees to testify truthfully as a witness before a grand jury or in any other judicial or administrative proceeding when called upon to do so by the United States.
- (c) The defendant agrees to voluntarily attend any interviews and conferences as the United States may request.
- (d) The defendant agrees to provide truthful, complete, and accurate information and testimony; and he understands that any false statements he makes to the Grand Jury, at any court proceeding (criminal or civil), or to a government agent or attorney, can and will be prosecuted under the appropriate perjury, false statement, or obstruction statutes.
- (e) The defendant agrees to provide to the United States all documents in his possession or under his control relating to all areas of inquiry and investigation.
- (f) Should the recommended departure, if any, not meet the defendant's expectations, the defendant understands that he remains bound by the terms of this Agreement and cannot, for that reason alone, withdraw his plea.

Waiver of Appellate Rights

9. The defendant is aware that 18 U.S.C. § 3742 affords a defendant the right to appeal the sentence imposed. The defendant agrees to waive the right to appeal the sentence imposed or the manner in which it was determined on all other

grounds set forth in 18 U.S.C. § 3742 except he reserves the right to appeal a sentence above the statutory maximum. Additionally, the defendant is aware that 28 U.S.C. § 2255 affords the right to contest or “collaterally attack” a conviction or sentence after the conviction or sentence has become final. The defendant waives the right to contest his conviction or sentence by means of any post-conviction proceeding, including but not limited to proceedings authorized by 28 U.S.C. § 2255. If at any time the defendant instructs his attorney to file a notice of appeal on grounds other than those specified above, the United States will seek specific performance of this provision.

10. In exchange for this Agreement with the United States, the defendant waives all defenses based on venue, speedy trial under the Constitution and Speedy Trial Act, and the statute of limitations with respect to any prosecution that is not time-barred on the date that this Agreement is signed, in the event that (a) the defendant’s conviction is later vacated for any reason, (b) the defendant violates any provision of this Agreement, or (c) the defendant’s plea is later withdrawn.

11. In agreeing to these waivers, the defendant is aware that a sentence has not yet been determined by the Court. The defendant is also aware that any estimate of the possible sentencing range under the *Sentencing Guidelines* that he may have received from his counsel, the United States, or the Probation Office is a prediction,

not a promise, did not induce his guilty plea, and is not binding on the United States, the Probation Office, or the Court. The United States does not make any promise or representation concerning what sentence the defendant will receive. The defendant further understands and agrees that the *Sentencing Guidelines* are “effectively advisory” to the Court. *United States v. Booker*, 125 S.Ct. 738 (2005). Accordingly, the defendant understands that, although the Court must consult the *Sentencing Guidelines* and must take them into account when sentencing him, the Court is bound neither to follow the *Sentencing Guidelines* nor to sentence the defendant within the guideline range calculated by use of the *Sentencing Guidelines*.

12. The defendant understands and agrees that each and all of his waivers contained in this Agreement are made in exchange for the corresponding concessions and undertakings to which this Agreement binds the United States.

The United States’ Agreements

13. The United States agrees to each of the following:
- (a) At the time of sentencing, the United States agrees not to oppose the defendant’s anticipated request to the Court and the United States Probation Office that he receive a two level downward adjustment pursuant to U.S.S.G. § 3E1.1(a) should the defendant accept responsibility as contemplated by the *Sentencing Guidelines*. The United States is not required to make this recommendation if Davis (1) fails or refuses to timely enter his plea and make a full, accurate and complete disclosure to the United States and the Probation Department of the circumstances surrounding the relevant offense conduct and his present financial condition; (2) is found to have misrepresented facts to

the United States prior to entering this Agreement; or (3) commits any misconduct after entering into this Agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

- (b) If the defendant qualifies for an adjustment under U.S.S.G. Section 3E1.1(a), the United States agrees to file a motion for an additional one level departure based on the timeliness of the plea or the expeditious manner in which the defendant provided complete information regarding his/her role in the offense if the defendant's offense level is 16 or greater.
- (c) The United States agrees that the appropriate Guidelines calculation in this case is the calculation described in Paragraph 1(b) above.

United States' Non-Waiver of Appeal

14. The United States reserves the right to carry out its responsibilities under the *Sentencing Guidelines*. Specifically, the United States reserves the right:

- (a) to bring its version of the facts of this case, including its evidence file and any investigative files, to the attention of the Probation Office in connection with that office's preparation of a presentence report;
- (b) to set forth or dispute sentencing factors or facts material to sentencing;
- (c) to seek resolution of such factors or facts in conference with the defendant's counsel and the Probation Office;
- (d) to file a pleading relating to these issues, in accordance with U.S.S.G. § 6A1.2 and 18 U.S.C. § 3553(a); and
- (e) to appeal the sentence imposed or the manner in which it was determined. If the United States appeals Davis's sentence, then Davis shall be released from his waiver of appellate rights.

Sentence Determination

15. The defendant is aware that the sentence will be imposed by the Court after consideration of the *Sentencing Guidelines*, which are only advisory, as well as the provisions of 18 U.S.C. § 3553(a). The defendant nonetheless acknowledges and agrees that the Court has authority to impose any sentence up to and including the statutory maximum set for the offense(s) to which the defendant pleads guilty, and that the sentence to be imposed is within the sole discretion of the sentencing judge after the Court has consulted the applicable *Sentencing Guidelines*. The defendant understands and agrees that the parties' positions regarding the application of the *Sentencing Guidelines* do not bind the Court and that the sentence imposed is within the discretion of the sentencing judge. If the Court should impose any sentence up to the maximum established by statute, the defendant cannot, for that reason alone, withdraw a guilty plea, and he will remain bound to fulfill all of his obligations under this Agreement.

Rights at Trial

16. The defendant represents to the Court that he is satisfied that his attorney has rendered effective assistance. The defendant understands that by entering into this Agreement, he surrenders certain rights as provided herein. The defendant understands that the rights of a defendant include the following:

- (a) If the defendant persisted in a plea of not guilty to the charges, the defendant would have the right to a speedy jury trial with the assistance of counsel. The trial may be conducted by a judge sitting without a jury if the defendant, the United States, and the Court all agree.
- (b) At a trial, the United States would be required to present witnesses and other evidence against the defendant. The defendant would have the opportunity to confront those witnesses and his attorney would be allowed to cross-examine them. In turn, the defendant could, but would not be required to, present witnesses and other evidence on his own behalf. If the witnesses for the defendant would not appear voluntarily, he could require their attendance through the subpoena power of the Court.
- (c) At a trial, the defendant could rely on a privilege against self-incrimination and decline to testify, and no inference of guilt could be drawn from such refusal to testify. However, if the defendant desired to do so, he could testify on his own behalf.

Factual Basis for Guilty Plea

17. If this case were to proceed to trial, the United States could prove each element of the offense beyond a reasonable doubt. The following facts, among others, would be offered to establish the defendant's guilt:

(a) Beginning in at least 1988, **JAMES M. DAVIS (DAVIS)** began serving as Controller of Guardian International Bank, Ltd (Guardian), a bank chartered in Montserrat and owned by Robert Allen Stanford (Stanford). Soon after **DAVIS** became Controller, Stanford requested that, in order to show fictitious quarterly and annual profits, **DAVIS** make false entries into the general ledger for the purpose of reporting false revenues and false investment portfolio balances to the banking regulators. In late 1989, Stanford closed Guardian in Montserrat due, in part, because of his concern with the heightened scrutiny being imposed upon Guardian by bank regulators in Montserrat.

(b) In early 1990, Stanford moved Guardian's banking operations to Antigua under the name Stanford International Bank, Ltd. (SIBL), of which he was the sole shareholder and for which **DAVIS** continued to serve as Controller through approximately 1992, when **DAVIS** became Chief Financial Officer of Stanford Financial Group (SFG). SFG was the parent company of SIBL and a web of other affiliated financial services entities, including Stanford Group Company (SGC) and Stanford Capital Management (SCM).

(c) SIBL's primary investment product was referred to as a Certificate of Deposit (CD) which SIBL would solicit to potential investors in the United States and elsewhere through SFG broker-dealers, sometimes referred to as "Financial Advisors" (FAs). By 2008, SIBL had sold CDs resulting in liabilities totaling over \$7 billion to investors in the United States and elsewhere. Stanford, **DAVIS**, and their conspirators promoted SIBL's investments as being well-managed, safe and secure, claimed that SIBL's investment strategy was to minimize risk and achieve liquidity, and falsely touted in SIBL's Annual Reports beginning in at least 1999 an almost year-by-year percentage and dollar increase in the purported value of SIBL's earnings, revenue and assets.

(d) Prior to purchasing SIBL CDs, potential investors were required to provide their basic biographical and financial information in the form of a Subscription Agreement. Subscription Agreements regarding the investors were routinely sent from Stanford Group Company in Houston, Texas to SIBL in Antigua. CDs and account statements regarding the CDs were also routinely sent by mail to investors, including an account statement driven by the false investment and revenue values for an investor (identified as "Investor TA" in Count 2 of the Information) which on November 30, 2008 was sent and delivered via United States Postal Service to Investor TA's address in Spring, Texas.

(e) Stanford, **DAVIS** and their conspirators further promoted the sale of SIBL's CDs by representing to investors that SIBL's operations and financial condition were being scrutinized by Antigua's bank regulator, the Financial Services Regulatory Commission (FSRC), and that SIBL's financial statements were subject to annual examination and inspections by the FSRC and audits by an independent outside auditor.

(f) Stanford, **DAVIS**, Chief Investment Officer Laura Pendergest-Holt (Holt) and other conspirators created and perpetuated the false impression to investors, potential investors, and the majority of SFG employees that Holt was responsible for overseeing and monitoring SIBL's entire portfolio of non-cash assets and that she managed all of those assets through a global network of money managers. In order to continue to effectuate the scheme, on December 7, 2005, Stanford and others, appointed Holt to the SIBL "Investment Committee." The purpose of this appointment was to continue to dupe the CD investors into falsely believing that Holt understood and "managed" SIBL's entire investment portfolio.

(g) Unknown to investors, Stanford, **DAVIS**, Holt and other conspirators internally segregated SIBL's investment portfolio into three investment tiers: (a) cash and cash equivalents ("Tier I"); (b) investments with "outside money managers," sometimes also referred to as "outside portfolio managers" ("Tier II"); and (c) other assets ("Tier III"). In actuality, Holt's management of SIBL's assets was confined to those assets contained in Tier II which, by 2008 made up only 10% of SIBL's entire portfolio. In fact, by 2008, approximately 80% of SIBL's investment portfolio was made up of illiquid investments, including grossly overvalued real and personal property that SIBL had acquired from Stanford-controlled entities at falsely inflated prices. At least \$2 billion dollars of undisclosed, unsecured personal loans from SIBL to Stanford were concealed and disguised in SIBL's financial statements as "investments."

(h) At Stanford's direction and assisted by SFG's Chief Accounting Officer, Gilberto Lopez (Lopez), and the Global Controller for an affiliate of SFG, Mark Kuhrt (Kuhrt), **DAVIS** regularly created false books and records in which the value of the investment portfolio was further fraudulently adjusted by percentage increases to produce false investment and revenue values. As a result, SIBL's values for revenue and investments were falsified on a routine basis.

(i) From at least 2002, **DAVIS**, at the request of Stanford, would prepare with the assistance of Lopez and Kuhrt, fictitious SIBL investment reports, which were provided to the Antigua FSRC on a quarterly basis, again falsely inflating the value of SIBL's investments. These false forms continued to be provided to the FSRC on a quarterly basis until at least September 2008. Kuhrt would send the false documents to SIBL in Antigua. SIBL Executive A would then execute the documents and provide them to the FSRC.

(j) Stanford was insistent that SIBL appear to show a profit each year. Stanford and **DAVIS** would collaborate to select a false revenue number. **DAVIS** would then send the collaborative false revenue numbers to Lopez and Kuhrt.

(k) To create the falsely inflated values for SIBL's assets, **DAVIS** would extrapolate from the values attributed to a portion of SIBL's investment portfolio which was monitored by Holt and managed by money managers. **DAVIS**, at Stanford's urging, would multiply those actual values by artificial percentage factors necessary to equal the value for depositor liabilities. By email or personal delivery, **DAVIS** would send the false investment valuation report to Kuhrt, who then sent it to SIBL.

(l) Initially, **DAVIS** did the calculations manually, but later a computer spreadsheet was created which was useful in generating the bogus revenue numbers. Every year, SIBL would prepare a budget projecting growth. Stanford, **DAVIS**, Lopez, Kuhrt and other conspirators would then use the "budgeted" numbers to develop falsely inflated revenue numbers which would be claimed as the "actual" revenue numbers to generate the desired Return on Investment (ROI). At Kuhrt's direction, subordinate employees in SFG's accounting group would be given a secret instruction sheet informing them as to how to make the changes to generate the false adjusted revenue figures, including the steps necessary to obtain approval by Lopez and **DAVIS**. After "backing into" or "reverse engineering" the numbers to match the "budgeted" numbers, Kuhrt would then transmit the inflated revenue numbers from Houston initially, and later from St. Croix when Kuhrt's accounting group moved to St. Croix, to Lopez in Houston, Texas and to **DAVIS** in Mississippi for **DAVIS**' approval. **DAVIS** often would further adjust the already bogus numbers to reach a desired ROI and would transmit to Kuhrt and Lopez the changes to be made.

(m) Kuhrt and Kuhrt's employees in the accounting group would prepare the false financial statements published in SIBL's annual reports, which Stanford, Lopez and **DAVIS** would review prior to publishing and sending out to investors.

(n) This continued routine false reporting by Stanford, **DAVIS**, Lopez, Kuhrt and their conspirators, upon which CD investors routinely relied in making their investment decisions, in effect, created an ever-widening hole between reported assets and actual liabilities, causing the creation of a massive Ponzi scheme whereby CD redemptions ultimately could only be accomplished with new infusions of investor funds. Stanford, **DAVIS**, Lopez, Kuhrt and their conspirators fraudulently claimed in SIBL's Annual Reports an increase in assets from approximately \$1.2

billion in 2001 to approximately \$8.5 billion reported in SIBL's Monthly Report for December 2008. By the end of 2008, Stanford, **DAVIS** and their conspirators falsely represented in SIBL's December monthly report that it held over \$7 billion in assets, when in truth and in fact, SIBL actually held less than \$2 billion in assets.

(o) By at least 2002, Stanford had introduced **DAVIS** to Leroy King, a bank auditor for the FSRC, a former Ambassador to the United States from Antigua and a former executive at Bank of America in New York. King became Administrator and the Chief Executive Officer (CEO) of the FSRC in approximately 2003.

(p) Sometime in 2003, Stanford performed a "blood oath" brotherhood ceremony with King and another employee of the FSRC, each of whom participated in the FSRC's regulatory oversight of SIBL. This brotherhood oath was undertaken in order to extract an agreement from both King and the other FSRC employee that they, in exchange for regular cash bribe payments by Stanford to King and the other FSRC employee, would ensure that the Antiguan bank regulators would not "kill the business" of SIBL. During the course of the fraud scheme King routinely referred to Stanford as "Brother" or "Big Brother." In the regular preparation of the false SIBL investment reports for submission to the FSRC, Stanford, **DAVIS**, and other conspirators relied upon the assurances that King and the other FSRC employee, because of the bribes, would ensure that the FSRC would not actually examine the validity of the investments of SIBL as set forth in those investment reports.

(q) When Stanford needed cash to make these bribe payments, he generally would instruct **DAVIS** to debit funds from a secret numbered Swiss bank account at Society General Bank (SocGen account #108731) and to wire those funds to an SFG account at Bank of Antigua, from which the cash in United States dollars would be withdrawn. This secret SocGen account #108731 was funded by CD investor funds and was also used to make regular bribe payments, via wire transfer, to SIBL's outside auditor in Antigua, C.A.S. Hewlett & Co. Ltd. The cash bribe payments by Stanford to King ultimately exceeded \$200,000.

(r) Sometime in approximately 2003, Stanford and SIBL Executive A complained to King that two FSRC examiners were becoming aggressive and suspicious in their examination of SIBL's financial statements. Stanford reassured **DAVIS** and SIBL Executive A that, because of their brotherhood oath and the bribe payments, King would assist in removing the two FSRC employees from the regulatory oversight function of SIBL. Both FSRC employees soon thereafter were reassigned or replaced.

(s) In January 2004, Stanford also continued his bribery scheme with Leroy King by paying \$8000 for tickets to the Super Bowl game in Houston and by corruptly giving those tickets to King and his girlfriend to attend the game.

(t) In June of 2005, King provided to Stanford a confidential letter that King had received from the United States Securities and Exchange Commission (SEC) in his capacity as Administrator and CEO of the FSRC wherein the SEC sought information and records regarding SIBL's CD investment portfolio. In the confidential letter, the SEC maintained that it was investigating SIBL's sales practices with respect to its CD program and sought from the FSRC details and records of SIBL's investments because the SEC stated that it had evidence to suggest that SIBL was engaged in a "possible Ponzi scheme." Stanford and SIBL Executive A then assisted King in drafting a false and misleading response by the FSRC to this confidential SEC letter.

(u) By August of 2005, Stanford had retained an outside counsel to represent the interests of SIBL in the SEC inquiry of SIBL's sales practices (hereafter Outside Attorney A). During that month, Outside Attorney A traveled to the SIBL facility in Antigua where he met with Stanford, DAVIS, SIBL Executive A, Leroy King and others to familiarize himself with the operations and finances of SIBL. Outside Attorney A further reviewed SIBL's disclosures to investors in its CD program.

(v) On July 30, 2006, Leroy King transmitted to SFG Attorney A in Houston, Texas, a letter dated July 11, 2006 from the Director of the Bank Supervision Department at the Eastern Caribbean Central Bank ("ECCB") to the FSRC in Antigua concerning, inter alia, the affiliate relationship of SIBL to the Bank of Antigua. Similarly, on August 1, 2006, King again faxed to SFG Attorney A in Houston, Texas, a proposed response to the ECCB letter which sought the input of SFG Attorney A in crafting a response by the FSRC calculated to mislead the ECCB as to the financial bona fides of SIBL to prevent legitimate scrutiny of SIBL by the Eastern Caribbean bank regulator. Recognizing that he had already been paid through cash bribe payments from Stanford, King concluded the August 1, 2006 facsimile transmission with the following handwritten words: "Please do not bill me (laugh), Thanks a million, Lee."

(w) On September 25, 2006, King provided to Stanford, SFG Attorney A, and SIBL Executive A another confidential letter he had received from the SEC wherein the SEC again sought records and information regarding SIBL's CD investment

portfolio. Stanford, **DAVIS**, SIBL Executive A, and SFG Attorney A would then propose various responses designed to mislead the SEC that King would be requested to insert into the FSRC's response to the SEC's confidential letter.

(x) In late September of 2006, Outside Attorney A contacted the SEC and represented that he had "heard through the grapevine" that the FSRC had not been provided with an appropriate request from the SEC for documents; that the SEC should "go to Antigua" to review the SIBL examination reports; that the SEC had "no basis" to request documents regarding SIBL's investment portfolio from SIBL; that he (Outside Attorney A) had spent 15 years investigating fraud for the SEC and was "well-equipped" to recognize the "hallmarks of fraud"; that he (Outside Attorney A) found SIBL to be credible in all their business dealings; and that, based upon his review of the situation and personal visit to SIBL, Outside Attorney A found SIBL to be an "incredible institution."

(y) In late 2008, Outside Attorney A was informed that SIBL's CD investment portfolio included a previously undisclosed third tier of investments (Tier III) that was not "managed" by Holt. Subsequently, in early January 2009, Outside Attorney A was informed that this third tier included real estate investments and private equity. Outside Attorney A, through his prior review of SIBL's disclosures knew and understood that this third tier of investments, including the real estate investments, had not been disclosed to investors. In early January of 2009 Outside Attorney A further learned that this undisclosed third tier of investments constituted approximately 80% of SIBL's investment portfolio or approximately \$6 billion.

(z) During the course of the fraud conspiracy, Holt supervised a group of research analysts at SFG's offices in Memphis, Tennessee, who were primarily responsible for researching and trading investments in the Tier II segment of SIBL's portfolio. These research analysts were aware that Tier II represented a small segment of SIBL's entire portfolio and that the vast majority of SIBL's purported assets were in Tier III of SIBL's portfolio. Occasionally, Holt's research analysts would question her regarding Holt's knowledge of SIBL's Tier III assets. Holt would often dismiss such inquiries and would explain that she knew the details of the assets in Tier III and the research analysts "did not need to concern themselves" with Tier III.

(aa) From 2005 through at least February of 2009, Stanford, **DAVIS**, Holt, SIBL Executive A and others would attend investor conferences and other meetings with FAs called "Top Producer Club" or "TPC" meetings where they would falsely tout the assets and earnings of SIBL's investments, falsely tout SIBL's investment

strategy and deceive both the investors and FAs as to the role Holt played in the “management” of SIBL’s investment portfolio.

(bb) In December 2008, Holt’s research analysts began to make further inquiry of Holt regarding the quantity and the quality of the assets that made up SIBL’s Tier III. During that same month, Holt led several meetings with her research analysts wherein she would purport to inform the analysts as to some of the content of SIBL’s Tier III. Specifically, Holt explained the evolution of Tier III from a segment of SIBL’s portfolio in the 1990s that contained mostly futures, options and currencies, to its current content which was purportedly geared toward larger holdings of real estate and private equity. Holt explained that Tier III was composed of 30-40% private equity and real estate and 10-12% cash. She further explained that SIBL had conducted private equity and real estate deals that had been “very profitable.” In fact, she cited one transaction involving “two islands and one club” that Stanford had acquired and “got a very good deal.” Because of this, Holt explained, Tier III was “up 7% mid-year.” Holt told her research analysts that “we are restructuring Tier III and that will happen as early as January 2009.”

(c) In mid-2008, Stanford, **DAVIS** and other conspirators were desperately seeking a fraudulent mechanism whereby they could artificially inflate SIBL’s assets and thereby further conceal the fact that, undisclosed to investors, Stanford had made approximately \$2 billion in loans to himself; that many if not all of private equity investments in Tier III were either insolvent or losing money badly, and that the touted returns on investment had been fictitious. As such, Stanford, **DAVIS**, Lopez, Kuhrt and other conspirators designed a real estate transaction wherein they would falsely inflate and convert an approximate \$65 million dollar real estate transaction in Antigua into a purported \$3.2 billion dollar asset of SIBL merely through a series of related party property flips through business entities controlled by Stanford. From approximately May 2008 through November 2008, Stanford, **DAVIS**, Lopez, Kuhrt, SIBL Executive A, SFG Attorney A and other conspirators participated in documenting elements of this bogus real estate in the books and records of SIBL designed to fraudulently add billions of dollars in value to SIBL’s financial statements.

(dd) On January 14, 2009, the SEC served, through Outside Attorney A, investigatory subpoenas to **DAVIS** and Holt seeking testimony and documents related to SIBL’s investment portfolio. Stanford also was served an SEC subpoena through Outside Attorney A. Outside Attorney A understood that the SEC inquiry would require the subpoenaed individuals to make a complete and transparent presentation to the SEC regarding all of the assets related to SIBL’s CD program.

(ee) On January 21, 2009, Outside Attorney A met at the SIBL airplane hangar in Miami, Florida, to discuss the SEC investigation with Stanford, DAVIS, Holt, SIBL Executive A, SFG Attorney A and others to discuss who could make the presentation to the SEC. At that meeting, despite the knowledge that Stanford and DAVIS were in the best position to disclose the assets in the Tier III portfolio, Stanford, DAVIS, Holt, Outside Attorney A, SIBL Executive A and SFG Attorney A all agreed that Outside Attorney A would seek to convince the SEC that Holt and SIBL Executive A were the best individuals to present testimony and evidence to the SEC as to SIBL's entire investment portfolio. The participants also agreed to participate in a series of meetings in Miami, Florida during the week of February 2, 2009, to bring Holt and SIBL Executive A "up to speed on Tier 3" before the SEC presentation.

(ff) On January 22, 2008, Outside Attorney A met in Houston, Texas with several SEC attorneys in Houston, Texas to discuss issues related to the SEC investigation. The SEC attorneys reiterated that their investigation was seeking to determine where and how the entire portfolio of SIBL assets were invested and managed. Outside Attorney A falsely maintained that Stanford and DAVIS did not "micro-manage" the portfolio but that Holt and SIBL Executive A were the "better people to explain the details" about SIBL's entire portfolio. As a result of Outside Attorney A's misleading statements, the SEC attorneys agreed to postpone the testimony of Stanford and DAVIS and to take the testimony of SIBL Executive A and Holt on February 9-10, 2009, respectively. Outside Attorney A also falsely informed the SEC attorneys at this meeting that SIBL was "not a criminal enterprise."

(gg) In the last week of January 2009, DAVIS met with King in Antigua. By that time, SIBL was facing increasing regulatory scrutiny from the SEC, and Stanford, Holt and DAVIS, had received subpoenas from the SEC. King appeared very stressed. King related that he had again been contacted by the SEC. King asked DAVIS if "we were going to make it?" which meant whether the fraud they had been engaged in was going to be exposed. DAVIS informed King that he thought they were going to be ok.

(hh) On January 27, 2009, Outside Attorney A contacted DAVIS, Holt and SIBL Executive A and informed them when Holt and SIBL Executive A responded to the SEC inquiry they would be required to present "positive proof" regarding all of the assets of SIBL including the three tiers, that they needed to "rise to the occasion," and that "our livelihood depends on it."

(ii) On February 3, 4, 5 and 6, 2009, DAVIS met with Holt, SFG Attorney A, SIBL Executive A, Outside Attorney A, and ultimately, Stanford on February 5,

and others, at SFG' s office in Miami, Florida to discuss the testimony that Holt and SIBL Executive A would provide to the SEC during the week of February 9, 2009. During these meetings Holt disclosed that the value of the assets she actually managed in Tier II totaled approximately \$350 million, down from \$850 million in June of 2008. At these meetings **DAVIS** further revealed that the purported value of Tier III of SIBL's investment portfolio was made up of: real estate valued at in excess of \$3 billion which allegedly had been acquired earlier that year by SIBL for less than \$90 million; \$1.6 billion in "loans" to Stanford; and various other private equity investments. Several of the Miami meeting participants acknowledged that if this disclosure was accurate, then the bank was insolvent. During the February 5, 2009 session, Stanford falsely informed the participants that despite what they had just been told, SIBL had "at least \$850 million more in assets than liabilities."

(jj) Later in the day of February 5, 2009, Stanford, **DAVIS** and Outside Attorney A attended a separate meeting where Stanford acknowledged that SIBL's assets and financial health had been misrepresented to investors, and were overstated in SIBL's financials.

(kk) On the morning of February 10, 2009, prior to Holt's testimony before the SEC in Fort Worth, Texas, in an effort to continue to obstruct the SEC investigation, **DAVIS** spoke with Holt by telephone and told her to only disclose to SEC investigators her knowledge of Tier II investments.

(ll) During her testimony to the SEC on February 10, 2009, in addition to failing to disclose the Miami meetings and participants which had occurred the prior week, Holt falsely stated in her SEC testimony that she was unaware of the assets and allocations of assets in Tier III of SIBL's portfolio.

Breach of Plea Agreement

18. If the defendant fails in any way to fulfill completely all of his obligations under this Agreement, the United States will be released from its obligations hereunder, and the defendant's plea and sentence will stand. If at any time the defendant retains, conceals, or disposes of assets in violation of this Agreement, or if the defendant knowingly withholds evidence or is otherwise not completely truthful

with the United States, then the United States may ask the Court to set aside his guilty plea and reinstate prosecution. Any information and documents that have been disclosed by the defendant, whether prior to or subsequent to execution of this Agreement, and all leads derived therefrom, will be used against the defendant in any prosecution.

Forfeiture

19. Defendant agrees to forfeit all property which constitutes or is derived from proceeds traceable to the violations charged in Counts One and Two of the information. Defendant stipulates and agrees that the factual basis for his guilty plea supports the forfeiture of at least \$1,000,000,000 (one billion dollars). Defendant agrees to a personal money judgment for \$1,000,000,000 (one billion dollars) against him and in favor of the United States of America. Defendant represents that he will make a full and complete disclosure of all assets over which he exercises direct or indirect control, or in which he has any financial interest. Defendant stipulates and admits that one or more of the conditions set forth in 21 U.S.C. § 853(p) exists. Defendant agrees to forfeit any of Defendant's property, or Defendant's interest in any property, up to the value of any unpaid portion of the money judgment, until the money judgment is fully satisfied. Defendant agrees to take all steps necessary to pass clear title to forfeitable and substitute assets to the United States, including but not limited to surrendering title, signing a consent decree, stipulating facts regarding the

transfer of title and basis for the forfeiture, and signing any other documents necessary to effectuate such transfer.

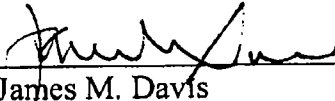
20. Defendant agrees to the entry of a preliminary order of forfeiture and consents to the preliminary order of forfeiture becoming final as to the Defendant immediately following this guilty plea pursuant to Fed.R.Crim.P. 32.2(b)(3). Defendant waives the right to challenge the forfeiture of property in any manner, including by direct appeal or in a collateral proceeding.

Complete Agreement

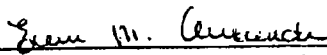
21. This Agreement, consisting of 23 pages, together with the attached letter agreement dated April 21, 2009, constitutes the complete plea agreement between the United States, the defendant, and his counsel. No promises or representations have been made by the United States except as set forth in writing in this Agreement. The defendant acknowledges that no threats have been made against him and that he is pleading guilty freely and voluntarily because he is guilty.

22. Any modification of this Agreement must be in writing and signed by all parties.

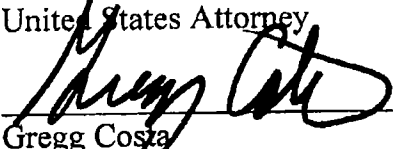
Filed at Houston, Texas, on August 27, 2009.



James M. Davis
Defendant


Subscribed and sworn to before me on August 27, 2009.

By: 
Deputy United States District Clerk

APPROVED:

Tim Johnson
United States Attorney
By: 
Gregg Costa
Assistant U.S. Attorney


David Finn
Attorney for Defendant

Steven A. Tyrrell
Chief
Fraud Section, Criminal Division
Department of Justice
BY: 
Paul E. Pelletier
Principal Deputy Chief
Jack B. Patrick
Senior Litigation Counsel
Matthew Klecka
Trial Attorney



U.S. Department of Justice

1400 New York Avenue
Washington, D.C. 20530
(202) 353-7693

April 21, 2009

VIA FEDEX and EMAIL

David Finn, Esq.
Milner & Finn
2828 North Harwood Street
Suite 1950, Lock Box 9
Dallas, TX 75201

Re: Davis Plea Agreement

Dear Mr. Finn:

This letter sets forth the terms of the plea agreement between your client, James Davis, and the United States, by and through the Fraud Section of the Criminal Division of the Department of Justice and the United States Attorney's Office for the Southern District of Texas (hereinafter referred to as the "United States"), regarding your client's involvement with Stanford Group, Inc., Stanford International Bank, Ltd., and related entities including the predecessor bank, Guardian Trust, from at least 1989 through the present. The terms of this "Agreement" are as follows:

1. Davis agrees to waive prosecution by indictment and to plead guilty to three counts of a Criminal Information, charging Davis: in Count 1 with conspiracy to violate the following laws: Securities fraud, in violation of Title 15, United States Code, Sections 78j(b) and 78ff(a), and Title 17, Code of Federal Regulations, Section 240.10b-5; wire fraud, in violation of Title 18, United States Code, Section 1343; mail fraud, in violation of Title 18, United States Code, Section 1341; and obstruction of a proceeding before the Securities and Exchange Commission, in violation of Title 18, United States Code, Section 1505; all in violation of Title 18, United States Code, Section 371; in Count 2 with mail fraud, in violation of Title 18, United States Code, Sections 1341 and 2; and in Count 3 with obstruction of a proceeding before the Securities and Exchange Commission, in violation of Title 18, United States Code, Sections 1505 and 2. The Criminal Information also includes a forfeiture allegation, as further discussed herein.

SEP
JRF
D.F.
JMD
SEP
JRF
D.F.
JMD

2. Davis is aware that his sentence will be imposed by the Court. Davis understands and agrees that federal sentencing law requires the Court to impose a sentence that is reasonable and that the Court must consider the United States Sentencing Guidelines and Policy Statements (hereinafter "Sentencing Guidelines") in effect at the time of the sentencing in determining that reasonable sentence. Davis acknowledges and understands that the Court will compute an advisory sentence under the United States Sentencing Guidelines and that the applicable

guidelines will be determined by the Court relying in part on the results of a Pre-Sentence Investigation by the Court's Probation Department, which investigation will commence after the guilty plea has been entered. Davis is also aware that, under certain circumstances, the Court may depart from the advisory sentencing guideline range that it has computed, and may raise or lower that advisory sentence under the Sentencing Guidelines. Davis is further aware and understands that while the Court is required to consider the advisory guideline range determined under the Sentencing Guidelines, it is not bound to impose a sentence within that range. Davis understands that the facts that determine the offense level will be found by the Court at the time of sentencing and that in making those determinations the Court may consider any reliable evidence, including hearsay, as well as the provisions or stipulations in this Agreement. The United States and Davis agree to recommend that the Sentencing Guidelines should apply and that pursuant to United States v. Booker, the Guidelines provide a fair and just resolution based on the facts of this case, and that no downward departures or variances are appropriate other than the reduction for acceptance of responsibility noted in paragraph 12 and the potential for a reduction under the terms set forth in paragraph 9. The Court is permitted to tailor the ultimate sentence in light of other statutory concerns, and such sentence may be either more severe or less severe than the Sentencing Guidelines' advisory sentence. Knowing these facts, Davis understands and acknowledges that the Court has the authority to impose any sentence within and up to the statutory maximum authorized by law for the offenses identified in paragraph 1 and that Davis may not withdraw the plea solely as a result of the sentence imposed.

3. Davis also understands and acknowledges that as to Count 1, the Court may impose a statutory maximum term of imprisonment of up to five (5) years. Davis understands and acknowledges that as to Count 2, the Court may impose a statutory maximum term of imprisonment of up to twenty (20) years. Davis understands and acknowledges that as to Count 3, the Court may impose a statutory maximum term of imprisonment of up to five (5) years. In addition to any period of imprisonment as reflected above, the Court may also impose a period of supervised release of up to three (3) years to commence at the conclusion of the period of imprisonment. In addition to a term of imprisonment and supervised release, the Court may impose a fine of up to the greater of \$250,000, or twice the gross pecuniary gain or loss pursuant to 18 U.S.C. § 3571(d).

4. Davis further understands and acknowledges that, in addition to any sentence imposed under paragraph 3 of this Agreement, a special assessment in the total amount of \$300 will be imposed on Davis. Davis agrees that any special assessment imposed shall be paid immediately after sentencing.

5. Davis further understands and acknowledges that he (a) shall truthfully and completely disclose all information with respect to the activities of himself and others concerning all matters about which the United States inquires of him, which information can be used for any purpose; (b) shall cooperate fully with the United States and any other law enforcement agency designated by the United States; (c) shall attend all meetings at which the United States requests his presence; (d) shall provide to the United States, upon request, any document, record, or other

tangible evidence relating to matters about which the United States or any designated law enforcement agency inquires of him; (e) shall truthfully testify before the grand jury and at any trial and other court proceeding with respect to any matters about which the United States may request his testimony; (f) shall bring to the attention of the United States all crimes which he has committed, and all administrative, civil, or criminal proceedings, investigations, or prosecutions in which he has been or is a subject, target, party, or witness; and, (g) shall commit no further crimes whatsoever. Moreover, any assistance Davis may provide to federal criminal investigators shall be pursuant to the specific instructions and control of the United States and designated investigators. In carrying out his obligations under this paragraph, Davis shall neither minimize his own involvement nor fabricate, minimize or exaggerate the involvement of others.

6. Davis shall provide, when requested, the Probation Department and counsel for the United States with a full, complete and accurate personal financial statement listing all assets under his direct or indirect control, including any assets he may have transferred or placed in the control of others within the 10 year period prior to execution of this Agreement. If Davis provides incomplete or untruthful statements in his personal financial statement, his action shall be deemed a material breach of this Agreement and the United States shall be free to pursue all appropriate charges against him notwithstanding any agreements to forbear from bringing additional charges otherwise set forth in this Agreement.

7. Provided that Davis commits no new criminal offenses and provided he continues to demonstrate an affirmative recognition and affirmative acceptance of personal responsibility for his criminal conduct, the United States agrees that it will recommend at sentencing that Davis receive a three-level reduction for acceptance of responsibility pursuant to Section 3E1.1 of the Sentencing Guidelines, based upon Davis' recognition and affirmative and timely acceptance of personal responsibility. The United States, however, will not be required to make this sentencing recommendation if Davis: (1) fails or refuses to timely enter his guilty plea and to make a full, accurate and complete disclosure to the United States and the Probation Department of the circumstances surrounding the relevant offense conduct and his present financial condition; (2) is found to have misrepresented facts to the United States prior to entering this Agreement; or (3) commits any misconduct after entering into this Agreement, including but not limited to committing a state or federal offense, violating any term of release, or making false statements or misrepresentations to any governmental entity or official.

8. The United States reserves the right to inform the Court and the Probation Department of all facts pertinent to the sentencing process, including all relevant information concerning the offenses committed, whether charged or not, as well as concerning Davis and Davis' background. Subject only to the express terms of any agreed-upon sentencing recommendations contained in this Agreement, the United States further reserves the right to make any recommendation as to the quality and quantity of punishment.

9. The United States reserves the right to evaluate the nature and extent of Davis' cooperation and to make Davis' cooperation, or lack thereof, known to the Court at the time of

sentencing. If, in the sole and unreviewable judgment of the United States, Davis' cooperation is of such quality and significance to the investigation or prosecution of other criminal matters as to warrant the Court's downward departure from the sentence required by the Sentencing Guidelines, the United States may, at or before sentencing make, a motion pursuant to Title 18, United States Code, Section 3553(e), Section 5K1.1 of the Sentencing Guidelines, or subsequent to sentencing by motion pursuant to Rule 35 of the Federal Rules of Criminal Procedure, reflecting that Davis has provided substantial assistance and recommending a sentence reduction. Davis acknowledges and agrees, however, that nothing in this Agreement may be construed to require the United States to file such a motion and that the United States' assessment of the nature, value, truthfulness, completeness, and accuracy of Davis' cooperation shall be binding on Davis.

10. Davis understands and acknowledges that the Court is under no obligation to grant a motion by the United States pursuant to Title 18, United States Code, Section 3553(e), 5K1.1 of the Sentencing Guidelines or Rule 35 of the Federal Rules of Criminal Procedure, as referred to in paragraph 9 of this Agreement, should the United States exercise its discretion to file such a motion.

11. Davis admits and acknowledges that the following facts are true and that the United States could prove them at trial beyond a reasonable doubt:

- a. That Davis' participation in the conspiracy and scheme and artifice resulted in a loss of more than \$400,000,000;
- b. That Davis' offense involved more than two-hundred fifty (250) victims;
- c. That a substantial part of Davis' fraudulent scheme was committed from outside the United States and otherwise involved sophisticated means;
- d. That Davis' offense affected the safety and soundness of a financial institution and endangered the solvency or financial security of 100 or more victims; and
- e. That Davis abused a position of trust as Chief Financial Officer of Stanford Group, Inc., and Stanford International Bank, Ltd.

12. Based on the foregoing, the United States and Davis agree that although not binding on the Probation Department or the Court, the applicable Sentencing Guidelines adjusted offense level is as follows:

- | | | |
|----|--|----|
| a. | Section 2B1.1(a) - Base offense level for wire fraud offense | 7 |
| b. | Section 2B1.1(b)(1)(K) - Loss of more than \$400,000,000 | 30 |
| c. | Section 2B1.1(b)(2)(B) - More than 250 victims | 6 |
| d. | Section 2B1.1(b)(9)(C) & (D) - Substantial part of scheme committed outside the United States and otherwise used sophisticated means | 2 |
| e. | Section 2B1.1(b)(14)(B) - Affecting safety and soundness | |

| | | |
|----|--|------------------|
| | of a financial institution and endangering the solvency or financial security of 100 or more victims | 4 |
| f. | Section 3B1.3 - Abuse of position of trust | 2 |
| g. | Section 2B1.1(b)(14)(C) - Combination of enhancement for more than 250 victims (+6) and enhancement for safety and soundness of a financial institution and endangering the solvency or financial security of 100 or more victims (+4) equals 10, therefore reduced to 8 | -2 |
| h. | Sections 3E1.1(a) and 3E1.1(b) Acceptance of Responsibility (if applicable) | -3 |
| | TOTAL OFFENSE LEVEL - ADJUSTED | <u>46</u> |

13. Davis agrees to forfeiture of all property, real or personal, which constitutes or is derived from proceeds traceable to the violations of 18 U.S.C. § 371 (conspiracy to commit wire and mail fraud) and 18 U.S.C. § 1343 (wire fraud). Davis agrees that all such property is subject to criminal forfeiture pursuant to 28 U.S.C. § 2461(c) (incorporating 18 U.S.C. § 981(a)(1)(C)), as property constituting, or derived from, proceeds obtained, directly or indirectly, as the result of the conspiracy (Count 1) and mail fraud scheme (Count 2). In order to effectuate the forfeiture, Davis agrees to the entry of a Consent Order of Forfeiture, in the form of a money judgment, of \$1,000,000,000.00 (one billion dollars). Davis acknowledges that the money judgment is subject to forfeiture as proceeds of illegal conduct or substitute assets for property otherwise subject to forfeiture.

14. Davis also agrees that he shall assist the United States in all proceedings, whether administrative or judicial, involving the forfeiture to the United States of all rights, title, and interest, regardless of their nature or form, in the assets which Davis has agreed to forfeit, and any other assets, including real and personal property, cash and other monetary instruments, wherever located, which Davis or others to his knowledge have accumulated as a result of illegal activities. Such assistance shall include Davis' consent to the entry of any order deemed by the United States as necessary to effectuate said forfeitures. In addition, Davis agrees to identify as being subject to forfeiture and/or restitution all such assets, and to assist in the transfer of such property to the United States by delivering to the United States upon the United States' request, all necessary and appropriate documentation with respect to said assets, including consents to forfeiture, quit claim deeds and any and all other documents necessary to deliver good and marketable title to said property. To the extent the assets are no longer within the possession and control or name of Davis, Davis agrees that the United States may seek substitute assets within the meaning of 21 U.S.C. § 853. Davis further agrees to assist the United States in recovering all victim assets, wherever located, including but not limited to, executing requests for repatriation of said assets, wherever located, and facilitating the entry of court orders or treaty requests regarding said assets, wherever located. Davis further agrees not to alienate, transfer or encumber any asset over which he has direct or indirect control unless otherwise agreed to by the United

States or permitted by order of the Court. Failure to comply with the terms of this paragraph will constitute a material breach of this agreement.

15. Davis knowingly and voluntarily agrees to waive any claim or defenses he may have under the Eighth Amendment to the United States Constitution, including any claim of excessive fine or penalty with respect to the forfeited assets or victim restitution. Davis further knowingly and voluntarily waives his right to a jury trial on the forfeiture of said assets, waives any statute of limitations with respect to the forfeiture of said assets, and waives any notice of forfeiture proceedings, whether administrative or judicial, against the forfeited assets. Davis waives the requirements of Federal Rules of Criminal Procedure 32.2 and 43(a) regarding notice of the forfeiture in the charging instrument, announcement of the forfeiture at sentencing, and incorporation of the forfeiture in the judgment. Davis acknowledges that he understands that the forfeiture of assets is part of the sentence that may be imposed in this case and waives any failure by the court to advise him of this, pursuant to Rule 11(b)(1)(J), at the time his guilty plea is accepted.

16. Davis acknowledges that because the offenses of conviction occurred after April 24, 1996, restitution is mandatory without regard to the Davis' ability to pay and that the Court must order Davis to pay restitution for the full loss caused by his criminal conduct pursuant to Title 18, United States Code, Section 3663A, provided, however, that the United States agrees that the value of any property returned to victims through the forfeiture and remission process shall be credited against any order of restitution due to victims.

17. Davis is aware that the sentence has not yet been determined by the Court. Davis is also aware that any estimate of the probable sentencing range or sentence that Davis may receive, whether that estimate comes from Davis' attorney, the United States, or the Probation Department, is a prediction, not a promise, and is not binding on the United States, the Probation Department or the Court. Davis further understands that any recommendation that the United States makes to the Court as to sentencing, whether pursuant to this Agreement or otherwise, is not binding on the Court and the Court may disregard the recommendation in its entirety. Davis understands and acknowledges, as previously acknowledged in paragraph 2 above, that Davis may not withdraw his plea based upon the Court's decision not to accept a sentencing recommendation made by Davis, the United States, or a recommendation made jointly by both Davis and the United States.

18. Davis is aware that Title 18, United States Code, Section 3742 affords Davis the right to appeal the sentence imposed in this case. Acknowledging this, in exchange for the undertakings made by the United States in this Agreement, Davis hereby waives all rights conferred by Section 3742 to appeal any sentence imposed, including any forfeiture or restitution ordered, or to appeal the manner in which the sentence was imposed, unless the sentence exceeds the maximum permitted by statute. Davis further understands that nothing in this Agreement shall affect the right of the United States and/or its duty to appeal as set forth in Title 18, United States Code, Section 3742(b). If the United States appeals Davis' sentence pursuant to Section

3742(b), however, Davis shall be released from this waiver of appellate rights. By executing this Agreement, Davis acknowledges that he has discussed the appeal waiver set forth in this Agreement with his attorney. Davis further agrees, together with the United States, to request that the district Court enter a specific finding that the Davis' waiver of his right to appeal the sentence to be imposed in this case was knowing and voluntary.

19. Davis acknowledges that he has accepted this Agreement and decided to plead guilty because he is in fact guilty. By entering this plea of guilty, the defendant waives any and all right to withdraw his plea or to attack his conviction, either on direct appeal or collaterally, on the ground that the Government has failed to produce any discovery material, *Jencks Act* material, exculpatory material pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963), other than information establishing the factual innocence of the defendant, and impeachment material pursuant to *Giglio v. United States*, 405 U.S. 150 (1972), that has not already been produced as of the date of the signing of this Agreement.

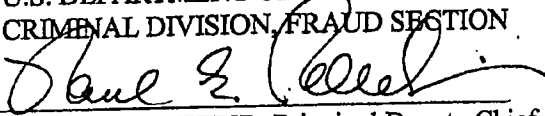
20. For purposes of criminal prosecution, this Agreement shall be binding and enforceable upon the Fraud Section of the Criminal Division of the United States Department of Justice and the United States Attorney's Office for the Southern District of Texas. The United States does not release Davis from any claims under Title 26, United States Code. Further, this Agreement in no way limits, binds, or otherwise affects the rights, powers or duties of any state or local law enforcement agency or any administrative or regulatory authority.

21. In the event that Davis does not plead guilty or if Davis breaches this Agreement by failing to comply with any terms hereto, Davis agrees and understands that he thereby waives any protection afforded by Section 1B1.8(a) of the Sentencing Guidelines and Rule 11(f) of the Federal Rules of Criminal Procedure, and that any statements made by him as part of his cooperation with the United States, or otherwise, both prior or subsequent to signing this Agreement, will be admissible against him without any limitation in any civil or criminal proceeding and Davis shall assert no claim under the United States Constitution, any statute, Rule 410 of the Federal Rules of Evidence, or any other federal rule that such statements or any leads therefrom should be suppressed. By entering into this Agreement, Davis intends to waive all rights in the foregoing respects.

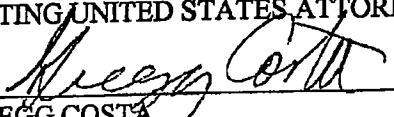
22. This Agreement is the entire agreement and understanding between the United States and Davis. There are no other agreements, promises, representations or understandings.

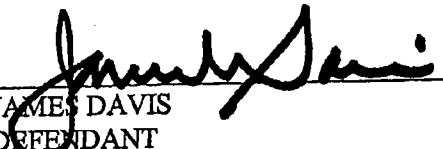
Respectfully submitted,


STEVEN A. TYRRELL, CHIEF
U.S. DEPARTMENT OF JUSTICE
CRIMINAL DIVISION, FRAUD SECTION

By: 
PAUL E. PELLETIER, Principal Deputy Chief
U.S. DEPARTMENT OF JUSTICE
CRIMINAL DIVISION, FRAUD SECTION

TIMOTHY JOHNSON
ACTING UNITED STATES ATTORNEY

By: 
GREGG COSTA
ASSISTANT UNITED STATES ATTORNEY


JAMES DAVIS
DEFENDANT
Date: _____


DAVID FINN
COUNSEL FOR JAMES DAVIS
Date: _____