**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. MARQUETTE; GAIL G. MARQUETTE,

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Defendants/Appellees

--Consolidated with--

**09-10765**

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

Plaintiff/Appellant

v.

JIM LETSOS; FELIPE GONZALES; 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, Civil Action No. 3:09-CV-0724-N

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## STATEMENT REGARDING ORAL ARGUMENT

This case warrants oral argument, both because of the significance of the issues presented and the tremendous importance of this appeal to the hundreds of innocent investors whose property is frozen.

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Appellees/Cross-Appellants Divo Milan Haddad and Singapore Puntamita Pte., Ltd. (herein referred to collectively as "Milan") file this, their principal and response Brief and would show the Court as follows:

## STATEMENT OF JURISDICTION

### I. The District Court Lacked Subject Matter Jurisdiction Of The Receiver's July 28 Freeze Motion Against Milan And Other Purported "Relief Defendants"

The District Court could have had subject matter jurisdiction of the July 28 Freeze Motion[1] in the "Ancillary Action" (No. 3:09-CV-0724-N) against "nominal" parties like Milan, who were named as purported "relief defendants" only if these parties (a) had no ownership interest in the property that was the subject of the ancillary action; and (b) had no legitimate claim to any such interest in that property. *CFTC v. Kimberlynn Creek Ranch, Inc.,* 276 F.3d 187, 191 (4th Cir. 2002); *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991).

The Receiver's Amended Complaint itself showed that this was not true. R. 201. The District Court therefore lacked subject matter jurisdiction as to the claims against Milan and others. These parties were and are the record owners of the property in the brokerage accounts at issue, and have consistently asserted their legitimate claims to such property. There is no alternative basis for subject matter

[1] *See* R. 265-97. Throughout this Brief, citations to the record will be made as follows: (1) the record certified on August 20, 2009 that contains pleadings from *Janvey v. Alguire*, Cause No. 3:09-CV-0724-N is "R."; and (2) the supplemental record certified on September 10, 2009 that contains pleadings from *SEC v. Stanford Int'l Bank, Ltd.*, Cause No. 3:09-CV-0298-N is "SEC Supp. R."

jurisdiction as to the Receiver's claims against Milan and others, in that the Receiver acknowledges they are innocent of any violations of the federal securities laws on which the principal action (No. 3:09-CV-0298-N) is based.

## II. The Court Of Appeals Lacks Jurisdiction Of The Receiver's Interlocutory Appeal

The appeal filed by the Receiver bases its assertion of appellate jurisdiction in this Court of Appeals solely on the Receiver's claim that this is an appeal from the "denial in part of a preliminary injunction, pursuant to 28 U.S.C., section 1292(a)(1)". Receiver's Brief at 1.

This is an interlocutory appeal, which seeks to invoke an exception to the general rule that a notice of appeal is effective only from a final order or judgment. *See McLaughlin v. Mississippi Power Co*., 376 F.3d 344, 350 (5th Cir. 2004). Since the August 4 Order does not in explicit terms deny any injunction, it could be appealable only if the order has the practical effect of denying an injunction and "threatens serious, perhaps irreparable consequences" to the Receiver. *Id*. The Receiver has made no such showing.

The August 4 Order is not an order "denying a preliminary injunction", either in its terms or in practical effect. R. 477-79. It denied the Receiver's request to impose a freeze, seizure, or attachment of property.

Such interlocutory orders denying the imposition or continuation of "security orders" are not appealable orders denying injunctions. The August 4

Order did not deny a request by the Receiver that Milan and other investors be ordered to do or not to do anything. *Id*. It is not enforceable by contempt against Milan or other innocent investors. *See NutraSweet Co v. Vit-Mar Enterprises, Inc*., 176 F.3d 151, 153-54 (3d Cir. 1999) (injunctions are orders directed to a party that are enforceable by contempt); *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 632 (2d Cir. 1995) (attachment and replevin are not injunctions for purposes of § 1292(a)(1)); *FDIC v. Elio*, 39 F.3d 1239, 1249 (1st Cir. 1994) (attachments not appealable); *American Mort. Corp. v. First Nat'l Mort. Co*., 345 F.2d 527, 528 (7th Cir. 1965) (order for attachment of property cannot be characterized as injunction so as to permit interlocutory appeal).

Such orders repeatedly have been held not appealable on an interlocutory basis. *See* Wright, Miller & Cooper, *Federal Practice and Procedure* § 3922.3; *Petroleos Mexicanos Refinancion v. M/T King A (Ex-Tblisi)*, 377 F.3d 329, 337-38 (3d Cir. 2004) (order refusing to vacate arrest of property not appealable as order denying injunction); *United States v. Quintana-Aguayo*, 235 F.3d 682, 686 (1st Cir. 2000) (warrant directing marshal to seize ranch pending proceeding for forfeiture not appealable as injunction); *FTC v. Overseas Unlimited Agency, Inc.*, 873 F.2d 1233, 1235 (9th Cir. 1989) (order requiring turnover of property to receiver); *Rosenfeldt v. Comprehensive Accounting Serv. Corp*., 514 F.2d 607, 609-10 (7th Cir. 1975) (order to deliver property to creditor treated as non-appealable

attachment). This Court similarly has held that orders requiring persons to turn over property to a receiver are not appealable on an interlocutory basis. *United States v. Beasley*, 558 F.2d 1200 (5th Cir. 1977); *Wark v. Spinuzzi*, 376 F.2d 827 (5th Cir. 1967).

Accordingly, the Court of Appeals lacks jurisdiction over the Receiver's appeal of the August 4 Order, which is not a final judgment or an order denying a preliminary injunction.

Milan timely filed his cross-appeal herein from the portion of the August 4 Order that imposed an "interest freeze" on his property. R. 143-44. If this Court has jurisdiction over the Receiver's appeal, then it also has jurisdiction over Milan's cross-appeal. However, if the Court concludes that it lacks jurisdiction over the Receiver's appeal, then it also lacks jurisdiction over Milan's cross-appeal.

## ISSUES PRESENTED FOR REVIEW

**1.** Did the District Court act within its discretion by declining to impose a "principal freeze" on the property of innocent investors as to amounts allegedly equal to their recovery of principal investments in SIB CDs at unspecified past times, under the following circumstances:

A. The SEC, as sole Plaintiff, and the Examiner appointed by the District Court to represent the interests of the victims of the alleged Stanford fraud, opposed the Receiver's request for the "principal freeze" as

contrary to SEC policy and the interests of the victims of the alleged fraud;

B. The Receiver made no attempt to satisfy the requirements for a constitutional pre-judgment attachment of the property of the innocent investors, and made no evidentiary showing that the property he sought to "freeze" is traceable to the proceeds of any SIB CDs; and

C. The innocent investors to be subjected to the "principal freeze" are sued as supposed nominal "Relief Defendants" over whom the District Court need not establish subject matter jurisdiction, but these investors are not nominal defendants and own the property the Receiver sought to freeze.

**2.** Did the District Court err by imposing an "interest freeze" on the property of innocent investors as to amounts allegedly equal to interest proceeds they recovered from investments in SIB CDs at unspecified past times, under the following circumstances:

A. The Receiver failed to provide the notice required by Due Process and Federal Rule of Civil Procedure 65(a)(1) prior to the July 31 hearing on his Freeze Motion, and failed to present sufficient evidence to justify such a "freeze";

B. The Receiver made no attempt to satisfy the requirements for a constitutional pre-judgment attachment of the property of the innocent investors, and made no evidentiary showing that the property he sought to "freeze" is traceable to the proceeds of any SIB CDs; and

C. The innocent investors subjected to the "interest freeze" are sued as supposed nominal "Relief Defendants" over whom the District Court need not establish subject matter jurisdiction, but these investors are not nominal defendants and own the property the Receiver sought to freeze.

## STATEMENT OF THE CASE

Divo Milan Haddad is a citizen of Mexico. He is a businessman who serves as a director of publicly traded companies in Mexico and elsewhere. Mr. Milan and a related entity, Singapore Puntamita Pte., Ltd. (collectively referred to herein as "Milan") are innocent of any wrongdoing alleged by the SEC against the Defendants in this case, and have no association with any of the Defendants, other than as a former customer of certain Stanford entities.

Milan owns Stanford Group Company brokerage accounts (the "Accounts") pursuant to which his securities and other property are held at Pershing LLC. Because these Accounts were administered through Stanford Group Company rather than some other broker, the Accounts were frozen by Order of the District Court at the request of the Plaintiff SEC on February 16, 2009 (the "Freeze Order"). SEC Supp. R. 73-82. Milan was not given any prior notice that his property would be frozen and effectively seized, or any opportunity for a hearing as to whether his property should be frozen or seized. Over seven months later, Milan still has not yet been afforded a hearing at which any evidence has been presented to justify the freezing of the Accounts under any applicable law.

## STATEMENT OF RELEVANT FACTS

### I. Procedural History

The SEC filed this proceeding (No. 3:09-CV-0298-N) in February 2009, naming as Defendants R. Allen Stanford and various entities and individuals

associated with him. SEC Supp. R. 3-25. The District Court entered an order immediately thereafter that named Ralph S. Janvey as receiver (the "Receiver") and an additional order that broadly froze property of the Defendants. SEC Supp. R. 73-82, 85-95. The freeze was not limited to property owned by the Defendants, but extended to tens of thousands of brokerage accounts that happened to be administered by a Stanford affiliate, Defendant Stanford Group Company.

The property in the Accounts (consisting of securities, bonds, cash, and other investments) was and is owned by investors around the world. Neither Stanford Group Company nor other Defendants claimed any ownership of that property. Moreover, the property in the Accounts was not even held by any Defendant, but was and is held by independent firms, Pershing LLC or JP Morgan.

Investors like Milan sought to recover their property in the months after the February freeze order, but were largely ignored by the Receiver. After increasing numbers of investor complaints and motions to intervene reached the District Court, the Court appointed John J. Little as Examiner. SEC Supp. R. 473-76. On May 21, 2009, the Examiner recommended to the District Court that the Accounts that were still frozen be released from the freeze in their entirety. SEC Supp. R. 1953-77; 2015-32. The SEC, the sole Plaintiff, supported the Examiner's recommendation, but the Receiver opposed it. SEC Supp. R. 1978-2014.

Milan was one of the investors who unsuccessfully sought to recover his property in his Accounts for months. Finally, Milan on June 22, 2009, filed his Motion for Release of Property, Order to Show Cause, and Related Injunctive Relief. SEC Supp. R. 2044-69. Milan asserted that he was being deprived of his property in violation of the Constitution and applicable law; that the Receiver had not even alleged, much less shown, any lawful basis for the freeze of Milan's property, and that the Receiver should be required either to release Milan's property to him or show a legal basis to deprive him of that property. *Id*.

Three days later, on June 25, 2009, the Receiver retaliated by filing a Second Supplemental Complaint in Civil Action No. 3:09-CV-0724-N (the "Ancillary Action") naming Milan as a "Relief Defendant". R. 68. The Receiver, usurping the SEC's role as Plaintiff in the Ancillary Action,[2] alleged that Milan was named solely as a "nominal" party, and stated no basis for jurisdiction of any claim against Milan. Moreover, the Receiver alleged that Milan is wholly innocent of any wrongdoing. The Receiver nevertheless claimed that he should recover all of Milan's property in his Accounts.

On June 29, 2009, the District Court entered its Order as follows:

> The Court finds that the freeze has lasted long enough to permit the Receiver to assess whether he has viable claims against the various

[2] The Ancillary Action was filed with the SEC as the sole Plaintiff. R. 24. In the Second Supplemental Complaint, without court permission, the Receiver deleted the SEC from the caption of the Ancillary Action and substituted himself as purported "plaintiff". R. 68.

> individual investors, and that it is time now for those claims to be asserted and tested. The Receiver has estimated that he needs an additional ten weeks to complete his review of accounts. In view of the hardship the freeze is causing the individual investors, the Court cannot leave the freeze in place that long. The Court finds that five additional weeks should give the Receiver sufficient time to assess whether he wants to assert claims against individual investors and to assert such claims in a proceeding ancillary to the receivership action, **together with claims for prejudgment attachment**.
>
> **The Court, therefore, orders that its prior orders freezing the accounts of individual investors are vacated to that extent effective noon, August 3, 2009**. . . .

R. 2042-43 (emphasis added).

Milan filed his Motion to Dismiss Second Supplemental Complaint in the Ancillary Action on July 20, 2009. SEC Supp. R. 2093-2113. Milan asserted that the District Court lacked subject matter jurisdiction over the Receiver's claims against Milan, and that the Receiver had failed to state a valid claim, because Milan is not a proper "Relief Defendant" and is not alleged to have violated any securities laws. Milan also argued that the claims should be dismissed because the Receiver lacks standing to assert such claims in opposition to the SEC as sole Plaintiff. Finally, Milan denied that he is subject to personal jurisdiction. *Id.*

On July 28, 2009, just six days before the freeze of the Accounts was to expire on August 3, the Receiver filed the "Receiver's Amended Complaint Naming Relief Defendants" in the Ancillary Action. R. 201-49 (the "Amended Complaint"). The Amended Complaint asserted claims (in a laundry list

"Appendix") against (1) 66 alleged former Stanford "Financial Advisors"; (2) 563 alleged owners of frozen Accounts (including Milan); (3) 40 persons who had entered into stipulations with the Receiver and deposited funds into an escrow account controlled by the Receiver; and (4) 49 persons who do not have frozen Accounts. *Id*. As to the 563 "Relief Defendants" in Category (2), the Receiver stated as follows:

> The Receiver does not allege at this time that any of the Relief Defendants participated in the fraudulent scheme at issue in the SEC's case or otherwise committed any wrongdoing. Rather, the Relief Defendants are added in a nominal capacity solely to facilitate return of assets to the Receivership Estate.

*Id*. ¶ 9.

The Amended Complaint was a "group pleading" that did not make any individualized allegations against Milan or any other Relief Defendant. The Receiver did not allege that any specific Relief Defendant's Account contains proceeds of SIB CDs. The Receiver only alleged generally that "a substantial portion" of the total proceeds of redemptions of SIB CDs alleged to have been received "directly or indirectly" by the Relief Defendants were located in the Accounts. *Id*. ¶¶ 40, 41.

The Amended Complaint did not assert any claim for a pre-judgment attachment of the Accounts. However, the Receiver claimed that he is entitled to a "claw-back claim" or to "disgorgement" of the property of the innocent investors

named as "Relief Defendants". He asked that the Court enter an order "allowing the Receiver to withdraw the assets in the [Accounts] . . . and add those assets, up to the amount of the fraudulent CD proceeds received by the investor Relief Defendants, to the assets of the Receivership Estate". *Id.* ¶ 51.

The Amended Complaint alleged, moreover, that the Relief Defendants were not entitled to the procedural rights provided by the Federal Rules of Civil Procedure, but should be deprived of their Accounts by "summary adjudication". *Id*. ¶ 52. On July 28, 2009, the Receiver also filed a "Motion for Order Establishing Summary Proceedings and for Expedited Consideration of Request for Continued Account Freeze and Brief in Support Thereof". R. 250-62. In this Motion, the Receiver sought an order that the Examiner would represent all of the more than 500 "Relief Defendants" in abbreviated proceedings to appropriate their Accounts (to be completed in less than two months), because separate representation of the Relief Defendants would be "impractical". *Id*.

Also on July 28, 2009, the Receiver filed the "Receiver's Motion for Order Freezing and for Disgorgement of Assets Held in the Names of Certain Relief Defendants and Brief in Support Thereof". R. 265-97. The Motion was not supported by any evidence, other than a Declaration of Karyl Van Tassel. R. 299-321. The Declaration did not purport to be made on the basis of any personal knowledge, but simply was based on knowledge Ms. Van Tassel claimed to have

gained "from documents I have reviewed and other work I and my team have performed in the course of FTI's investigation on behalf of the Receiver." *Id*. ¶ 2. The unspecified "documents" were not made available to Milan or other Relief Defendants.

Ms. Van Tassel opined that Category (2) of the Appendix to the Amended Complaint identified frozen Accounts "determined to be associated with the persons and entities listed on that schedule based on the customer records and other information available." *Id*. ¶ 25. Ms. Van Tassel stated in her Declaration that her "team" also identified persons who "appeared" to them to have received payments of SIB CD proceeds at unspecified times, and then cross-checked those names against the Accounts, using an electronic search for "common identifiers". *Id*. ¶ 17-18. Thus, the 563 persons (including Milan) sued in Category (2) appear simply to be a list of persons that the "team" identified as both (a) owning frozen Accounts and (b) as having received SIB CD proceeds at unidentified points in time.

However, Ms. Van Tassel did not offer even a hearsay assertion that a single dollar in the frozen Accounts of Milan or any other Relief Defendant actually came from an SIB CD, either directly or indirectly. Accordingly, Ms. Van Tassel offered no evidence that there are <u>any</u> proceeds of SIB CDs in the frozen Accounts

that could be the subject of a "claw-back" or constructive trust claim.[3] *See In re Bradley*, 501 F.3d 421, 429-31 (5th Cir. 2007) (tracing required for constructive trust); *In re Haber*, 12 F.3d 426, 437 (5th Cir. 1994) (same).

The Receiver provided no notice to the hundreds of newly-named Relief Defendants of his July 28 Motion to extend the freeze on their property past August 3. On the afternoon of July 29, 2009, the District Court entered an order setting a hearing on the Motion for Friday, July 31, at 5:00 p.m. Milan filed a Response to the Motion on July 31, 2009. R. 457-62.

At the outset of the hearing at 5:00 p.m. on July 31, the District Court announced that it had preliminary views as to how it would rule on the matters before it, but that it would hear argument before making any rulings. Hr'g Tr. 3. No evidence was presented by the Receiver, but he and his counsel presented argument. The District Court announced at the conclusion of the July 31 hearing that the "freeze" would expire as to amounts in the frozen investor Accounts representing alleged SIB CD principal, but not as to amounts in the frozen investor accounts representing SIB CD interest. Hr'g Tr. 47-50. The Court entered its Order setting forth its rulings on August 4, 2009. R. 477-79.

[3] The Receiver loosely refers to his claims against the frozen Accounts as "claw-back" claims, but this is misleading. There is no evidence that any of the securities and property in Milan's Accounts is traceable to any SIB CD. For this reason, the Receiver in substance sought a pre-judgment attachment of the Accounts.

The Receiver filed a notice of appeal from the August 4 Order on August 6, 2009. R. 480-81. Milan timely filed a notice of cross-appeal on September 2, 2009. R. 143-44.

## II. Relevant Facts

The record shows few facts relevant to the Receiver's claims against Mr. Milan or the freeze of Mr. Milan's property. This is because the Receiver never filed any declarations (other than the generalized hearsay Declaration of Ms. Van Tassel) and presented no evidence at the July 31 hearing in the District Court. There is no evidence in the record of establishing any purchases of any SIB CDs by Milan, or any redemption of any SIB CDs by Milan. There is no evidence that any funds that were ever in SIB as CD principal or interest were ever deposited in the Milan Account that is and has been frozen for over seven months now.

The Receiver did not present evidence in the District Court establishing when the alleged Ponzi scheme at Stanford began, and therefore did not present any evidence that the alleged Ponzi scheme was in effect when any amounts in redemption of SIB CDs were paid to Milan. The Receiver certainly presented no evidence in the District Court as to the source of any specific funds that were ever paid by SIB to Milan, or prove that any proceeds of SIB CDs are or ever were in Milan's Accounts.

Thus, the "facts" on which the Receiver relied in the District Court to justify relief against Milan consisted of Ms. Van Tassel's Declaration that Milan was on a list of persons identified as having received proceeds of SIB CDs at an unspecified time, and that Milan also owns frozen Accounts. This was plainly insufficient to justify a freeze of the Accounts.

The Receiver now attempts to gloss over his failure to introduce evidence below by asking the Court of Appeals to take "judicial notice" of a plea agreement of Defendant James Davis in a criminal proceeding in a different court. Crim. No. H-09-335, in the U.S. District Court for the Southern District of Texas. That plea agreement was never offered in evidence in the District Court. While such a plea agreement might have been admissible had it been offered below in evidence against Davis or his alleged co-conspirators as an admission under Federal Rule of Evidence 801(d)(2), it would have been inadmissible hearsay as to innocent investors like Milan.[4]

The Receiver does not explain why detailed factual assertions made by a admitted felon, in an effort to lessen his punishment, should be regarded as facts "not subject to reasonable dispute in that [they are] either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and

[4] Federal Rule of Evidence 803(22) provides a hearsay exception for a "final judgment of conviction", but a plea agreement plainly is not a "final judgment of conviction". Moreover, Davis has not yet been convicted, so no "final judgment of conviction" exists. His plea agreement may or may not be withdrawn, and may or not be accepted by the Court in the Southern District of Texas.

ready determination by resort to sources whose accuracy cannot readily be questioned". FED. R. EVID. 201(f). Judicial notice is reserved for objective and substantially indisputable facts. *See United States v. Herrera-Ochoa*, 245 F.3d 495, 501-02 (5th Cir. 2001) (judicial notice not taken of defendants' location in United States on date of indictment). The assertions in Defendant Davis's plea agreement fall far short of that standard.[5]

In any event, the plea agreement cannot properly be considered for the first time in the Court of Appeals, when it was not offered into evidence in the District Court. This Court has consistently declined invitations by appellants to use judicial notice to remedy on appeal their failures to introduce evidence in the trial court. *E.g*, *Knox v. Butler*, 884 F.2d 849, 852 n.7 (5th Cir. 1989), *cert. denied*, 494 U.S. 1088 (1990); *Kemlon Products & Dev. Co. v. United States*, 646 F.2d 223, 224 (5th Cir.), *cert. denied*, 454 U.S. 863 (1981); *United States v. Glass*, 744 F.2d 460, 461 (5th Cir. 1984). Milan therefore objects to any "judicial notice" or other use of the assertions in the Davis plea agreement against Milan in the Court of Appeals.

[5] Defendant Davis's account of what occurred in the Stanford companies appears to be hotly disputed by Defendant R. Allen Stanford and others. One admitted felon's version of the facts, disputed by other accused felons, is the opposite of the kind of indisputable evidence that can properly be the subject of judicial notice by this Court.

## STANDARD OF REVIEW

The Receiver asserts that the District Court's August 4 Order is a denial of a preliminary injunction. Receiver's Brief at 1, 13.[6] The Receiver correctly states that, to obtain a preliminary injunction, a plaintiff must establish each of the following:

(a) Substantial likelihood of success on the merits;
(b) A substantial threat that the plaintiff will suffer irreparable injury absent the injunction;
(c) That the threatened injury to the plaintiff outweighs any harm the injunction might cause the defendants; and
(d) That the injunction will not impair the public interest.

*See* Receiver's Brief at 13, citing *Enrique Bernat F., S.A. v. Guadalajara, Inc*., 210 F.3d 439, 442 (5th Cir. 2000).

The Receiver made no evidentiary showing in the District Court to meet any of these requirements, since he submitted on the Declaration of Ms. Van Tassel with his motion to extend the freeze and no evidence at the July 31 hearing on that motion. Perhaps for that reason, he argues incorrectly that the Court of Appeals now should focus solely on one issue of law: whether a receiver (rather than the plaintiff) is legally entitled to deprive innocent investors of their property in amounts alleged to equal funds they invested as principal in an alleged Ponzi scheme.

[6] The Receiver's sole allegation that this Court of Appeals has jurisdiction of this appeal is based on his assertion that this is "an appeal from the denial in part of a preliminary injunction." Receiver's Brief at 1.

That is certainly an important legal issue that has much to do with whether the Receiver showed a likelihood of success on the merits, and received some focus at the hearing in the District Court on July 31. That legal issue is subject to *de novo* review by the Court of Appeals. However, the District Court's August 4 Order declining to impose a "principal freeze" on the property of innocent investors could not properly be reversed simply based on that legal issue.

Even if the Court of Appeals were to conclude that the District Court erred in its conclusion on that legal issue, the Court of Appeals would be required to affirm the District Court's denial of the "principal freeze" unless the Court of Appeals concluded that the District Court abused its broad discretion in making that ruling. *Gonzalez v. O Centro Espirita*, 546 U.S. 418, 428, 126 S. Ct. 1211, 1219 (2006) (although legal rulings are reviewed de novo, ultimate decision to grant or deny preliminary injunction is reviewed for abuse of discretion); *McCreary County v. ACLU of Kentucky*, 545 U.S. 844, 867, 125 S. Ct. 2722, 2737-38 (2005) (same). Here, Milan not only disputes the Receiver's assertions regarding the legal propriety of a "principal freeze", but also vigorously disputes that the Receiver established a basis for any preliminary injunction in the form of a "principal freeze" (or "interest freeze") for each of the following reasons:

1. The Receiver did not give Milan (or other innocent investors) proper notice of the "preliminary injunction" hearing on July 31, 2009, or present evidence that established a basis for such a preliminary injunction against Milan (or other innocent investors);

2. The Receiver lacked standing as a "plaintiff" to seek or obtain a preliminary injunction, especially since the actual sole plaintiff (the SEC) actively opposed the Receiver's demand for the preliminary injunction.

3. The Receiver did not establish "a substantial threat that the plaintiff will suffer irreparable injury absent the injunction."

4. The Receiver did not establish that the "threatened injury to the plaintiff outweighs any harm the injunction might cause the defendants".

5. The Receiver did not establish that "the injunction will not impair the public interest".

6. The Receiver did not meet the requirements for a lawful prejudgment attachment or satisfy the due process requirements for a constitutional pre-judgment seizure of the property of Milan (and other innocent investors).

The matters set forth above in Paragraphs 3, 4, and 5 clearly involve the weighing of equities, and are therefore committed to the District Court's equitable discretion. Thus, the District Court's decision to deny the Receiver's request for a "principal freeze" must be affirmed unless such denial was an abuse of discretion.

On Milan's cross-appeal as to the portion of the August 4 Order that instituted an "interest freeze", Milan acknowledges the District Court's discretion as set forth above. However, Milan notes that the District Court's discretion does not extend to the matters that are described in Paragraphs 1, 2, and 6 above. If the Court of Appeal concludes that the Court made errors of law on any of such matters, and especially if it concludes that the "interest freeze" is inconsistent with the United States Constitution, then the portion of the August 4 Order that imposed an "interest freeze" must be reversed.

## SUMMARY OF THE ARGUMENT

The Receiver correctly argues that his claims in this case are based in equity. Receiver's Brief at 11. That is why the Receiver is wrong when he (inconsistently) characterizes the issues presented in this appeal as "pure questions of law". Receiver's Brief at 3. The District Court's decision not to order a "principal freeze" – which the Receiver describes as the denial of a preliminary injunction depriving innocent persons of the use of their property pending trial in this case – involves the application of equitable principles and is committed to the District Court's sound discretion. Accordingly, this Court should affirm the District Court's denial of the Receiver's request for a "principal freeze" unless the District Court abused its broad discretion in denying such extraordinary relief to the Receiver.

It is quite clear that the District Court did not abuse its discretion. The District Court had ample basis for denying the Receiver's request for a "principal freeze" that would selectively punish a relatively small group of innocent investors who had the misfortune to hold their own property in brokerage accounts at Stanford Group Company (rather than in some other brokerage firm or anywhere else in the world, as did the vast majority of former investors in SIB CDs) as of the date of the initial freeze order in February 2009.

First, the SEC -- the sole plaintiff in this case, and the agency of the United States whose role it is to protect investors and the public interest – vigorously opposed the "principal freeze". The Receiver arrogantly exceeded his proper role by ignoring the views of the SEC as sole plaintiff, and by ignoring the views of the Examiner appointed by the Court to represent the interests of Stanford investors. Having anointed himself as the sole arbiter of the "true" public interest, he now disputes the views of the very District Court that appointed him, all the while demanding to be paid tens of millions of dollars out of the funds of the innocent investors he is supposed to be helping. The Receiver may be short of authority and standing, but he is not short of chutzpah.

The SEC made it clear in the District Court that the consistent policy of the SEC is not to seek or impose a "principal freeze" on the property of innocent investors in receivership cases like this one. This SEC policy is not only just, but is consistent with the overwhelming if not unanimous views of the law held by the courts that have ruled on this issue. It is also consistent with the most basic principles of equity. Seizure of the property of a relatively small number of innocent investors like Milan would harm them grievously, but would neither deprive wrongdoers of ill-gotten gains nor provide a meaningful recovery for other victims of the alleged Stanford fraud.

The "elephant in the room" that the Receiver does not mention is that the sole big winner, if his inequitable position were adopted, would be the Receiver himself (and his hordes of high-billing professionals). However, the SEC and the Examiner correctly and practically pointed out to the District Court that the Receiver and his professionals are incurring enormous expenses in pursuing claims against these innocent investors. It was the reasonable view of the SEC and the Examiner that continuing those claims and the related "principal freeze" would drain the receivership estate and inflict great harm on the Stanford victims that the Receiver purports to hold dear to his heart.

The District Court certainly was entitled to take into account the enormously expensive (but profitable for the Receiver's professionals) litigation against hundreds of "Relief Defendants" that the "principal freeze" would engender. Indeed, the practical and fact-sensitive weighing of the balance of harms and benefits of proposed injunctive relief is exactly the kind of equitable function that the District Court is uniquely situated to perform. The District Court's decision not to impose an aggressive, expensive, and inequitable "principal freeze" on the property of innocent people was well within the District Court's discretion, and should be affirmed.

The Receiver has been consistent in his disregard of the individual rights of innocent investors like Milan, even though they also are victims of the alleged

Stanford fraud. He has asserted claims against them solely as "Relief Defendants", stating that he is suing them only as "nominal parties". Through this device, he seeks to ignore the constitutional requirement of establishing personal and subject matter jurisdiction over each of them. He also seeks to run roughshod over all of their other procedural rights by using "summary" procedures as he takes their property.

However, it is clear that Milan and other innocent investors who are owners of the brokerage accounts at issue are not and cannot be proper Relief Defendants. This procedural shortcut is available only against those who hold property strictly in a custodial capacity and assert no claim whatsoever of ownership to that property. Milan and other investors are the record owners of the brokerage accounts at issue and the property in them. They are not mere custodians of the property in the Accounts. Milan vehemently assert his claim to ownership of the property that the Receiver has frozen through the August 4 Order and seeks to steal from him through a "summary" procedure. Because Milan and other innocent investors are not proper Relief Defendants, the "interest freeze" on their property (as well as any possible "principal freeze") is unlawful and erroneous.

More fundamentally, the "interest freeze" of the property of Milan and other innocent investors is invalid because it violates basic principles of the United States Constitution and federal law. The Due Process Clause requires that (other

than in emergency circumstances not present here) even a brief pre-judgment deprivation of a person's property must be based on a prior hearing and an individualized showing that the deprivation is warranted. For this reason, the United States Supreme Court has repeatedly invalidated pre-judgment attachment statutes, pre-judgment injunctions, and other remedies that permit pre-judgment seizures or restraints of a person's property without procedural due process.

Here, the Receiver has not met or even attempted to meet the requirements of the applicable pre-judgment attachment statute in seizing the property of Milan and other innocent investors. He has not made, or attempted to make, any sworn evidentiary showing as to his probable right to recover the property of Milan. Milan has not been afforded the notice and hearing required by the Constitution prior to such deprivation of his property. The Receiver has just asserted that "equity" requires a seizure of the property of Milan and other innocent investors.

As a result, the interest freeze imposed in the August 4 Order (as well as any possible "principal freeze") clearly violates the Due Process Clause as well as applicable attachment statutes. The District Court apparently recognized these requirements in its June 29 Order that indicated that the Receiver would be required to meet the pre-judgment attachment requirements in order to maintain the freeze of any brokerage accounts of innocent investors like Milan after August 3. However, the continuation of the interest freeze in the August 4 Order without

meeting those requirements was erroneous. The Constitution and the law require that these pre-judgment restraints on the property of innocent investors, without due process, must be reversed.

## ARGUMENT AND AUTHORITIES

### I. The Receiver Failed To Provide The Notice Required By Rule 65(a)(1), And Did Not Present Sufficient Evidence To Support His July 28 Demand For A Freeze Of The Property Of Milan And Other "Relief Defendants".

The Receiver alleges that he was entitled to a preliminary injunction imposing a "principal freeze" on the property of hundreds of innocent investors like Milan in response to his motion of July 28, 2009 seeking such relief (the "July 28 Freeze Motion").[7] The Receiver's July 28 Freeze Motion did not include any competent evidence, other than a declaration that fell far short of justifying the relief the Receiver sought.[8] At the hearing on the Motion on July 31, 2009, the Receiver did not offer any evidence. Instead, the Receiver merely relied on assertions in his pleadings and argument at the hearing.

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[7] This is the "Receiver's Motion for Order Freezing and for Disgorgement of Assets Held in the Names of Certain Relief Defendants and Brief in Support Thereof" [Civ. Action 3:09-CV-0724-N, Docket No. 17).

[8] The Receiver offered only the Declaration of Karyl Von Tassel, a CPA who was hired by the Receiver. Appendix in Support of Receiver's Motion for Order Freezing Assets Held in the Name of Certain Relief Defendants and for Summary Judgment and Brief in Support Thereof [Civ. Action No. 3:09-CV-0724-N, Docket No. 18]. Ms. Van Tassel had no personal knowledge of the facts at issue and based his declaration on work done by her "team" on unspecified documents that were not authenticated as business records or made available to the court or any other parties. Her declaration included no specific facts about Milan and other Relief Defendants, other than an assertion that the Relief Defendants had been "electronically identified" as being both on a list of those who had frozen Accounts and on a list of those who had received proceeds of SIB CDs at unspecified times.

Federal Rule of Civil Procedure 65(a)(1) provides that a preliminary injunction may be issued "only on notice to the adverse party." Here, the Receiver on July 28, 2009 filed an Amended Complaint naming hundreds of "Relief Defendants" for the first time. The Receiver also filed the July 28 Freeze Motion on the same day, but did not serve the Motion on the hundreds of newly-named Relief Defendants, even though the Motion sought a preliminary injunction to freeze their property. Thus, these "Relief Defendants" received no notice at all of the July 31 hearing, in violation of Rule 65(a)(1).

Milan and a few other "Relief Defendants" had previously been sued by the Receiver, and therefore did receive notice of the July 28 Freeze Motion, which also requests that it be given "expedited consideration."[9] However, the Receiver violated the requirement of Federal Rule of Civil Procedure 6(d) that "the notice under Rule 65(a)(1) should be served on the adverse party at least five days before the preliminary injunction hearing." Wright & Miller, *Federal Practice and Procedure* § 2949, at 213. As stated in *Granny Goose Foods, Inc. v. Brotherhood of Teamsters*, 415 U.S. 423, 432 n.7, 94 S. Ct. 1113, 1121 (1974):

> The notice required by Rule 65(a) before a preliminary injunction can issue implies a hearing in which the defendant is given a fair opportunity to oppose the application and to prepare for such opposition.

[9] There was no basis for "expedited consideration" of the July 28 Freeze Motion, other than the fact that the Receiver had neglected to file the July 28 Freeze Motion until six days before the freeze was to expire on August 3, 2009, in accordance with the Court's Order of June 29, 2009.

In *Parker v. Ryan*, 960 F.2d 543, 544 (5th Cir. 1992), this Court stated:

> Compliance with rule 65(a)(1) is mandatory. *Phillips v. Chas. Schreiner Bank*, 894 F.2d 127, 130 (5th Cir. 1990). Notice under Rule 65(a)(1) should comply with Rule 6(d), which requires five days' notice before a hearing on a motion. *Marshall Durbin Farms v. National Farmers Org*., 446 F.2d 353, 358 (5th Cir. 1971).

The Court also noted:

> The notice requirement of rule 65(a)(1) has constitutional as well as procedural dimensions; it implies a "hearing in which a defendant is given a fair opportunity to oppose the application and to prepare for such opposition. *Williams v. McKeithen*, 939 F.2d 1100, 1105 (5th Cir. 1991). . . .

The Fifth Circuit has reiterated these principles more recently in *United States v. Holy Land Found. For Relief and Dev*., 445 F.3d 771, 792-93 (5th Cir. 2006).[10] The same principles of notice and due process apply both to requests for injunctions and to requests to modify existing injunctions. *Western Water Management, Inc. v. Brown*, 40 F.3d 105, 109 & n.4 (5th Cir. 1994).

Here, Milan received two day's notice of the July 31 hearing,[11] while the hundreds of other "Relief Defendants" newly named in the July 28 Amended Complaint received none. The July 31 hearing commenced at 5:00 p.m. on Friday, and no evidence was presented. Milan and the other "Relief Defendants" plainly

[10] The *Holy Land* case also makes it clear that the "adverse parties" entitled to five-day notice under Rule 65(a)(1) are all those having an interest in the property that is the subject of the motion, who would be adversely affected by the requested order. *Id.* Milan and all of the innocent investors named in the Amended Complaint are such "adverse parties".

[11] The July 28 Freeze Motion did not itself give notice of a hearing on that Motion, and the Court entered an Order on the afternoon of July 29 setting a brief hearing for Friday, July 31, at 5:00 p.m.

did not have a "fair opportunity to oppose the [Receiver's] application and to prepare for such opposition", as required by Rule 65(a)(1) and constitutional due process.[12] Thus, the District Court could not have lawfully granted a "principal freeze" as demanded by the Receiver, and the District Court's decision not to do so certainly was not reversible error.

For the same reasons, the District Court's August 4 Order was erroneous to the extent that it imposed an "interest freeze". Milan and the hundreds of Relief Defendants against whom the "interest freeze" was imposed (many of them located throughout Latin America or elsewhere in the world) plainly did not receive the five-day notice required by Rule 65(a)(1), or a fair opportunity to prepare to oppose the Receiver's demand for that freeze. Moreover, there is no evidentiary basis for the order imposing an "interest freeze." Among other things, there was no evidence in the Receiver's July 28 Motion or at the July 31 hearing establishing:

> (a) If Milan had ever owned any SIB CDs, when those SIB CDs were acquired, and for what principal amount(s);

[12] The difficulty of preparing to oppose the Motion at the July 31 hearing was increased by the fact that the Receiver included no specific factual information in his Motion or in Ms. Van Tassel's Declaration as to Milan. However, Milan did file a Response [Civ. Action No. 3:09-CV-0724-N, Docket No. 30] on July 31 that pointed out that the Receiver had failed to meet the requirements for a constitutional or lawful prejudgment seizure of Milan's property.

(b) If Milan had ever owned and later redeemed any SIB CDs, when such redemptions were made;[13] and

(c) What, if any redemption payments of SIB CD interest and principal were ever actually made into Milan's brokerage Account to be frozen.[14]

The Receiver has had the SIB records that could have provided such evidence for months, but has never provided them to Milan or other Relief Defendants, even informally. More importantly, the Receiver never presented SIB records or other specific information to support his allegations against Milan in affidavits in support of the July 28 Freeze Motion. Absent such evidence, Milan had no fair opportunity to prepare an opposition to the Receiver's freeze demand, and the District Court lacked the evidentiary basis to impose the "interest freeze." For this additional reason, the "interest freeze" portion of the August 4 Order was erroneous and must be vacated.[15]

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[13] The Receiver is fond of positing the perceived injustice that some relief defendants redeemed SIB CDs a short time before the February 16, 2009 freeze order. However, most relief defendants (including Milan) redeemed any SIB CDs they ever owned many months or years before February 2009.

[14] The Receiver sometimes suggests that the frozen brokerage Accounts at issue consist of the proceeds of redemptions of SIB CDs. However, the Receiver does not allege that this is true, but only asserts that a "portion" of the proceeds from SIB CDs were paid into some of the brokerage accounts of unspecified relief defendants. The Receiver does not allege, and certainly never presented any evidence, that Milan's (or any other specific relief defendant's) brokerage account includes any proceeds of SIB CDs. In effect, the Receiver has simply gotten a prejudgment attachment of other assets of Milan to secure a claim seeking proceeds of SIB CDs in which Milan innocently invested.

[15] A final reason why the portion of the August 4 Order imposing an "interest freeze" must be reversed is its failure to comply with Rule 65(d), which requires that any injunction be in specific terms. *Seattle-First Nat'l Bank v. Manges*, 900 F.2d 795, 799-800 (5th Cir. 1990) (strict "no reference" requirement); *Landmark Land Co. v. OTS*, 990 F.2d 807, 810-11 (5th Cir. 1993)

## II. The Receiver Lacks Standing To Seek A Remedy In This Case That Is Not Sought, And Is Actively Opposed, By The Sole Plaintiff, The SEC.

The plaintiff in a case is the "master of his complaint", and is entitled to determine the relief that he seeks through the judicial process. That is especially true when the action is based on enforcement of the federal securities laws, and is brought by the SEC – the agency of the United States Government whose special role and responsibility it is to enforce those securities laws in the public interest. As here, the SEC often brings actions in which it seeks a receivership as a remedy to assist in enforcing the securities law, but the SEC remains the sole plaintiff and the sole party that is empowered to determine the relief that is consistent with public policy and the public interest in securities law enforcement. That is why this action is an ancillary action that exists only to effect relief sought by the SEC in its principal receivership case.

A receiver, in contrast, is not a government agency or official. A receiver has neither the power nor the responsibility to enforce the laws or determine public policy. Instead, its role is to carry out the orders of the court in effecting relief sought by the plaintiff. Its role emphatically is not to demand relief that is in direct

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(statement of reasons required). The portion of the August 4 Order that imposes an "interest freeze" does not name or otherwise specify the accounts subject to the freeze or the persons against whom the freeze is imposed; and does not identify the alleged "interest" amounts in the accounts that are frozen by the Order. The Receiver has never identified (even informally) what portions of the accounts that he claims are interest, and has never presented any evidence on that matter. The absurd result is that, today, Milan and other innocent investors have no knowledge of what portions of their accounts actually are frozen by the August 4 Order.

opposition to that sought by the sole plaintiff, and in violation of the SEC's settled policy.

Milan knows of no case in which a receiver in an SEC case has been found to have standing to seek relief that is opposed by the plaintiff SEC. "In every federal case, the party bringing the suit must establish standing to prosecute the action." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 11 (2004); *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("the party invoking federal jurisdiction bears the burden of establishing [standing] . . . in the same way as any other matter on which the plaintiff bears the burden of proof"); *Doe v. Tangipahoa Parish Sch. Bd.*, 494 F.3d 494, 496-97 (5th Cir. 2007) ("Standing to sue must be proven, not merely asserted, in order to provide a concrete case or controversy" and to confine adjudication within its "proper judicial sphere.").

Here, the unprecedented nature of the Receiver's actions is exacerbated by the fact that he seeks relief that is opposed by virtually every other party affected by the freeze he seeks: the SEC as plaintiff; the defendants; the Examiner; and all of the Relief Defendants who have been heard from. Simply put, the Receiver lacks standing in an SEC receivership proceeding to seek an asset freeze in opposition to the SEC as sole plaintiff. For this reason, the District Court's denial of the "principal freeze" plainly was not erroneous, and the portion of the August 4 Order that imposed an "interest freeze" at the Receiver's request was in error.

## III. The Receiver Has Improperly Sued Milan And Others As Purported "Relief Defendants", Even Though They Are The Owners Of The Property At Issue.

The Receiver alleges that Milan and others named in the Amended Complaint he filed on July 28 are merely "Relief Defendants" who are named as parties solely in "a nominal capacity". In cases in which the "Relief Defendant" concept is properly used,[16] courts have held that no subject matter jurisdiction over relief defendants is even necessary because no "real" claim is asserted against them. Because they are merely "nominal", these relief defendants are virtually invisible for subject matter jurisdiction purposes.

The Receiver here has stretched the concept of a "relief defendant" far beyond what is permitted by either precedent or justice. A "relief defendant" or "nominal defendant" typically is "a bank or trustee, which has only a custodial claim to the property". *SEC v. Colello*, 139 F.3d 674, 675-77 (9th Cir. 1998).[17] The nominal or relief defendant must hold the property that is the subject of litigation "in a subordinate or possessory capacity as to which there is no dispute."

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[16] Milan has found no Fifth Circuit cases specifically approving the problematic "relief defendant" concept. Assuming it is valid at all, that concept – pursuant to which the SEC can sue someone as a "nominal party" without independent subject matter jurisdiction and without even alleging a cause of action against the "relief defendant" – should be strictly limited to cases where the alleged "relief defendant" makes no colorable claim to ownership of the property at issue.

[17] This Court also recognizes that "nominal" parties are limited to those whose "role is restricted to that of a depositary or stakeholder." See *In re Beazley Ins. Co.*, 2009 WL 205859 (5th Cir. 2009)(unpublished); *Louisiana v. Union Oil Co. of California*, 458 F.3d 364, 367 (5th Cir. 2006); *Tri-Cities Newspapers, Inc. v. Tri-Cities Printing Pressmen & Assts. Local 349*, 427 F.2d 325, 327 (5th Cir. 1970). These cases involve whether a party is required to join in a petition for removal, since "nominal" parties do not need to so do.

*Id*. quoting *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991), quoting *Colman v. Shimer*, 163 F. Supp. 347, 351 (W.D. Mich. 1958) (referring to relief defendant as a "trustee, agent, or depository").

As described in *SEC v. Cherif*, 933 F.2d at 414:

> A nominal defendant is not a real party in interest, however, because he has no interest in the subject matter litigated. His relation to the suit is merely incidental and "it is no moment [to him] whether the one side or the other in [the] controversy prevails." *Bacon v. Rives*, 106 U.S. 99, 104, 1 S.Ct. 3, 6, 27 L.Ed. 69.

Thus the Seventh Circuit concluded that "because of the non-interested status of the nominal defendant there is no claim against him and it is unnecessary to obtain subject matter jurisdiction over him once the jurisdiction over the defendant is established." *Id.*

Other circuit courts have allowed such a relief defendant to be joined "purely as a means of facilitating collection" since he is "part of the suit only as the holder of assets that must be recovered in order to afford complete relief; no cause of action is asserted against a nominal defendant." *CFTC v. Kimberlyn Creek Ranch, Inc.*, 276 F.3d 187, 191-92 (4th Cir. 2002). However, such decisions require that the putative relief defendant have no ownership interest at all in the property sought from them, and not even any legitimate claim to that property. *See SEC v. Colello*, supra; *SEC v. Cavanagh*, 155 F.3d 129, 136 (2d Cir. 1998). Even *Colello*, the Ninth Circuit case relied on by the Receiver, held only that "the SEC

may name a non-party *depository* as a nominal defendant to effect full relief in the marshalling of assets that are the fruit of the underlying fraud" (emphasis added). *Accord, SEC v. Ross*, 504 F.3d 1130, 1141-42 (9th Cir. 2007).

Quite obviously, Milan is not a proper relief defendant under the facts as alleged by the Receiver. Milan is not merely a "depository" or a disinterested "custodian" of the securities and property in his Accounts.[18] To the contrary, Milan owns all of the property in the Accounts, and vigorously disputes the Receiver's unfounded claims to his hard-earned property.

Moreover, Milan has ample basis for a legitimate claim to such ownership, in that no one – including the Receiver – claims that Milan was in any way a participant in any alleged wrongdoing by Stanford International Bank, Ltd., the Stanford Group Company, or other defendants. The property in the Accounts is owned by Milan, and by him alone – he earned it lawfully. The Accounts cannot be taken from him by the Receiver, so long as the rule of law prevails.

What the Receiver seeks to do here is to twist the "relief defendant" concept – which is expressly limited to instances in which "no cause of action is asserted against [the] nominal defendant", *see CFTC v. Kimberlyn Creek Ranch, Inc., supra* – into a device by which the Receiver effectively asserts a cause of action for

[18] To the contrary, it is the interest of the Stanford Group Company in the Accounts (through Pershing LLC) that is much more akin to that of a custodian or depository, as distinguished from the clear ownership interest of Milan.

disgorgement or constructive trust against admittedly innocent third parties who are the record owners of the property the Receiver seeks. The Receiver thereby demands, under the guise of the "relief defendant" concept, that the District Court adjudicate (and by a "summary adjudication", no less) causes of action asserted by the Receiver against innocent owners of property over which the District Court had no subject matter jurisdiction. This is a distortion that would violate principles of due process of law, and the District Court had no power to impose either a "principal freeze" or "interest freeze" against the property owned by Milan and other "Relief Defendants".

This case is quite comparable to *SEC v. Founding Partners Capital Management*, 2009 WL 1606491 (M.D. Fla. 2009).[19] Sun Capital was named in that case as a relief defendant, and moved to dismiss for lack of subject matter jurisdiction as well as failure to state a claim. The SEC alleged that the principal defendants made loans to Sun Capital pursuant to written loan agreements, but made no substantive claim of wrongdoing against Sun Capital.

The court found that the SEC had failed to meet the requirement of alleging that Sun Capital lacked an ownership interest or legitimate claim to the loaned funds, and granted the motion to dismiss.

[19] See also *SEC v. Sun Capital, Inc.*, 2009 WL 1362634 (M.D. Fla. 2009) (SEC could not impose freeze on assets of person with legitimate claim to funds, who therefore was not proper relief defendant). However, this case is <u>not</u> comparable to the *Founding Partners* case in that this case is not brought by the SEC, but by a receiver acting without joinder or even approval of the SEC. The Receiver lacks standing to assert these claims against Milan. See Section II *supra*.

> The case law only requires an "ownership interest" or "legitimate claim" in the funds to preclude an entity from being a proper relief defendant. This does not require possession of the full bundle of ownership rights that may exist in various types of property. It is undisputed that Sun Capital received the loan proceeds pursuant to written loan agreements with Stable-Value, which gives Sun Capital certain rights and obligations with respect to the loan proceeds. There has been a debtor-creditor relationship between Sun Capital and Stable-Value since 2001. That constitutes a sufficient legitimate ownership interest to preclude treating Sun Capital as a relief defendant.
>
> Sun Capital is a far cry from the "paradigmatic" nominal defendant: a trustee, nominee, or depository. The Complaint affirmatively alleges facts showing that Sun Capital has a legitimate ownership interest and/or a legitimate claim to the loan proceeds. This precludes Sun Capital from being a proper relief defendant even if, as the SEC argues, its claim is subordinate to the ownership claims of investors.

*Id*. (citations omitted).

Similarly, the Receiver alleges here only that Milan purchased CDs from Stanford International Bank – a familiar and lawful transaction that creates a legitimate debtor-creditor relationship – and that a "portion" of the proceeds of repayment of that loan to them by the Bank might be traceable to property in the Accounts. On the face of the Amended Complaint, it therefore is apparent that Milan at the very least has ownership interests and legitimate claims to the Accounts. The Court therefore lacked subject matter jurisdiction to impose either a "principal freeze" or "interest freeze" against the property of Milan or other Relief Defendants.

Similarly, the court in *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co*., 940 F.Supp. 1101, 1136 (W.D. Mich. 1996), found that it lacked subject matter jurisdiction over parties named as nominal defendants, where they claimed an interest in stock that was the subject matter of the litigation. "The so-called nominal defendants are therefore not disinterested parties who hold the stock in trust for the primary wrongdoers, as is required by *Cherif*." Since there were no allegations of securities law violations by these parties, the court dismissed the claims.

In *CFTC v. Sarvey*, 2008 WL 2788538 (N.D. Ill. 2008), the Commission alleged that defendants engaged in unlawful non-competitive trading and added Bonfitto as a relief or nominal defendant. Bonfitto received funds resulting from such trades, because he acted as a clearer and thus guaranteed the trades. Bonfitto moved for dismissal for lack of subject matter jurisdiction pursuant to Rule 12(b)(1), and the court granted the motion. The court noted that a nominal defendant may be named only if he is a "trustee, agent, or depository", has no legitimate claim to the property, and "it is of no importance to him which side prevails." The court concluded that Bonfitto held the relevant funds as a result of providing services to the defendants and had at least a legitimate claim to the funds.

Judge Kaplan discussed the origin and limits of the expansive power claimed by the Receiver in *CFTC v. Hanover Trading Corp*., 34 F. Supp. 2d 203 (S.D.N.Y. 1999). There, the Commission sought disgorgement or a constructive trust on 48 checks the defendant had received as commissions on sales that the Commission alleged were in violation of the Commodities Exchange Act. The Court found that the sales transactions were no more than voidable, and not void, and that the commissions could be recovered only on a showing of actual knowledge of the fraud by the defendant. 34 F. Supp. 2d at 206, citing *SEC v. Levine*, 881 F.2d 1165, 1176-78 (2d Cir. 1989).

The Court stated:

> It is often said that 'disgorgement does not penalize, but merely deprives wrongdoers of ill-gotten gains.' In ordinary circumstances, there is no basis for disgorgement by an innocent party. . . . To be sure, it is well established under the securities and, by analogy, the commodities laws that district courts, at the behest of the SEC and CFTC, respectively, in appropriate cases may reach funds held by non-parties. But that power is not entirely boundless.
>
> In *Deckert v. Independence Shares Corp*., 311 U.S. 282, 61 S.Ct. 229, 85 L.Ed.2d 189 (1940), the wellspring of this authority, the Supreme Court in relevant part merely held sufficient a bill in equity seeking restitution from a relief defendant of funds held by the relief defendant "for account of [the principal defendant], which consisted in part of the payments alleged to have been procured by the fraud of" the principal defendant. Thus the bill did not seek recovery of funds to which the relief defendant had a claim of entitlement in his own right. Subsequent cases have extended *Deckert* to permit recovery from relief defendants, irrespective of their culpability, who possess illegally obtained profits and have no legitimate claim to them. . . .

> Each of these cases focused on the relief defendant's lack of a legitimate claim to the money sought, whether because the relief defendant was a gratuitous beneficiary of the principal defendants' fraud or because he or she merely was the custodian of the principal defendants' assets. . . In other cases in which relief defendants claimed to have earned the money sought, courts have permitted seizure or required disgorgement only after determining that the relief defendant in fact had no legitimate claim to the money.
>
> No such determination is possible on the record before this Court now.

*Id*. Similarly here, where the Receiver does not allege any wrongdoing by Milan, and does not claim either that Milan holds the Accounts for the Stanford defendants or that he is a recipient of some gratuitous transfer from the alleged wrongdoers, there is no basis as a matter of law for disgorgement of the Accounts.

The Receiver argues that disgorgement of the proceeds of lawful CD investments is essential to do "equity" to other victims of the alleged Stanford fraud, and to compensate them for their losses. The Receiver's arguments distort the proper purpose of the disgorgement remedy, and fly in the face of precedents in this Court. This Court has always recognized that the purpose of the disgorgement remedy is not to compensate fraud victims, but instead to deter wrongdoing and deprive the guilty parties of profits earned through their misdeeds. As stated in *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978):

> The trial court acted properly within its equitable discretion in ordering Pullman to disgorge the profits that he earned by fraud. This

> restitution merely forces the defendant to give up to the trustee the amount by which he was unjustly enriched. The purpose of disgorgement is not to compensate the victims of the fraud but to deprive the wrongdoer of his ill-gotten gain.

Accord, *SEC v. Seghers*, 298 Fed. Appx. 319, 336 (5th Cir. 2008) (purpose of disgorgement is to deprive wrongdoer of ill-gotten gains and deter future violations of law); *Allstate Ins. Co. v. Receivable Finance Co., LLC*, 501 F.3d 398, 413 (5th Cir. 2007); (disgorgement is remedy meant to prevent a wrongdoer from enriching himself by his wrongs); *SEC v. Hoffman*, 996 F.2d 800, 802 (5th Cir. 1995)(disgorgement "wrests ill-gotten gains from the hands of a wrongdoer" and "does not aim to compensate the victims of the wrongful acts"); *SEC v. AMX Int'l, Inc*., 7 F.3d 71, 73 (5th Cir. 1993)(purpose of disgorgement is not to compensate victims, but to deprive wrongdoer of ill-gotten gain).

The Receiver's claims for disgorgement against Milan and other "Relief Defendants" stand the Fifth Circuit's consistent statements as to the proper purpose of the disgorgement remedy on their head. Disgorgement is intended to "wrest ill-gotten gains from the hands of a wrongdoer", but the Receiver seeks to use it to wrest both principal and interest on lawful investments from the hands of innocents. Disgorgement is intended to deprive a wrongdoer of the fruits of his wrongdoing, but taking the Accounts of innocent investors would deprive the alleged wrongdoers – Allen Stanford and other defendants – of absolutely <u>nothing</u>. Disgorgement is intended to deter wrongdoers from future misdeeds, yet taking the

Accounts from innocent investors would in no way serve deter wrongdoers from future Ponzi schemes.

Finally, this Court has stated time and time again that disgorgement is not a remedy for the compensation of fraud victims. Yet that is precisely the sole and admitted purpose of the Receiver in demanding disgorgement from Milan and other innocent investors here. For all of these reasons, the Receiver's legal theory for his claims against Milan and other innocent "Relief Defendants" is fundamentally wrong. He has not shown and cannot show a likelihood of success on the merits.

Because disgorgement does not exist to provide funds to compensate fraud victims, but instead has the purpose of depriving wrongdoers of their ill-gotten gains, this Court has held that the "power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment." *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir. 1978). *See Zacharias v. SEC*, 569 F.3d 438, 471-72 (D.C. Cir. 2009) (citing *Blatt*); *SEC v. Seghers*, 298 Fed. Appx. 319, 336 (5th Cir. 2008). Here, again, the Receiver ignores the decisions of this and other courts. Although the disgorgement remedy is clearly limited to wresting profits from wrongdoers, the Receiver demands disgorgement of the principal of lawful investments (as well as interest on those investments) from entirely innocent investors. The Court

should squarely reject this exercise in overreaching (at great expense to the victims of the alleged Stanford fraud).

The Receiver seems to assume – wrongly – that if any CD proceeds can be traced to property in the hands of an innocent third party like Milan, he is entitled as a matter of law to seize[20] and recover that property. That is not and has never been the law. To the contrary, the law has always been that when a wrongdoer transfers ill-gotten gains to an innocent party who takes that property in good faith and for value, the property cannot be recovered from the innocent party. This is not only true under the common law, but fraudulent transfer statutes also generally recognize similar defenses. *See, e.g.*, TEX. BUS & COM. CODE § 24.009.

Here, the innocence and good faith of Milan is conceded (indeed, alleged) by the Receiver. It is indisputable that certificate of deposit transactions like those at issue in this case are ones in which the depositor gives value – the time value of the use of his money by the bank – in return for the repayment by the bank of the CD principal and agreed interest. Thus, the Receiver certainly has no right to recover property in the hands of innocent third parties Milan simply because the Receiver claims that he received proceeds of apparently legitimate bank CD transactions in which thousands of similarly blameless members of the public

[20] It is not proper to enter an *ex parte* freeze order as to assets that are "anything other than the property, or deemed property of a defendant or a culpable third party." *SEC v. Black*, 163 F.3d 188, 196 (3d Cir. 1998). "Nothing in the statute or case law suggests that 15 U.S.C. § 78u(d) or (e) authorizes a court to freeze the assets of a non-party, against whom no wrongdoing is alleged." *SEC v. Cherif*, 933 F.2d 403, 413-14 (7th Cir. 1991).

engaged. These innocent parties are entitled under the law to their property. Accordingly, the Receiver failed to show a "likelihood of success on the merits" sufficient to justify either a "principal freeze" or "interest freeze".

**IV. The Receiver Failed To Meet The Requirements For A Constitutional Pre-Judgment Attachment Of Milan's Property.**

One of the most sacred and fundamental principles of American law is the commandment of the Fifth Amendment to the United States Constitution that a person may not be deprived of his or her property by the government without due process of law.[21] This principle "reflects the high value, embedded in our constitutional and political history, that we place on a person's right to enjoy what is his, free of governmental interference." *Fuentes v. Shevin*, 407 U.S. 67, 81, 92 S.Ct. 1983, 1994 (1972). Such "due process of law" means, at a minimum, that the person whose property is to be seized – even temporarily -- is entitled to notice and an opportunity for a hearing prior to the seizure of property (or in truly extraordinary circumstances, promptly after such seizure). *Id*.

The United States Supreme Court has made it clear that prejudgment seizures of property offend the United States Constitution's Due Process of Law

[21] Although Mr. Milan is not a United States citizen, "the Fifth Amendment's Due Process Clause gives aliens a right to challenge mistreatment of their person or property." *Demore v. Kim*, 538 U.S. 510, 543, 123 S.Ct. 1708, 1728 (2003). *See United States v. Pink*, 315 U.S. 203, 227, 62 S.Ct. 552, 564 (1942) (Fifth Amendment applies to rights of foreign creditors with respect to property in the United States); *United States v. Husband R. (Roach*), 453 F.2d 1054, 1058 (5th Cir. 1971).

Clause unless they are meet specific procedural requirements.[22] *See, e.g.*, *Connecticut v. Doehr*, 501 U.S. 1, 111 S.Ct. 2105 (1991); *N. Georgia Finishing, Inc. v. Di-Chem, Inc.*, 419 U.S. 601, 95 S.Ct. 719 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972). These constitutional requirements include those embodied in the prejudgment attachment statutes and procedures of Texas, which are applicable in this case pursuant to Federal Rule of Civil Procedure 64. The Texas statutes require proof of the existence of specific statutory grounds as to each defendant, see TEX. CIV. PRAC. & REM. CODE § 61.001, as follows:

(1) The defendant is justly indebted to the plaintiff;

(2) The attachment is not sought for the purpose of injuring or harassing the defendant;

(3) The plaintiff will probably lose his debt unless the writ of attachment is issued.

In addition, Texas law requires that the following procedural requirements must be met by a party seeking a prejudgment attachment:

> (a) an application for prejudgment attachment in which the specific facts relied upon are supported by an affidavit setting forth such facts as would be admissible in evidence;[23]
>
> (b) a hearing as to each such application for attachment;
>
> (c) a written order of the court that makes "specific findings of facts to support the statutory grounds found to exist"; and

[22] Pre-judgment seizures without prior notice and hearing can be justified on a temporary basis by emergency conditions, but the August 4 Order did not involve any such emergency circumstances.

[23] The affidavit required must be made on personal knowledge, except that facts made be stated on information and belief if the grounds for such belief are specifically stated.

> (d) a bond in an amount sufficient to adequately compensate the defendant for his damages if the attachment later proves to have been wrongful. *See* TEX. R. CIV. P. 592, 592a.

Although the District Court made it clear in its Order of June 29, 2009 that any continued freeze after August 3 would have to be based on a valid pre-judgment attachment, the Receiver ignored that requirement. The Receiver did not seek a prejudgment attachment as to the property of Milan or other "Relief Defendants", either in the July 28 Freeze Motion or in his Amended Complaint. Moreover, the Receiver plainly did not meet (or even seek to meet) any of the requirements for a prejudgment attachment of the property Milan under Texas law, as set forth above. For this reason, the District Court's denial of the "principal freeze" demanded by the Receiver was entirely appropriate, and the portion of the August 4 Order that imposed an interest freeze was erroneous.

For similar reasons, the Receiver did not meet the constitutional requirements for either a "principal freeze" or an "interest freeze". According to the Supreme Court's decisions, the Due Process Clause generally requires that, prior to any prejudgment attachment or other seizure of property, the proponent of the seizure make a showing of his right to such extraordinary relief by specific affidavit or other sworn testimony. *See Connecticut,* 501 U.S. at 13-15, 111 S.Ct. at 2114. Moreover, such a showing generally must be made with prior notice and hearing to the person whose property is to be seized, unless the proponent shows

that *ex parte* proceedings are justified because of specific circumstances making such proceedings necessary. *Id*., 501 U.S. at 16-18, 111 S.Ct. at 2115-16. In addition, the Supreme Court has emphasized the importance of a bond or other security to protect the person whose property is subjected to prejudgment seizure from loss in the event that the seizure proves improvident. *Id*., 501 U.S. at 19-23, 111 S.Ct. at 2116-19.

All of these constitutionally-required safeguards – which are embodied in the Texas pre-judgment attachment statutory procedures – were ignored by the Receiver. The Receiver made no showing by affidavit or sworn testimony of anything in the July 28 Freeze Motion or at the July 31 hearing. The Receiver made no showing in the July 28 Freeze Motion or at the July 31 hearing of emergency circumstances requiring that the "principal freeze" or "interest freeze" be imposed on Milan or the hundreds of other "Relief Defendants" without normal notice and hearing. Finally, the Receiver has never posted a bond or other security to protect Milan and other "Relief Defendants" against damages if the prejudgment seizure of their property proves to be improvident. Accordingly, there simply was no lawful or constitutional basis for the prejudgment "principal freeze" or the "interest freeze" demanded by the Receiver.

The justifications offered by the Receiver for the prejudgment seizure of Milan's property, while ignoring the pre-judgment attachment procedures and the

constitutional principles they embody, have the virtue of being time-honored. They are of the kind offered by tyrants in all ages: (a) people like Milan have no legal or due process rights as to their property, because the Receiver simply asserts that their property "really" belongs to the Stanford receivership estate; and (b) the individual legal and due process rights of Milan must be ignored for the greater good of a supposed distribution regime (that, by the way, will be administered at undisclosed but enormous cost to innocent investors by the Receiver and his professionals).

Courts of the United States, like this Court, have long rejected such invitations to ignore the substantive and procedural protections for individual rights embodied in our Constitution and laws. The courts steadfastly protect these rights, even when those claiming such rights are plainly guilty of the worst kinds of crime. Surely it is not too much to ask that such rights be respected for those like Milan and the other "Relief Defendants", whom even the Receiver admits are entirely innocent victims of alleged wrongdoing.

Milan will not reiterate the many other reasons why the Receiver's "principal freeze" was properly denied, because these have been well presented by the SEC, the Examiner, and by other putative "Relief Defendants". Milan asks only that the Court consider the undeniable reality that the Receiver has failed to meet the constitutional and legal requirements for a prejudgment seizure of his

property – both principal and interest. Accordingly, the Court should affirm the District Court's August 4 Order to the extent it denied any "principal freeze" and vacate that Order to the extent it imposed an "interest freeze".

## CONCLUSION

For all of the foregoing reasons, Appellees/Cross-Appellants Divo Milan Haddad and Singapore Puntamita Pte., Ltd. request that the Court should enter its Order either (a) dismissing this appeal for lack of jurisdiction or (b) affirming that portion of the District Court's August 4 Order that declined to impose a "principal freeze" on the brokerage Accounts, and vacating that portion of the Order that imposed an "interest freeze" on such Accounts, with directions to dismiss the Ancillary Action against Milan. Appellees/Cross-Appellants request such other and further relief to which they may be entitled.

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## CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Brief of Appellees-Cross-Appellants Divo Milan Haddad and Singapore Puntamita Pte., Ltd. was served on the following counsel of record this 30th day of September 2009 in electronic form and by U.S. Mail:

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## CERTIFICATE OF COMPLIANCE

1. This Brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 11,151 words, excluding the parts of the Brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This Brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2007 in Times New Roman 14-point typeface.

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