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,

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 GONZALES; CHARLOTTE HUNTON; RICHARD O. HUNTON; CHARLES HUNTON,

Defendant-Appellee

On Appeal from the United States District Court for the Northern District of Texas, Dallas Division Docket No. 3:09-CV-724-N

BRIEF OF CROSS-APPELLANTS-APPELLEES, JOSEPH BECKER ET AL.

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

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STATEMENT REGARDING ORAL ARGUMENT

Because of the complexity of the computation of the definition of "profits", which are subject to disgorgement as defined in the case law, oral arguments will assist the Court in understanding the computation of these amounts and the manner that it applies to the Louisiana Retirees IRA Accounts. Further, oral arguments will assist the Court in understanding why no plan of disgorgement should be implemented at all if equitable disgorgement is not made against all innocent investors who received any cash distributions during the time period of the fraud.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes

Other Authorities

STATEMENT OF JURISDICTION
(FOR CROSS APPEAL)

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 upon 15 U.S.C.§ 77v(a) and §78aa and also on 28 U.S.C. §754. The Receiver, Ralph Janvey, appealed the order of the district court dated August 4, 2009. The Louisiana Retirees have timely filed a cross-appeal in response to the Order.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the Receiver has the authority to initiate the unprecedented plan to disgorge the entire market and rescind all payments to innocent investors for the time period of the alleged fraud absent proof of insider trading or participation in the sale of the fraudulent securities.

2. How much weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

3. Whether the district court's determination that profits are the only payments subject to disgorgement is reviewed under a de novo or abuse of discretion standard in this appeal. *Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S.Ct. 1463, 1469, 36 L.Ed.2d 151 (1973).

4. Whether restitution or disgorgement of profits from wrongdoers should be the primary focus of the Receiver's disgorgement plan. *S.E.C. v. Huffman*, 996 F.2d 800 (5th Cir. 1993).

5. Whether, as a matter of law, the Receiver is not entitled to disgorge any payments from the innocent Louisiana Retirees until the Louisiana Retirees have recovered an amount equal to the principal amount of the certificate of deposit they purchased. *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir.1995); *S.E.C. v. Blatt*, 583 F.2d at 1325, 1335 (5th Cir. 1978).

6. Whether the Receiver may disgorge the assets of a party against whom no wrongdoing is alleged. *S.E.C. v. Cherif,* 933 F.2d 403, 414 (7th Cir.1991); *CFTC v. Sidoti*, 178 F.3d 1132, 1138 (11th Cir.1999); *Allstate Ins. Co. v. Receivable Fin. Co.*, 501 F.3d 398, 413 (5th Cir. 2007).

7. Whether the clawback of the market of innocent investors initiated by the Receiver is not an equitable remedy that existed as of 1789 and is not permissible

under the holding of *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999).

STATEMENT OF THE CASE

The epicenter of the losses from the sale of the Stanford bogus CD's is Baton Rouge, Louisiana. The Defendants/Appellees/Cross-Appellants (the "Louisiana Retirees"), Joseph Becker *et al.*, submitting this brief to this Honorable Court are mostly retirees from Exxon or other companies located in Baton Rouge, Louisiana, who had accumulated retirement funds by working every day of their adult lives.[1] Upon retirement, many of these individuals rolled their retirement savings into individual IRA's. In this particular case, their retirement funds were rolled into IRA's of which the Stanford Trust Company was the trustee and custodian. In other cases, some of Louisiana Retirees were living on the income from the SIB certificates of deposits.

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[1]Joseph Becker, Terry Beven, Kenneth Bird, James Brown, Murphy Buell, John C. Busceme, Virginia Buscheme, John B. Buscheme, Robert Bush, Gene Causey, Joseph Schultz, Darrell Courville, William Dawson, Deborah Dougherty, Gwen Fabre, Richart Feucht, Joan Feucht, Kendall Forbes, Deborah Forbes, Lynn Gildersleeve, Willa Mae Gildersleeve, Robert V. Gildersleeve, Gordon C. Gill, Robert Graham, Jason Graham, Martha Johnson, Benton B. Johnson, William Bruce Johnson, Jennifer Savoic, Dennis Kirby, Kerry R. Kling, Teresa Michelle Lamke, Don Landers, Laura Lee, Troy Lillie, Ron Martsen, Susan Martsen, 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, Martha Witmer, Bruce Stone, and Sharon Witmer.

At the suggestion of sales representatives of the Stanford Group, the Louisiana Retirees' IRA's purchased Stanford International Bank certificates of deposit (the "SIB CD's"). Many, if not all, of the Louisiana Retirees lived off the interest income that was being paid on the SIB CD's during the past five to eight years. It is uncontested that these Louisiana Retirees had no knowledge of the fraud surrounding the Stanford ponzi scheme. (See Receiver's Amended Complaint, ¶9, R.(A). 204.)[2] Many of these Louisiana Retirees have now seen their retirement savings evaporate to nothing as the SIB CD's have no value. The Receiver is now attempting to add insult to injury by seeking a remedy which no court has ever endorsed--the wholesale recapture of any funds paid out to innocent investors during the period of the fraud. If the Receiver's claims are allowed to go forward, many of these Louisiana Retirees, who have no or little income, will be faced with the prospect of selling their homes and having to go back to work at low paying jobs in an attempt to pay a judgment obtained by the Receiver.

In addition, prior to the establishment of the receivership, some of the Louisiana Retirees elected to redeem all or a part of their SIB CD's for reinvestment

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[2]Due to the multiple volumes and supplemental volumes of records in the various matters, the record references will be identified as follows: "R(A)."means appellate record certified August 20, 2009 in *Alguire* matter, Docket 09CV724; "R(B)." means appellate record certified September 9, 2009 in *SEC v. Stanford Int'l Bank et al.*, Docket 09CV298.

in alternative investments or for their personal use. The Receiver has frozen cash and securities account balances equal to any redemption or interest payments received by the Louisiana Retirees since the year 2000 and the Receiver has informed each Louisiana Retiree that these amounts are subject to disgorgement in the complaint filed against these Louisiana Retirees.[3] In stark contrast, the Receiver has only sought disgorgement on another select group of investors for payments received since January 1, 2007, without giving any valid justification or reasoning for such distinction.[4] Stunningly, the Receiver's attempt to seize everything for which the Louisiana Retirees have worked has occurred without any proof or allegation of wrongful misconduct, any justification by the Receiver as to why this group has been singled out, or any explanation by the Receiver justifying the indiscriminate clawback for eight years against this select group as opposed to shorter time periods for other innocent investors.

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[3]What is even more revealing is the fact that the Receiver's personnel have refused, despite numerous requests, to make an accounting to each of the Louisiana IRA Retirees as to how the amount subject to disgorgement was computed.

[4]See Defendants listed on Appendix KTV-4 of Receiver's complaint, R(A). 233-246. While the parties have not been able to put on evidence of this amount, the record would show that the amounts that the Receiver is seeking against the Louisiana Retirees were amounts received up to eight years prior to the receivership, while only seeking a two year clawback against people that did not have accounts with Stanford at the time of the establishment of the receivership.

The SEC has formally advised the district court and the Receiver that it opposes the disgorgement actions against innocent investors and took the unprecedented position of filing a motion with the district court on July 20, 2009 to remove the power from the Receiver to file disgorgement actions by the SEC. (R(B). 2075-2076.) In response to the motion, and before a hearing could be held before the district court to determine the authority of the Receiver, the Receiver filed a disgorgement suit against the Louisiana Retirees and other innocent investors.

One *res nova* issue presented for review is whether the Receiver appointed by the SEC has the authority to ignore the public position of the SEC on a matter involving the interpretation of the equitable powers created under the securities law when consistent application of the law requires that the SEC's position, rather than the view of an individual receiver, be the law. Allowing the Receiver to ignore the SEC's positions, when the SEC administers a number of receiverships and disgorgement claims, would create havoc in this area of the law. Such a ruling would have the effect of taking the discretion away from the SEC in any enforcement action or civil litigation in the area of equitable receiverships.

Another *res nova* issue presented to the Court is whether there is a basis in fact or law for the Receiver's apparent attempt to require disgorgement of all cash payment made to innocent investors during the eight year period of 2000 to 2008.

In an unprecedented legal maneuver, the Receiver is seeking from the Louisiana Retirees a disgorgement of funds received from the entire trading market of SIB CD's for the past eight years during the period of the fraud. However, this disgorgement is based upon persons that neither were involved in the fraud nor redeemed their SIB CD's on insider information. The breadth and scope of the "Clawback of the Market" is unsupported by any case law provided by the Receiver and is contrary to the policy of the SEC.

While the Louisiana Retirees acknowledge the Receiver has provided the Court the minority views on the issue of disgorgement of cash received by innocent investors, none of these cases cited by the Receiver involves more than ten innocent persons, and certainly does not involve a clawback of the scope, number, duration, complexity, and magnitude proposed by the Receiver. At best, these cases stand for the proposition that innocent parties closely related to the persons that committed the wrongful acts, by family, other otherwise, are subject to disgorgement. The Receiver has ignored and failed to cite in its brief the substantial body of law that exists, all of which have been previously provided to the Receiver by the SEC and the Examiner, John Little, that limits disgorgement actions to profits received by the wrongdoers.

STATEMENT OF RELEVANT FACTS

A. Relevant Facts and Procedural History

Baton Rouge, Louisiana was the epicenter of the losses in the United States caused by Stanford's Ponzi scheme. Most of the brokers who sold the largest shares of the securities in the United States are located in Stanford's Baton Rouge office. The Louisiana Retirees are mostly retirees of Exxon and IRA account holders that invested substantially all of their life savings with the Stanford Group and Stanford Trust Company (the "Trust") in SIB CD's. Many of the investors lost their entire life savings, held in individual retirement accounts ("IRAs"). These funds were amassed by sacrificing and cautiously saving throughout the course of their working lives.

The Louisiana Retirees have suffered substantial financial injury. A substantial number of all of the Louisiana Retirees are older adults, who are no longer gainfully employed and their prospects of replacing the retirement monies lost are virtually nonexistent--leaving the Louisiana Retirees with substantially reduced means for their continued sustenance.

The investment advisors employed by the Stanford Group recommended that Louisiana Retirees' retirement funds be rolled over from the retirement plans of the company where each of the Louisiana Retirees had worked most of their careers and that Stanford Trust be designated as the custodian of the IRA for the sole purpose of providing a conduit to the purchase and/or renewal of the SIB CD's. Many, if not all, of the Louisiana Retirees lived off the interest income that was being paid on the SIB CD's during the past five to eight years.

The SEC appointed Ralph Janvey as the receiver (the "Receiver") to operate Stanford Financial on February 17, 2009. (R(B). 83-85.) As of that date, the non SIB CD securities accounts of the Louisiana Retirees at Stanford were frozen. Now, some seven months later, the funds remain frozen and the innocent Louisiana Retirees have no access to the funds. The Receiver is now attempting to add insult to injury by filing suit against Louisiana Retirees, many of whom have never been sued in their lives, seeking a remedy which no court has ever endorsed--the wholesale disgorgement of any funds paid out to innocent investors. The Receiver named the Louisiana Retirees as defendants and requested that the Louisiana Retirees pay back all of the monthly retirement income that each had received over the past three to eight years.[5] However, the suit makes several unexplained, arbitrary conclusions. Clawback was sought for an eight year period against the

[5]What is more inherently unfair about this is that while the clawback suit against account holders such as the Louisiana Retirees has gone back over eight years, the same claims against non-account holders have only been made for payments received in 2008. See Receiver's Complaint, R(A). 248-249.

Louisiana Retirees, all of whom have accounts frozen. Another group who did not have existing accounts with Stanford was named as defendants, but only to the extent that payments were received for an approximate two year period. (R(A). 248-249.) Another large group of non-United States citizens who received large amounts of payments from SIB over the years was not named at all. No explanation or reasoning was given by the Receiver for the arbitrary discrimination within the innocent investors groups during the period of the fraud.

John Little was named as examiner (the "Examiner") on April 20, 2009 to essentially present the investors' viewpoints to the trial court. (R(B). 473-476.) Mr. Little attempted to persuade the Receiver to limit to the clawback claims to persons that were involved in or had knowledge of the wrongful conduct that caused the losses at issue. (R(B). 1953-1977.) The Receiver apparently has a more expansive view of the law and now claims that anyone who has received proceeds from Stanford during the period of the fraud, regardless of their knowledge, the amount of their loss or regardless of the time period of the payment, would be subject to a clawback claim and that their securities accounts, if they exist with the Receiver, would be frozen and not paid out.

A status conference was held with the district court on June 28, 2009. The district court established a deadline of August 3, 2009 for the Receiver to file a suit against the innocent victims, such as the Louisiana Retirees. (See R(B). at 2042-2043.) During this conference, the SEC, for the first time, informed the Receiver that he was exceeding the authority granted under the equitable doctrines of the 1933 and 1934 Acts by filing suit against innocent investors. In an unprecedented move after the receiver notified the SEC that it would not agree with its position, the SEC filed a motion with the district court requesting that the Receiver's powers to implement disgorgement proceedings be terminated, and the SEC be vested with this authority. (R(B). 2073-2082.) Before this motion was decided by the district court, the Receiver filed suit against the innocent victims, including the Louisiana Retirees, on July 28, 2009. (R(A). 200-220.) After the suit was filed but before service was made, the district court held an emergency hearing on July 31, 2009 on the clawback issue and the Receiver's authority. Over the objection of the Receiver, the district court ruled that the principal amount invested by the innocent investors was not subject to clawback. (R(A) 477-479.)

The Louisiana Retirees believe the intent of the district court was that, until the principal amount invested by each victim has been recovered, the Receiver is not entitled to a clawback of any amount and the Receiver may pursue clawbacks for amounts received in excess of the original investment. The interpretation of this issue is the subject of a protective cross-appeal. The Louisiana Retirees do not believe that any amount is subject to clawback because of (i.) the failure to prove wrongful conduct and (ii.) the failure to pursue an equitable claw back plan for the same length of time against anyone, and not just account holders, whether foreign or United States citizens, who received funds from Stanford during the time period. In the alternative, the period of the clawback of any amounts in excess of the principal amount of the investment must be equally implemented against all innocent investors if it is implemented against the Louisiana Retirees. The failure to disgorge "profits" from all innocent investors during the period of the fraud makes the plan inequitable and does not meet the standard of "equality is equity." It only meets the "low hanging fruit" standard opposed by the Examiner in his first report filed on May 21, 2009. (R(B). 1959-1960.)

B. Complaint Filed by Receiver

The complaint was filed on July 28, 2009 against the Louisiana Retirees and other innocent victims who were account holders at the time of the receivership establishment. These clawback claims were for the prior eight years. The Receiver stipulated that all of the defendants including the Louisiana Retirees were not involved in the fraud. The complaint stated the following:

> 9. 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.

(R(A). 204-205.)

The Receiver has filed suit against three classes of investors. The first class ("Class One") consists of account holders who where sales representatives or investment advisors employed by Stanford. (R(A). 208, ¶20.) The second class ("Class Two") consists of account holders who had funds at Stanford on the date of the receivership establishment who received distributions of cash from Stanford either in the form of interest income or redemptions of the SIB CD's. (R(A). 208, ¶21.) In most instances, the amount of the cash received did not exceed the amount of the investment in the CD's. The third class of persons ("Class Three") included in the lawsuit consisted of persons who were not account holders who received cash payment in the form of redemption during after January 1, 2007. (R(A). 209, ¶23.) The clawback period for Class One and Class Three commenced January 1, 2007. (R(A). 248-249.) However, the clawback period for the Class Two victims commences in the year 2000 and goes through the current date.

The Receiver makes no attempt to plead the factual basis for the arbitrary distinctions in the time periods of the clawback applicable to the various classes or the scope of the defendants who will be subject to the clawback. Further, the

Receiver makes no attempt to explain the concept of equitable disgorgement and why certain innocent investors have been named as a defendant during the period of the fraud, while non account holder innocent investors for the fraud period have not been sued.

SUMMARY OF ARGUMENT

1. No authority exists in law for the Receiver to initiate the unprecedented plan to disgorge the entire market and rescind all payments to innocent investors for the time period of the alleged fraud absent proof of insider trading or participation in the sale of the fraudulent securities. As a matter of law, the phrase "equality is equity" as proposed by the Receiver means that prior to determining equitable distributions, the receiver is required to initiate a plan of equitable disgorgement of all innocent investors that received cash payment during the period of the fraud. Because of the number of foreign investors that received funds during the period of the fraud that no longer have funds held by the Receiver, and the sheer number of innocent investors that received cash payments during the fraud period and that later severed relations with Stanford during the fraud period, a "equality is equity" disgorgement plan cannot be initiated in accordance with the law or the policies of

the SEC. [6] As a matter of law, the Receiver may not freeze the assets of a party against whom no wrongdoing is alleged. *S.E.C. v. Cherif,* 933 F.2d 403, 414 (7th Cir.1991); *CFTC v. Sidoti*, 178 F.3d 1132, 1138 (11th Cir.1999); *Allstate Ins. Co. v. Receivable Fin. Co.*, 501 F.3d 398, 413 (5th Cir. 2007).

2. Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer. If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, no court should disturb the view of the federal agency unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984).

3. In shaping equity decrees, the trial court is vested with broad discretionary power; appellate review is correspondingly narrow. *Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S.Ct. 1463, 1469, 36 L.Ed.2d 151 (1973). The trial court has broad discretion not only in determining ***whether to order***

[6] If the plan proposed by the Receiver to disgorge innocent investors of cash received during the frauds period is accepted by this Court, equity requires that the suit be filed against any investors who had accounts at Stanford during the period of the fraud. There is no legal justification to exclude persons that closed their accounts at any time during the fraud period if these persons received cash from Stanford during the fraud period.

disgorgement but also in calculating the amount to be disgorged. Because the district court had broad discretion to deny the disgorgement of the receiver, the case is reviewed on an abuse of discretion standard and not a de novo review. *U.S. S.E.C. v. Maxxon, Inc.*, 465 F.3d 1174, 1179 (10th Cir.2006); *SEC v. First Jersey Sec. Inc.,* 101 F.3d 1450, 1474-75 (2nd Cir.1996); *S.E.C. v. Michel*, 521 F.Supp.2d 795, 830 -831 (N.D. Ill. 2007).

4. The Receiver has erred in making compensation to victims the primary focus of his disgorgement plan. The primary purpose of disgorgement is not to compensate investors. Unlike damages, it is a method of forcing a defendant to give up the amount by which he was unjustly enriched. Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly secondary goal. *S.E.C. v. Huffman*, 996 F.2d 800 (5th Cir. 1993); *S.E.C. v. Bear, Stearns & Co. Inc.,* 626 F.Supp.2d 402, 406 (S.D.N.Y. 2009).

5. As a matter of law, the Receiver is not entitled to disgorge any payments from the innocent Louisiana Retirees until the Louisiana Retirees have recovered an amount equal to their principal contribution to Stanford. *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir.1995); *S.E.C. v. Blatt*, 583 F.2d at 1325, 1335 (5th Cir. 1978).

6. Clawback of the market of innocent investors is not an equitable remedy that existed as of 1789 and is not permissible under the holding of *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc*. 527 U.S. 308, 119 S.Ct. 1961, 144 L.Ed.2d 319 (1999).

ARGUMENT AND AUTHORITIES

A. The Receiver has failed to allege sufficient facts that he will likely prevail on the merits of the disgorgement case because he has not attempted to allege or prove an plan of equitable disgorgement of innocent investors.

As the U.S. 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, 44 S.Ct. 424, 427, 68 L.Ed. 873 (1924) (ordering pro rata distribution in bankruptcy proceedings resulting from Charles Ponzi's fraud). This same concept, which focused upon equality in distributions, must also focus on the necessary first step - equality in disgorgement actions in obtaining the funds to be equally distributed. In much the same way as each investor should receive the same amount, all "innocent" investors should be subject to the same disgorgement for the same time period. If the plan is to meet the "equality is equity" standard, all innocent investors who received cash payments during the period of the fraud, should be subject to legal actions for disgorgement. Absent the legal ability of the Receiver to effect this plan under the existing law where all “innocent” investors are subject to disgorgement for the same period, the “equality is equity” standard cannot be achieved in this case. In this particular case, because of the number of foreign investors that are not subject to the jurisdiction of the court who have received cash payment during the term of the fraud, the “equality is equity” standard for disgorgement cannot be achieved. Despite the repeated request of the SEC and Examiner, this has been ignored by the Receiver.

The Receiver has made no attempt to address in previous pleadings, or the complaint how inequitable disgorgement of innocent victims meets its self professed standard of equality is equity. The reason is simple. First, in excess of 80% of the accounts are held by foreign investors not subject to the jurisdiction of the United States Court. This one fact prevents the receiver from meeting the “equity is equality’ standard. Secondly, the Receiver has fallen woefully short of meeting the criteria of equal disgorgement of all innocent parties who have received funds from Stanford during the eight year period of persons who are subject to the jurisdiction of the court. Exhibit KVT-4 to the complaint lists the persons who funds are frozen and are subject to disgorgement. (R(A). 233-246.) The time period for disgorgement of the Louisiana Retirees is for 8 years. Exhibit KVT-6 to the complaint lists person who have no funds on deposit with Stanford but are being sued in an attempt to obtain a return of funds (the “Non-Account Disgorgement

Group"). (R (A). 248-249.) In the Non-Account Disgorgement Group, the clawback period commences on January 1, 2007.

This discriminatory treatment of the Non-Account Disgorgement Group that have received cash payments from Stanford and disgorgement for Louisiana Retiree Accounts holders for the last eight years verses disgorgement for non-account holders for only two year certainly does not meet the Receiver's proclaimed "equality is equity" standard. This is further exacerbated by the fact that there is a large group of foreign investors who were not sued at all and a large number of persons that closed accounts prior to January 1, 2007, during the fraud period, that have not been sued. The whole fact of the matter is that the Receiver ignores this issue of inequitable disgorgement of innocent investors, and a true implementation of this "equality" principle cannot be made in this case because of (i.) the number of foreign investors who have closed their accounts with Stanford prior to the appointment of the Receiver yet received substantial cash payment during the period of the fraud and (ii.) the number of innocent investors who have received cash payment during the period of the fraud who have not been names as disgorgement defendants.

Because of its expertise in this area of the law, the SEC is aware of the policy problems presented in implementing equitable disgorgement of all innocent parties during the fraud period and has determined, that as a matter of public policy, it should not be implemented. As a matter of public policy, the SEC believes that "wrongful conduct" is the bright line of demarcation in pursuing clawback claims. Once any receiver ventures past this bright line in cases involving mass marketing of securities, numerous policies are implicated.

The "Clawback on the Market" of this number of innocent investors is a novel legal concept, is unprecedented, and in certain respects, meets the definition of an equitable "nuclear blast" discussed in the case of *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 322, 119 S.Ct. 1961, 1969 -1970, 144 L.Ed.2d 319 (1999). None of the cases provided by the Receiver related to the disgorgement of more than ten persons much less the entire trading market for the security as suggested in this case. Why are there no cases discussing, much less endorsing, the Clawback of the Market--because there is no judicial precedent for this type of action.

The best analogy for why the Receiver has exceeded its legal authority on the Clawback of the Market is best illustrated by comparing the requested disgorgement in this action and disgorgements that have historically arisen in insider trading cases under Rule 16(b) of the Securities Exchange Act of 1934. In multiple instances too frequent to cite, securities are traded in the market place based upon inaccurate or fraudulent financial information. A company's securities may trade based upon fraudulent financial information for an extended period of time. During the time period that the fraudulent financial information is being relied upon by the market, innocent investors invariably buy and sell securities. During this period, some investors make profits and some loss money based upon the random purchase and sale of securities.

When the SEC ultimately suspends the trading of the security after discovery of the fraudulent financial information, no attempt is made to disgorge the profits and rescind all purchase and sales during the period of the fraud so that all parties are treated equally based upon the fraud that existed in the market. However, there are two exceptions to the general rule. First, disgorgement actions can be filed against persons connected to the fraud and persons that are buying and selling securities based upon insider information. Some of the unknowing investors lose money and some make profits, even though the market is tainted by fraudulent information, which is not known to the market place at the time of the transactions. However, no legal precedent exists to allow for all buyers and sellers in the market to be sued and requiring persons who made profits, even though the market was tainted by the fraud, to return the proceeds of the sale or redemption.

What should be noted is that this substantial body of law provides no authority to rescind every sale and purchase made in the market during this time period of the fraud under the theory of "equality is equity" which would theoretically require all transactions from the date the fraud started to be rescinded. Such a rule would bring utter chaos to the marketplace. However, that is exactly what the Receiver is attempting to do in this case by seeking to disgorge the marketplace up until the time the first fraudulent information appeared. All of this is being accomplished without legal precedent.

B. <u>Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer</u>

This appears to be the first case in which a receiver, which was hired by the SEC and appointed by the court, has defied the position of the agency that created its existence and has attempted to use the resources of the receivership to develop new law to over turn the established policy of the SEC, which is responsible under federal law for administering the federal securities law. In the case of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844, 104 S.Ct. 2778, 2782, 81 L.Ed.2d 694 (1984), the United States Supreme Court recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer and the principle of deference to administrative interpretations. In reaching this conclusion, the court cited a long line of cases that gave deference to the agency in question, whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.[7] "If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, no court should disturb the view of the federal agency unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." Further, based upon the case law provided herein, it is very difficult, if not impossible, for the Receiver to argue that the position presented by the SEC is not a reasonable accommodation of conflicting policies before the SEC, which is attempting to prevent more harm on a group of

[7] *Aluminum Co. of America v. Central Lincoln Peoples' Util. Dist.*, 467 U.S. 380, 389, 104 S.Ct. 2472, 2479-2480, 81 L.Ed.2d 301 (1984); *Blum v. Bacon*, 457 U.S. 132, 141, 102 S.Ct. 2355, 2361, 72 L.Ed.2d 728 (1982); *Union Electric Co. v. EPA*, 427 U.S. 246, 256, 96 S.Ct. 2518, 2525, 49 L.Ed.2d 474 (1976); *Investment Company Institute v. Camp*, 401 U.S. 617, 626-627, 91 S.Ct. 1091, 1097, 28 L.Ed.2d 367 (1971); *Unemployment Compensation Comm'n v. Aragon*, 329 U.S. 143, at 153-154, 67 S.Ct. 245, at 250-251, 91 L.Ed. 36 (1946); *NLRB v. Hearst Publications, Inc.*, 322 U.S. 111, 131, 64 S.Ct. 851, 860, 88 L.Ed. 1170 (1944); *McLaren v. Fleischer*, 256 U.S.477, at 480-481, 41 S.Ct. 577, at 577-578, 65 L.Ed. 1052 (1921); *Webster v. Luther*, 163 U.S. 342, at 342, 16 S.Ct. 1017, 41 L.Ed. 183 (1896); *Brown v. United States*, 113 U.S. 568, 570-571, 5 S.Ct. 648, 649-650, 28 L.Ed. 1079 (1885); *United States v. Moore*, 95 U.S. 760, 763, 24 L.Ed. 588 (1878); *Edwards' Lessee v. Darby*, 12 Wheat. 206, 210, 6 L.Ed. 603 (1827).

people that have already suffered tremendous losses. *United States v. Shimer*, 367 U.S. 374, 382, 383, 81 S.Ct. 1554, 1560, 1561, 6 L.Ed.2d 908 (1961); *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 699-700, 104 S.Ct. 2694, 2700-2701, 81 L.Ed.2d 580 (1984).

In this case, the district court did not abuse its discretion in accepting the SEC view that only profits should be subject to clawback. Further, the Receiver has made no attempt to establish that the view of SEC is not correct or that the view of the SEC is not one that Congress would sanction. In fact, in its brief at page 23, footnote 2, the Receiver admits that its view, at best, is one view that "amply supports the power of a receiver to seek disgorgement: and is not necessarily the controlling view in every circumstance.

As a matter of its enforcement responsibility, the SEC routinely files civil actions for disgorgement. While the Receiver argues that his power does not emanate from the SEC and he is not accountable to the SEC in developing a policy of jointly administering the enforcement of the remedies provided under the securities law, there is little doubt that his authority emanates from the law that the SEC is primarily responsible for enforcing. The inconsistent treatment of the law at the discretion of one receiver versus the SEC's position is not in accordance with the statutory scheme envisioned by the courts or Congress. It would be bad public policy to allow one receiver to determine how the law should be implemented. It would also be inequitable for the Louisiana Retirees to be subject to the harsh effects of this inconsistent treatment in this particular case. It should not be within the individual discretion of any receiver as to what is fair and what is not as suggested by the receiver. Why should the position of a specific receiver and the U.S. government be different when both are empowered to exercise the same right of disgorgement against a group of people under the same statutory scheme? Who should have the final authority to set policy? The answer is obvious. The SEC has the authority to fairly administer the securities laws as well as implementing standards for disgorgement across the entire United States. There is no legal precedent for the Receiver ignoring the policy of the SEC.

Further, based upon the case law provided herein, it is very difficult, if not impossible, for the Receiver to argue that the position presented by the SEC is not a reasonable accommodation of conflicting policies and at a minimum, the SEC is attempting, as a matter of public policy, to prevent more harm on a group of people that have already suffered tremendous losses. While the Receiver may not agree with this public policy, the law is clear that based upon *Chevron U.S.A., Inc., supra*, "If this choice represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, no court should disturb the view of the federal agency."

C. <u>The district court's denial of the disgorgement of principal was not an abuse of discretion based upon the court's understanding of the facts of the case and the positions of the examiner and the SEC</u>.

In his brief, the Receiver argues that the issue presented to the Court should be reviewed on a de novo basis because the plan of disgorgement against innocent investors has been denied as a matter of law. In making this argument, the Receiver ignores its own brief where the Receiver acknowledges that the trial court has broad discretion in administering an equity receivership. See pg. 22 of Receiver's Appellant Brief. Further, the argument ignores two important points. First, the district court has heard numerous factual arguments on the hardships of the innocent investors in this case. Secondly, the law is clear that denial of a plan of the receiver is viewed based upon an abuse of discretion standard.

In shaping equity decrees, the district court is vested with broad discretionary power and appellate review is correspondingly narrow. *Lemon v. Kurtzman*, 411 U.S. 192, 200, 93 S.Ct. 1463, 1469, 36 L.Ed.2d 151 (1973). The Court has broad discretion not only in determining ***whether to order disgorgement*** but also in calculating the amount to be disgorged. *SEC v. First Jersey Sec. Inc.,* 101 F.3d 1450, 1474-75 (2nd Cir.1996); *S.E.C. v. Michel*, 521 F.Supp.2d 795, 830 -831 (N.D.

Ill. 2007); *U.S. S.E.C. v. Maxxon, Inc.* 465 F.3d 1174, 1179 (10th Cir.2006). Thus, the appellate courts review therefore is limited to whether the trial court's order approving or disapproving a settlement was an abuse of its discretion. *S.E.C. v. Wang*, 944 F.2d 80, 85 (2nd Cir.1991); *S.E.C. v. Certain Unknown Purchasers of Common Stock of and Call Options for Common Stock of Santa Fe Intern. Corp.*, 817 F.2d 1018, 1020 (2nd Cir.1987).

As an exercise of its equity powers, the court may order wrongdoers to disgorge only their fraudulently obtained profits. Once the profits have been disgorged, it remains within the court's discretion to determine how and to whom the money will be distributed, and the district court's distribution plan will not be disturbed on appeal unless that discretion has been abused. *S.E.C. v. Fischbach Corp.*, 133 F.3d 170, 175 (2nd Cir.1997); *Securities and Exch. Comm'n v. Hardy*, 803 F.2d 1034, 1037-38 (9th Cir.1986); *Commodity Futures Trading Com'n v. Topworth Intern., Ltd.*, 205 F.3d 1107, 1115 (9th Cir.1999).

The Receiver has argued that this Court should conduct a de novo review of the district court's decision. It implies that the ruling of the district court was that the district court wanted to disgorge net losers, but simply felt that it did not feel that it had the authority to implement the Receiver's plan. Nothing could be further from the truth. The district court listened to the well argued and defined facts presented by the Receiver and the SEC and determined, based upon the facts that were presented, the SEC policy of only allowing clawback of profits was the correct view. The position was further confirmed by the admission and stipulation of the Receiver that none of the Class Two victims were involved in the illegal conduct.

D. <u>The Receiver's plan is fundamentally flawed because compensation to victims is not the primary focus of equitable disgorgement</u>

_____The primary focus of the Receiver's plan is restitution to all investors of Stanford through the implementation of an inequitable disgorgement plan. However, the case law is clear that restitution does not set the parameter for the group of person that can be subject to disgorgement action. The leading cases on the scope and purpose of the equitable remedy of disgorgement is this Court's opinion in *S.E.C. v. Huffman*, 996 F.2d 800 (5th Cir.1993). In this case, the Court stated the following:

> It is an equitable remedy meant to prevent the wrongdoer from enriching himself by his wrongs. Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does. *SEC v. Commonwealth Chemical Securities, Inc.,* 574 F.2d 90, 102 (2d Cir.1978). Thus, a disgorgement order might be for an amount more or less than that required to make the victims whole. It is not restitution.

Huffman, *supra,* at 802. Further, in the seminal case on the issue, Judge Friendly stated, "[t]he primary purpose of disgorgement is not to compensate investors.

Unlike damages, it is a method of forcing a defendant to give up the amount by which he was unjustly enriched." *S.E.C. v. Commonwealth Chem. Sec., Inc.,* 574 F.2d 90, 102 (2nd Cir.1978).[8]

The remedial principles underlying the Receiver's proposed disgorgement plan is a focus on getting the "stolen money" back to the entire market place and the 26,000 investors. However, the case law is clear that the primary purpose of the equitable remedy of disgorgement is to deprive a "wrongdoer" of unjust enrichment. In this particular case, as admitted by the Receiver, no "wrongdoer" is the subject of the plan for disgorgement. The plan of the Receiver completely disregards the primary purpose that "[d]isgorgement is designed to deprive a ***wrongdoer*** of unjust enrichment, and to deter others from violating securities laws by making violations unprofitable." *S.E.C. v. JT Wallenbrock & Associates*, 440 F.3d 1109, 1113 (9th Cir.2006). See also, *Securities and Exchange Commission v. Blatt*, 583 F.2d 1325, 1335 (5th Cir.1978) ("Disgorgement is remedial and not punitive. The court's 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

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[8]See also *S.E.C. v. Cavanagh*, 445 F.3d 105, 117 (2nd Cir.2006); *Wang, supra*; *S.E.C. v. Haligiannis*, 470 F.Supp.2d 373, 384 (S.D.N.Y.2007); *S.E.C. v. Novus Technologies, LLC*, 2008 WL 115114, 4 (D.Utah 2008); *S.E.C. v. AmeriFirst Funding, Inc.*, 2008 WL 1959843, 1 (N.D. Tex. 2008).

penalty assessment."); *Sec. and Exch. Comm'n v. AMX, Int'l, Inc.*, 7 F.3d 71, 73 (5th Cir.1993) ("We have stated that the purpose of disgorgement is to deprive the ***wrongdoer*** of his ill-gotten gains and deter future violations of the law."); *S.E.C. v. Seghers*, 298 Fed.Appx. 319, 336, 2008 WL 4726248, 14 (5th Cir.2008).

In direct contrast, the Receiver is attempting to use disgorgement against innocent investors for the period of the fraud to obtain restitution for all aggrieved investors. However, in this case, the Receiver is aiming in the wrong direction. As noted, the Receiver has admitted and pleaded that the Louisiana Retirees have not been involved in wrong doing or violation of the federal securities laws. The Receiver is thus attempting to use a remedy designed to be used against wrongdoers against innocent victims under the pretense of restitution of all investors. "Although some courts and parties may equate disgorgement with restitution, 'they are distinct in that restitution aims to make the damaged persons whole, while disgorgement aims to deprive the wrongdoers of ill-gotten gains.'" *S.E.C. v. Bear, Stearns & Co. Inc.*, 626 F.Supp.2d 402, 406 (S.D.N.Y.2009), citing *S.E.C. v. Drexel Burnham Lambert*, 956 F.Supp. 503, 507 (S.D.N.Y.1997). "Although disgorged funds may often go to compensate securities fraud victims for their losses, such compensation is a distinctly secondary goal" *Fishbach*, *supra*.[9] Thus, there is no basis in law for the Receiver to use restitution as the primary reason to use this remedy against any innocent victim such as the Louisiana Retirees and any attempt to do so must be dismissed in full.

This is yet another reason that the Court should defer to the position of the SEC in these matters. The SEC has obviously considered these competing policy issues of fairness in requiring disgorgement versus increasing the amount of restitution. The SEC, which must administer these laws across the United States, must be accorded the discretion to make this judgment. *Chevron U.S.A., Inc.* , *supra*.

E. <u>As a matter of law, the Receiver is not entitled to disgorge any payments from innocent retirees until the retirees have recovered an amount equal to their initial capital contribution to Stanford</u>

Even if the Court were to find that the Receiver were able to pursue an equitable remedy of disgorgement against innocent investors such as the Louisiana Retirees, the Receiver's proposed scope of such disgorgement is not supported by

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[9]See also("Disgorgement does not aim to compensate the victims of the wrongful acts, as restitution does. . . . Thus, a disgorgement order might be for an amount more or less than that required to make the victims whole. It is not restitution."); *SEC v. Commonwealth Chemical Securities, Inc*., 574 F.2d 90, 102 (2nd Cir.1978) citing *Huffman*, *supra*; ("The purpose of disgorgement is not to compensate the victims of the fraud, but to deprive the wrongdoer of his ill-gotten gain."); *SEC v. Bilzerian*, 29 F.3d 689, 696 (D.C.Cir.1994), quoting *SEC v. Blatt*, 583 F.2d 1325, 1335 (5th Cir.1978); *Zacharias v. S.E.C.*, 569 F.3d 458, 471 (D.C. Cir. 2009).

law. The Receiver, relying on the Sixth Circuit's decision in *SEC v. George*, 426 F.3d 786 (6th Cir.2005), asserts he is entitled to recover all amounts paid to any investor during some unknown time period regardless of whether the person was tainted by the fraud and regardless of whether the person was a “net loser,” because the funds received by were not actually returns of principal contributions but were “stolen funds” from other investors.

In doing so, the Receiver improperly focuses on the restitution issue rather than the conduct of the defendant. In *Scholes v. Lehmann*, 56 F.3d 750, 757 -758 (7th Cir.1995), the court expressly rejected this argument. It refused to permit the receiver to obtain a full disgorgement of payments made to investors, holding that the victims of the fraud are only required to return "the difference between what [was] put in at the beginning and what [was retained] at the end." See *Scholes*, *supra*. In this case, that difference is the only amount that could possibly be said to be unjustly retained by the defendants. “While it may be unjust or unfair as against the so-called ‘unsuccessful investors’ in that the successful investors would receive a greater portion of their initial fraud losses, it is undisputed on this record that the Receiver lacks standing to pursue claims for the other unsuccessful investors/creditors of the Receivership entities”. *In re Burton Wiand Receivership*

Cases Pending in the Tampa Div. of Middle Dist. of Fla., 2008 WL 818509, 12 (M.D. Fl. 2008).

In determining the extent of the disgorgement, two factors have generally been considered by the courts. The first factor is that if a fraud is involved, the clawback is limited to the amount in excess of the investors principal or capital contribution. The second factor is that the targeted person be involved in the fraud.

1. First Factor - Disgorgement is only allowed to the extent of the profits.

In *Blatt*, *supra*, this Court upheld the trial court's decision by ordering that the defendant disgorge only the profits obtained by fraud. The Court found that the power to order disgorgement extends only to the amount with interest by which the defendant ***profited***, stating as follows:

> The purpose of disgorgement is not to compensate the victims of the fraud, but to deprive the wrongdoer of his ill-gotten gain. *SEC v. Commonwealth Chemical Securities, Inc.*, 574 F.2d 90, 102 (2d Cir. 1978)…. The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing.

Blatt, *supra*, at 1335 (5th Cir.1978). See also *S.E.C. v. ETS Payphones, Inc.*, 408 F.3d 727, 735 (11th Cir.2005), which affirmed *Blatt*.

The leading case on the issue of the extent of the disgorgement is *Scholes*, *supra*. This case has been followed by most jurisdictions and has firmly established the legal principal that the disgorgement is limited to the amount, if any, that the investor has received in excess of his investment or purchase price. See, *Scholes*, *supra* ("Investors should return the net profits of their investment-the difference between what was put in at the beginning and what he had at the end"); *Donell v. Kowell* 533 F.3d 762, 776 (9th Cir.2008) ("The Receiver is only entitled to recovery of the amounts above defendant's initial investment"); *In re Taubman,* 160 B.R. 964, 981 (Bkrtcy. S.D. Ohio 1993) ("In such circumstances, to allow any investor to recover promised returns in excess of the original amount invested would be to further the Debtor's fraudulent scheme at the expense of other investors, particularly newer investors."); *S.E.C. v. Seghers*, 298 Fed.Appx. 319, 336, 2008 WL 4726248, 14 (5th Cir.2008) ("We have held that 'The court's power to order disgorgement extends only to the amount with interest by which the defendant *profited* from his wrongdoing.'"); *S.E.C. v. Michel*, 521 F.Supp.2d 795, 830-831 (N.D. Ill.2007).

2. Second Factor - Receiver may not freeze the assets of a party against whom no wrongdoing is alleged

The Receiver has argued the minority view based upon the cases of *S.E.C. v. George*, 426 F.3d 786 (6th Cir.2005) and others that a party who has committed no wrongdoing is subject to disgorgement. In making this argument, the Receiver has ignored the specific facts of the cases and the relationship of the nominal parties to the persons that committed the fraud. In each of the cases relied upon by the Receiver, the nominal parties are a very limited group and one or all of the nominal parties had a special relationship to the parties to the fraud, because the law is almost universal, for disgorgement to be a remedy, the party must be a party to the wrongdoing or closely related to the party that committed the wrongdoing. No authority exists anywhere for the Receiver to have the right to clawback and disgorge the entire trading market of persons who are not wrongdoers or related to the wrongdoers.

The cases supporting this are legion. See *S.E.C. v. Cherif*, 933 F.2d 403, 414 (7^{th} Cir.1991) ("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, one against whom no wrongdoing is alleged."); *S.E.C. v. Solow*, 554 F.Supp.2d 1356, 1363 (S.D. Fla. 2008), citing *CFTC v. Sidoti*, 178 F.3d 1132, 1138 (11^{th} Cir.1999) ("As a corollary to this rule, the district court may not disgorge profits obtained without the aid of any wrongdoing."); *S.E.C. v. Solow*, 554 F.Supp.2d 1356, 1363 (S.D. Fla. 2008); *Allstate Ins. Co. v. Receivable Fin. Co.*, 501 F.3d 398, 413 (5th Cir.2007), quoting *SEC v. Huffman*, 996 F.2d 800, 802 (5th Cir.1993); ("'Accordingly, the party seeking disgorgement must distinguish between that which has been legally and illegally obtained. The court's power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing.'"); *S.E.C. v. AmeriFirst Funding, Inc.*, 2008 WL 1959843, 1 (N.D. Tex. 2008); ("Disgorgement deprives **wrongdoers** of the **profits** obtained from their violations.")(emphasis added); *Zacharias v. S.E.C.*, 569 F.3d 458, 472 (C.A.D.C. 2009).

F. Clawback of the Market of innocent investors is not an equitable remedy that existed as of 1789 and is not permissible under the holding of *Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308 (1999).

The United States Supreme Court has closely monitored the use of equitable remedies by receivers, which have the ability to significantly alter a parties' historical right to a jury trial and examination of witnesses before any court can take title to property in the defendants' names, and have generally limited those remedies to those that existed in 1789. In all of these cases, the court has noted the potential abuse if this equitable right is not closely monitored. Specifically, the court has stated the following:

> We do not question the proposition that equity is flexible; but in the federal system, at least, that flexibility is confined within the broad boundaries of traditional equitable relief...To accord a type of relief that has never been available before-and especially (as here) a type of relief that has been specifically disclaimed by longstanding judicial precedent-is to invoke a "default rule," *post,* at 1979, not of flexibility but of ***omnipotence***.....Even when sitting as a court in equity, we have

> no authority to **craft a "nuclear weapon" of the law like the one advocated here.**

Grupo Mexicano de Desarrollo S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 322, 119 S.Ct. 1961, 1969 - 1970, 144 L.Ed.2d 319 (1999) (emphasis added). Further, these remedies must have existed as of 1789. In *Grupo*, the court stated:

> The Supreme Court has explained that the equity jurisdiction conferred on federal courts by the Constitution and the Judiciary Act "is an authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at the time of the separation of the two countries."

Grupo, 527 U.S. at 318, 119 S.Ct. 1961 (quoting *Atlas Life Ins. Co. v. W.I. Southern, Inc.,* 306 U.S. 563, 568, 59 S.Ct. 657, 83 L.Ed. 987 (1939)).

The courts have recently confirmed that disgorgement by receiver is a remedy that is allowable under *Grupo*. However, its application is limited to wrongful misconduct. *S.E.C. v. Cavanagh*, 445 F.3d 105, 118 -119 (2nd Cir.2006) ("Early writings on equity recognized the Chancellor's power to compel disgorgement of wrongly gained assets. *See* Joseph Story, *Commentaries on Equity Jurisprudence as Administered in England and America* 423-504") .

The Eleventh Circuit has specifically ruled that *Grupo* does not bar courts from freezing assets to preserve them for equitable relief, such as disgorgement. *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734-35 (11th Cir.2005). See also, *Cavanagh*, 445 F.3d at 116-119; *S.E.C. v. Lauer*, 445 F.Supp.2d 1362, 1367 (S.D. Fla. 2006). However, once again, each of these cases involve wrongful conduct by the person subject to the equitable remedy of disgorgement.

Because the remedy of disgorgement only existed in 1789 against persons that had committed a wrong, the Receiver here is not entitled to pursue the remedy at hand against innocent investors for the entire terms of the fraud. The Receiver makes no attempt to qualify his "faultless disgorgement" against an entire market under the parameters of *Grupo* or to show that the disgorgement of the market of all payments during the relevant time period of the fraud from people who were not participants in the fraud was a remedy that existed in 1789. In all due respect, it was a remedy that did not exist until August 2009, when the Receiver alleged it.

It is respectfully submitted that the Receiver has no right to craft a "nuclear weapon" of the likes advocated in this case that is not granted in any statutes by Congress and is against the policy of the Securities and Exchange Commission. Rather, the Receiver believes he is omnipotent in this area and believes that he solely, to the exclusion of the SEC, is allowed to understand and set policy on how the legal precedent of requiring all innocent investors during the fraud period to rescind their purchases and sales will ultimately effect the trading markets in the United States. It is exactly this type of discretionary conduct under the pretext of equity, with no statutory support or support of the regulatory agency responsible for regulating securities markets, that must be curtailed by this Honorable Court.

CROSS APPEAL OF RULING OF DISTRICT COURT

Louisiana Retirees filed a notice of cross appeal on August 12, 2009. (R(A). 524-529.)

First Issue

In the order of the district court, Judge Godbey ruled that the "principal" amount of the SIB investment was not subject to disgorgement. The issue for clarification by this Court is whether the district court meant that principal payment ***received*** by innocent investors were not subject to disgorgement or did the court mean that only payments in excess of the principal amount ***invested*** were subject to disgorgement. It is respectfully submitted that, in the event the Court was to find that innocent victims are subject to disgorgement, then only the payment in excess of the principal amount received are subject to disgorgement in accordance with the law provided at pages 33 to 34 of this brief.

For example, if retiree X had purchased a $500,000 SIB CD and had been receiving income from the CD of $35,000 per year for 10 years, what amount is subject to disgorgement? Based upon a possible interpretation of the ruling of the district court, it would appear that $350,000 would be subject to disgorgement even though he would be a net loser to the extent of $150,000. The case law only allows profits to be subject to disgorgement, and interest income should not be subject to disgorgement, if the total payments do not equal the principal amount invested. It is respectfully submitted that the proper computation of the profit subject to possible disgorgement would be an amount equal to the total cash payments (whether interest or principal redemptions) minus the principal amount of the SIB CD. The Louisiana Retirees submit this interpretation is in accord with the ruling of the district court and the interpretation of the SEC. To the extent the appeals court would interpret the ruling of the district court differently, this issue is the subject of a cross appeal and request that the Court rule in accordance with these standards.

The case of *Scholes*, *supra*, is illustrative of the computation of this amount. Further, there is no net profit on the transaction until such time as all of the initial capital contribution is recovered.

<u>Second Issue</u>

The Louisiana Retirees do not believe that any amount is subject to clawback because case law overwhelming establishes that wrongful conduct is a predicate act to disgorgement. This is extensively briefed above at pages 34 to 36.

Even if disgorgement is allowed against innocent investors for the amount in excess of the principal amount invested by the innocent investors, and wrongful conduct is not a predicate act to disgorgement, any plan seeking return of the amounts in excess of the principal invested in the SIB CD's must implement a plan of equitable disgorgement during the period of the fraud. As a matter of law, the plan cannot discriminate against innocent investors in terms of scope of people subject to the plan or the time periods that cash was paid and subject to disgorgement.[10] There is no valid reason for the failure of the Receiver to pursue an equitable claw back plan for "profits" for the same length of time against anyone, and not just account holders, whether foreign or United States citizens, who received "profits" from Stanford during the fraud time period. The period of the clawback of any amounts in excess of the principal amount of the investment must be equally implemented against all innocent investors if it is implemented against the Louisiana Retirees. The failure to disgorge "profits" from all innocent investors during the period of the fraud makes the plan inequitable.

To the extent that the Court would approve a plan of disgorgement that allows the Receiver to disgorge cash payments representing "profits" received by an innocent investor, the plan can only be equitable if it requires disgorgement by all innocent investors (including foreign investors) for the same time periods who

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[10]For example , if X received a cash payment in year 2000 of $100,000, but the plan of the receiver is only seeking disgorgement beginning January 1, 2007, the $100,000 cash payment should not be considered in computing the principal repayment or net loss.

received "profits." If a plan of equitable disgorgement for "profits" cannot be initiated because lack of jurisdiction of the court of a substantial number of innocent investors that have received cash during the term of the fraud or if the plan of disgorgement does not apply to the same time periods for all innocent investors who received cash payments, then no plan of disgorgement can be initiated against any innocent investor for any amount. This is in accordance with the dictates of the Supreme Court in the case of *Cunningham v. Brown*, *supra*, which states "equality is equity".

CONCLUSION

The Receiver has failed to explain to this Court how his plan meets requirement of "equality is equity" when his briefing completely ignores and does not address the concepts of equitable disgorgement previously raised by the SEC and Examiner. Any claw back or disgorgement requires the action to be filed against all innocent investors, on the exact same basis that it is filed against one innocent investor. The Receiver many not discriminate against innocent investors based upon nationality, jurisdiction or time periods for disgorgement. "Equality is equity" requires both equitable distributions and equitable disgorgements. The Receiver has sacrificed the "equitable disgorgement" requirement on the altar of distributions. Absent the ability to initiate equitable disgorgement against all innocent investors for the same time periods, no lawsuit should be allowed against an one innocent investor or group of innocent investors.

The Receiver's proposed remedy is not equitable. It does not treat those who received payments from Stanford in an equitable fashion. The Receiver has not even attempted to explain the concept of equitable disgorgement for the same time periods and for the cash received by all innocent investors. The Receiver's plan goes back further in time against certain innocent persons and it does not attempt to address the inequities associated with the clawback against foreign investors despite the fact that it has not been raised the Examiner and SEC on multiple occasions.

______Equity means if the Receiver clawbacks one innocent investor for "profits", equity requires that all innocent investors who received cash payments be subject to disgorgement. Equity means if the Receiver initiates a plan to include cash distributions for eight years to determine the amount of profits or cash distributions received, the same period time should be applicable to all innocent investors.

The legal inconsistencies of the Receiver's attempts of pursing innocent investors and overturning the "bright" standard of wrongful conduct being the predicate act to disgorgement have become apparent. When the Court ventures outside of individual lawsuits based upon wrongful conduct as the standard for disgorgement, based either upon trading on inside information or being a participant in the fraud, there are no objective parameters in the implementation of this remedy. It becomes an all or nothing approach once innocent investors are involved.

The approval of this Court of the Receiver's plan conflicts with the policies the SEC implements and its duty to provide for any orderly and efficient market in buying and selling securities. The effect of the development of a "nuclear weapon" of this nature proposed by the Receiver that creates a threat of a clawback on the market to rescind profitable sales or purchases of securities of all innocent investors for the period of the fraud is best determined by the SEC and not an individual receiver.

Where is the equity? Simply put, there is none and there is no basis for the Receiver's plans. As stated by the Examiner, it is a plan to capture only the "low hanging fruit." His appeal must be denied in full. Further, the cross-appeal of the Louisiana Retirees should be granted and the Court should rule in accordance with the law that an innocent investor is not subject to the clawback of any amounts unless it is involved in wrongful conduct. To the extent that the Court would approve a plan of disgorgement that allows the Receiver to disgorge cash payments received by an innocent investor in excess of his principal investment, the plan to disgorge the amount in excess of his principal investment shall only be implemented after approval by the district court of a plan of equitable disgorgement of all excess amounts received by all innocent investors (including foreign investors) for the same time periods.

If a plan of equitable disgorgement of all investors for amounts in excess of the principal amount of investment cannot be initiated because lack of jurisdiction of the court of a substantial number of innocent investor that have received cash during the term of the fraud, then no plan of disgorgement can be initiated against any innocent investor for any amount.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief of Cross-Appellants-Appellees, Joseph Becker *et al.* in both paper and electronic form has been sent hand delivery to the office for the Clerk of the United States Court of Appeals for the Fifth Circuit, and a true and correct copy of the Brief of Cross-Appellants-Appellees was served in both paper and electronic form upon the below listed counsel by U.S. mail on this 25th day of September, 2009:

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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 this brief contains 10,884 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. 32(a)(6) because this brief has been prepared in a monospaced typeface using WordPerfect 10 from WordPerfect Office 2002 in Times New Roman 14-point typeface.

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