09-10761

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RALPH S. JANVEY,

Plaintiff – Appellant – Cross-Appellee,

v.

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

Defendants – Appellees – Cross-Appellants

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

Defendants – Appellees

Consolidated with
09-10765

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

Plaintiff – Appellant

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 C.A. No. 3:09-CV-0724-N

BRIEF OF APPELLEE-CROSS APPELLANT JAMES RONALD LAWSON

COZEN O'CONNOR
Gene F. Creely, II
1221 McKinney Street,
Suite 2900
Houston, Texas 77010
Telephone: (832) 214-3900
Telecopier: (832) 214-3905

Attorneys for Appellee – Cross
Appellant
James Ronald Lawson

Of Counsel:
Thomas S. Harty*
John V. Donnelly III*
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
Counsel for Appellee-Cross Appellant
James Ronald Lawson
*Application for admission to the bar of this Court pending

September 30, 2009

Certificate of Interested Persons

Appellee – Cross Appellant James Ronald Lawson, as a relief defendant named by the Receiver for the Stanford Group of Companies ("the Receiver") submits this Brief and shows the following:

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

Attorneys of Record for the Hunton Parties

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

Attorneys of Record for the SEC

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

Court Appointed Examiner

Ben L. Krage
Charlie E. Gale
KRAGE & JANVEY LLP
2100 Ross Ave., Suite 2600
Dallas, Texas 75201

Attorneys of Record for Court Appointed Receiver

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

Attorney of Record for Christopher Allred and Patricia A. Thomas

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

Attorney of Record for Jay Stuart Bell, Gregory Alan Maddux, David Jonathan Drew, Andruw Rudolph Bernardo Jones, Carlos Felipe Pena, Johnny David Damon, Bernabe Williams

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

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

Attorneys of Record for Divo Haddad Milan and Singapore Puntamita Pte. Ltd.

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

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

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

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

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

Attorney of Record for James M. Davis

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

Attorney of Record for Laura Pendergest-Holt

Hank Mills
2623 Kleinert Avenue
Baton Rouge, LA 70806

Attorney of Record for Hank Mills

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

Attorney of Record for Maria Villanueva

Bradley W. Foster

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

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

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

Attorney of Record for HMS&B, Ltd.

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

Attorney of Record for Roberto Ulloa

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

Attorney of Record for Joseph Becker, Terry Beven, Kenneth Bird, James Brown, Murphy Buell, John C. Busceme, Virginia Buscheme, Robert Bush, Gene Causey, Joseph Chustz, Darrell Courville, William Dawson, Deborah Dougherty, Gwen Fabre, Richard Feucht, Joan Feucht, Kendall Forbes, Deborah Forbes, Lynn Gildersleeve, Willa Mae Gildersleeve, Robert V. Gildersleeve, Gordon C. Gill, Robert Graham, Jason Graham, Benton B. Johnson, William Bruce Johnson, Jennifer Savoic, Dennis Kirby, Kerry R. Kling, Teresa Michelle Lamke, Don Landers, Laura Lee, Troy Lillie, Ron Marsten, Susan Marsten, Billie Ruth

McMorris, Ronald McMorris, Virginia McMorris, Thomas Moran, Arthur Ordoyne, Bennie O'Rear, Claudia O'Rear, Mary Ann Paternostro, Larry Perkins, Charles Sanchez, Mamie Sanchez, Thomas Slaughter, Larry Smith, James Stegall, Carol Stegall, Walter Stone, Terry Tullis, Ron Valentine, Anthony Ventrella, Olivia Sue Warnock, Arthur Waxley, Charles White, Kenneth Wilkewitz, Matha Witmer, Bruce Stone, Sharon Witmer, Martha Johnson, John B. Buscheme

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

Attorneys of Record for Eduardo Najera and Jennifer Najera

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

Attorney of Record for Bobby G. Wilkerson

Thomas S. Harty
John Donnelly
Gene Creely, II
Kendall Kelly Hayden
COZEN O'CONNOR
2300 Bankone Center
1717 Main Street
Dallas, Texas 75201

Attorney of Record for James Ronald Lawson

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

Attorney of Record for Marie Nieves

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

Attorneys of Record for Pershing LLC

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

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

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

Attorney of Record for Hannah Kay Peck

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

Attorneys of Record for Numa L. Marquette and Gail G. Marquette

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

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

For additional interested parties, please see the attached Exhibit A. In addition to the parties listed in Exhibit A attached hereto, other parties may exist whose identities are not known to the Mr. Lawson or his counsel but who will be affected by the outcome of this proceeding.

Respectfully submitted,
COZEN O'CONNOR

Gene Creely

By: Gene F. Creely, II
State Bar No. 05060550
COZEN O'CONNOR
1221 McKinney Street,
Suite 2900
Houston, Texas 77010
Telephone: (832) 214-3900
Telecopier: (832) 214-3905

Of Counsel:
Thomas S. Harty*
John V. Donnelly III*
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103
Counsel for Appellee-Cross Appellant
James Ronald Lawson
*Application for admission to the bar of this Court pending

September 30, 2009

STATEMENT REGARDING ORAL ARGUMENT

Oral argument would likely aid this Court in evaluating and deciding the issues of national importance raised by this appeal. James Ronald Lawson is the victim of a Ponzi scheme orchestrated by Stanford International Bank, Ltd., Stanford Group Company, Stanford Capital Management, LLC, Robert Allen Stanford, James M. Davis, Laura Pendergaest-Holt, Stanford Financial Group, and the Stanford Financial Group Bldg Inc. (collectively the "Stanford Receivership Defendants"). Specifically, the Stanford Receivership Defendants and others induced Mr. Lawson to purchase Certificates of Deposit issued by Stanford International Bank by representing, *inter alia, that these investment vehicles provided a safer alternative than traditional financial institutions and the equity market.*

Unaware that the Stanford International Bank Certificates of Deposit were a Ponzi scheme, Mr. Lawson invested $2.9 million in these investment vehicles. Each Certificate of Deposit was evidenced by a subscription or renewal agreement as the case may be, which memorialized the term of the purchase and the sums deposited. Months before The Securities Exchange Commission brought its action against the Stanford Receivership Defendants, several of Mr. Lawson Certificate of Deposits matured and he elected to have $1.3 million directed to him or alternate investment vehicles.

Now, acting on behalf of the Stanford Receivership Defendants seek unprecedented relief. Despite the fact they (i) defrauded Mr. Lawson and (ii) still owe Lawson in excess of $1.6 the Stanford Receivership Defendants seek to force Mr. Lawson to disgorge his own money to the Receiver. Mr. Lawson's assets would then be used to pursue other investors in litigation and possible redistribute the balance to the investors - although the latter appears a remote possibility at best.

Ironically, because the Receiver has conceded that Mr. Lawson is an innocent victim, he has asserted no claim against him. Instead, the Receiver names Mr. Lawson as a so-called "relief defendant" and contends that the district court can order Mr. Lawson to disgorge the money he received, based on the Receiver's definition of "equity". This position is unprecedented and has been opposed by the Examiner appointed by the district court as it is well established that a party is not an appropriate relief defendant unless they have received ill-gotten gains and have no ownership interest in or legitimate claim to those funds.

Oral argument will likely assist the Court in answering the following questions:

1. Under either contract or tort law, does Mr. Lawson have an ownership interest in or legitimate claim to the funds he recovered such that he is not an appropriate relief defendant?

2. If Mr. Lawson is not an appropriate relief defendant, should the district court have dismissed the action for lack of subject matter jurisdiction?

3. If the district court had subject matter jurisdiction over this action, does the Receiver have standing to assert any claims against Mr. Lawson?

4. Does the district court have authority to expand broadly the powers of a receiver pursuant to the Receiver's proposed rule, even though doing so would violate principals of federalism by undermining existing state statutory law and result in bad policy?

5. Can an asset freeze properly be applied to the money in Mr. Lawson's Individual Retirement Account, even though such a freeze is prohibited by Texas law?

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STATEMENT OF JURISDICTION

Mr. Lawson adopts and incorporates as if fully set forth herein the Statement of Jurisdiction as set forth in the Brief of Intervenor, Court-Appointed Examiner, John J. Little. By way of further statement, Mr. Lawson agrees that the Receiver's appeal from the district court's order dated August 4, 2009 was timely filed. Because Mr. Lawson filed his cross-appeal on September 3, 2009, it is timely filed as well.

ISSUES PRESENTED FOR REVIEW

This case presents the following three issues for review. The first issue is the question presented by the Receiver's appeal.

1. Mr. Lawson is an innocent victim of a Ponzi scheme in which he lost $1.6 million of the $2.9 million he used to purchase Certificates of Deposit from Stanford International Bank, Ltd. On behalf of the entities involved in perpetrating the fraud, the Receiver sued Mr. Lawson as a "relief defendant." The Receiver seeks to take from Mr. Lawson the $1.3 million he received when two of his Certificates of Deposit matured, which happened months before the Receiver was appointed and the alleged Ponzi scheme revealed. Courts define a proper "relief defendant" as someone who has no interest in the property which is the subject matter of the litigation. Does Mr. Lawson have an "ownership interest" or "legitimate claim" to the funds that were returned to him, such that he is not a proper relief defendant?

Mr. Lawson raises the following two issue on cross-appeal:

2. If Mr. Lawson and other investors are not proper relief defendants, did the Court err by authorizing the Receiver to proceed with claims against the named relief defendants for "interest" they received in excess of the amount they paid to the Ponzi scheme?

3. Because Texas law prohibits freezing assets contained in an individual retirement account ("IRA"), did the district court err by allowing the freeze to apply to Mr. Lawson's IRA?

Mr. Lawson submits that the answer to these three questions is, yes. Rather than segregate the brief into issues on appeal and cross appeal, because these questions are intertwined, Mr. Lawson discusses them together.

STATEMENT OF THE CASE

Mr. Lawson adopts and incorporates as if fully set forth herein the Statement of Jurisdiction as set forth in the Brief of Intervenor, Court-Appointed Examiner, John J. Little.

STATEMENT OF RELEVANT FACTS

I. James R. Lawson

James Ronald Lawson, named as relief defendant by the Receiver, is 65 years old and maintains a residence with his wife of 30 years at both 2301 Spanish River Road in Boca Raton, Florida and 7 Tanbark Court in Voorhees, New Jersey. He has four sons, ages 20 to 42. (Affidavit of James Ronald Lawson attached hereto as Exhibit B).[1]

[1] Because the Receiver failed to serve Mr. Lawson with notice of the action against him in accordance with the Federal Rules of Civil Procedure, Mr. Lawson did not learn of that action until August 26, 2009, well after the district court has issued its decision. Mr. Lawson will file this affidavit with the district court and will file a motion to supplement the appendix on appeal. The Receiver will not be prejudiced by the consideration of Mr. Lawson's affidavit. Except for the facts concerning the lack of notice of the Receiver's action against him, the Receiver is

As a victim of Stanford's fraud, Mr. Lawson has (i) suffered substantial losses; (ii) seen his retirement compromised; (iii) suffered severe emotional stress and (iii) seen his family damaged. At present, Mr. Lawson has suffered losses exceeding $1,675,556 arising from his investment in Stanford International Bank ("SIB") Certificate of Deposits (the "CDs"). The Receiver seeks to increase his losses by an additional $1,300,000 (approx.) to $2,970,000, apparently to fund on-going litigation and expense associated with the Receivership.

The Receiver argues, among other claims, that Mr. Lawson has no interest in the assets he has invested in various funds, managed by Stanford or its agents on his behalf, including IRA retirement funds held by Pershing LLC as Mr. Lawson's "Custodian". These funds were only invested with Stanford for an extremely limited time and were always identified as the distinct assets of Mr. Lawson.

However, the Receiver has never spoken to Mr. Lawson, responded to any request for information and has no knowledge of the basis for Mr. Lawson's depositing investment capital money with Stanford to manage. For 35 years, Mr. Lawson has been employed in various capacities in the medical technology industry, on an international and domestic basis. Most recently, he was employed by Stryker Corporation as an Executive Vice President. Through hard work and at great personal sacrifice, Mr. Lawson has been very successful in his field.

II. Lawson's Investment History & Involvement With Stanford

Due to his business success, Mr. Lawson has had the opportunity to accumulate and invest assets with a number of investment bankers and advisors. The first "national" institution which he entrusted with his retirement funds and

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already aware of the information set forth in the affidavit because, in June 2009, Mr. Lawson filed a claim form required by the Receiver.

families' well-being was NationBank's Private Banking Group. NationsBank eventually went through a number of corporate acquisitions and iterations until it was finally acquired by Bank of America. Over the years Mr. Lawson's account was managed by a number of portfolio managers, the last being John Nee ("Nee").

In or about 2005, Nee left Bank of America for the Stanford Group. Mr. Lawson knew virtually nothing about this enterprise. Further, he had not previously invested with this organization. Nee began to solicit Mr. Lawson to leave Bank of American and transfer his portfolio to Stanford. Based on Nee's representations concerning Stanford philosophy, performance and reputation, Mr. Lawson transferred a significant portion of his investment portfolio to their office in 2005.

After he transferred Mr. Lawson's portfolio to Stanford, Mr. Nee began to recommend that Mr. Lawson invest a portion of his assets into SIB. Nee repeatedly assured Mr. Lawson that this was a safer and more conservative alternative then "US banks" which were represented to be over-extended and in financial distress. Mr. Lawson was repeatedly assured there CDs were essentially a secure, no-risk investment. Over the years, Mr. Lawson invested a total of $2,970,000 of his retirement assets, spread in varying amounts over six Stanford CDs. Mr. Lawson has received back less than $1,300,000, and has thus sustained a loss of more than $1,600,000.

In 2008, upon the maturation of two of these CDs (CD 177662 and CD 178288), Mr. Lawson received approximately $1,294,000. He used some of the money received to pay off a home mortgage and other living expenses. At his instruction, the money Mr. Lawson received from these two CDs was transferred from Stanford Bank to his brokerage account that was overseen by Pershing LLC. From the time those funds were transferred until the time the account was frozen by the Court in connection with the underlying case, the funds were under Mr. Lawson's control (not the control of Stanford Bank) and could have been moved to another account by Mr. Lawson at any time.

Around the same time these two CDs matured, a third CD also matured. Mr. Lawson "rolled over" that Stanford CD, reinvesting it in another Stanford CD. The remaining three Stanford CDs (including the Rolled Over Stanford CD), CD 161335, CD 160209, and CD 300348, had not yet matured at the time the Receiver was appointed. These CDs had a combined value of approximately $1,769,000, not including the interest that was supposed to be earned thereon. Accordingly, as a result of his investment in Stanford CDs, Mr. Lawson have sustained a net loss of approximately $1,600,000.

At no time prior to the appointment of the Receiver did Mr. Lawson know or suspect that investments through Stanford International Ltd. were not legitimate and secure. He was not an "insider" on any alleged scheme by the Stanford Receivership Defendants. He had no knowledge of the alleged fraud engaged in by the Stanford Receivership Defendants and others. Mr. Lawson invested his money according to the advice of his financial advisor to yield a slow but steady rate of return for use in his retirement.

Separate from his investment in the CDs, Mr. Lawson had three other accounts that had been set up through Stanford, but were managed by Pershing LLC and Dana (collectively the "Frozen Accounts"). Two of these accounts are brokerage accounts, the third is an Individual Retirement Account ("IRA"). The combined value of these accounts is approximately $1,650,000, as of March 2009, approximately $885,000 of which is in the IRA.

Although Pershing LLC and Dana provide asset management services to Mr. Lawson, at all times up to the freeze, the Frozen Accounts were under Mr. Lawson's ultimate control. With respect to the brokerage account, until the account was frozen, Mr. Lawson was at all times free to close the account, withdraw the funds, or write checks against those funds as he deemed appropriate. With respect to the IRA account, Mr. Lawson remained free to transfer that account to another entity at any time, as he had when he transferred it from Bank of America to Stanford to be managed by Pershing and Dana.

III. The Receiver's Failure to Serve Lawson; Lawson's Proof of Claim

On August 26, 2009, Mr. Lawson learned for the first time that Mr. Janvey, as Receiver for the Stanford Receivership Defendants had sued him. The Receiver had pleadings left at Mr. Lawson's Florida residence. Neither Mr. Lawson's family nor Mr. Lawson were home through the summer and thus he had no idea this action was pending.

In accordance with the instructions on the Receiver's website and based on Mr. Lawson's last financial statements from SIB dated March of 2009, Mr. Lawson completed a claim form and submitted a claim for the remaining $1,600,000 that he still had invested in the Stanford CDs at the time the Receiver was appointed. In addition, as required by the Receiver, in completing the claim form, Mr. Lawson identified the CDs that he had invested in and the Frozen Accounts that he had through Stanford, that were managed by Pershing. Based on the Receiver's instructions, Mr. Lawson believed that he needed to complete and submit these forms so that the Receiver would return the money that he had invested with the Stanford Defendants to him.

IV. The Receiver

Pursuant to the district court's order, Mr. Janvey was appointed the Receiver for the Stanford Receivership Defendants. (Amended Order Appointing Receiver, p. 1, Mar. 12, 2009, 09-cv-0298). He does not represent the investors.

The Receiver alleges that the Stanford Receivership Defendants and others engaged in a massive Ponzi scheme. According to the Receiver, the Ponzi scheme consisted of persuading innocent investors to invest in Certificates of Deposit offered by Stanford International Bank, Ltd. The Stanford Receivership Defendants and others involved in the scheme represented to investors that their money would be invested in a diverse portfolio of holdings throughout the world and that the returns on that portfolio allowed Stanford International Bank to pay slightly above market rates on the CDs. The Receiver states further that the Stanford Receivership Defendants did not invest the money as promised, but converted some of it to their own uses. The Receiver states that some innocent purchasers of the Stanford CDs earned a profit on their transactions, some lost all of the money they had invested in the Stanford CDs, and others, like Mr. Lawson, lost money but less than they had invested because they recovered some of their investment before the SEC commenced its action against the Stanford Receivership Defendants.

When the SEC initiated its enforcement action against the Stanford Receivership Defendants in February 2009, the district court entered an order freezing all accounts that had a potential connection to the Stanford Receivership

Defendants. (Supp. R. 0073, Case 3:09-cv-00298-N, Doc. 8). At the Receiver's request, in March 2009, the district court continued the freeze order as it applied to accounts at Pershing, Dana and NVQ. (Supp. R. 0128-0133, Case 3:09-cv-00298-N, Doc. 239). In June 2009, concluding that enough was enough, the district court ordered the Receiver to decide whether the Stanford Receivership Defendants' estate had any claims against any of the account holders by August 4, 2009—some 6 months after the Receiver and his army of attorneys and accountants hit the ground. (Case 3:09-cv-00298-N, Doc. 533). The district court ruled further that the freeze order would expire as of August 3, 2009, and the frozen accounts would be released. (*Id.* ¶3).

Three of Mr. Lawson's accounts were (and remain) frozen. (Lawson Aff. ¶38.) An IRA account, which does not contain any proceeds from Mr. Lawson's investments in the Stanford CDs, and two investment accounts, one of which contains some money derived from the Stanford CDs. (*Id.* ¶35.) At Mr. Lawson's direction, the money in these accounts is managed by Pershing LLC. At all times, Mr. Lawson has retained control over these three accounts. (*Id.* ¶39.) The Stanford Defendants have never had control over these accounts. (*Id.* ¶39.)

As he acknowledges, the Receiver has released some 97% of the originally frozen accounts. He has released all the accounts of anyone who received proceeds from the Stanford CDs but had less than $250,000 in their account. The Receiver has not offered an explanation for his arbitrary decision to allow people with less than $250,000 to take the money and leave while seeking to sue innocent victims like Mr. Lawson who invested more than $250,000.

On July 28, 2009, the Receiver filed an amended complaint, in which he named Mr. Lawson as a relief defendant. The Receiver acknowledges that Mr. Lawson is an innocent victim of the Ponzi scheme. And the Receiver knows that Mr. Lawson lost $1.6 million of his $2.9 million investment. Nevertheless, the Receiver sought permission from the district court to sue Mr. Lawson for $1.3 million he got back before the Receiver was appointed. The Receiver recognizes that the Stanford Receivership Defendants stole this money from Mr. Lawson in the first place, but contends that Mr. Lawson must return it to the den of thieves estate.

Furthermore, the Receiver asserts that he could force Mr. Lawson to disgorge his own money without bringing any claim against Mr. Lawson and simply have the district court declare through summary proceedings that the Receiver has the right to disgorge this money from Mr. Lawson. Compounding this unprecedented request for relief is the fact that the Receiver failed to serve Mr. Lawson with this amended complaint, as required by the Federal Rules of Civil Procedure. As a result, Mr. Lawson did not learn about the Receiver's efforts to disgorge his $1.3 million until the end of August, well after the district court had ruled on the Receiver's amended complaint.

SUMMARY OF ARGUMENT

This case involves a Receiver run amok. In direct opposition to the SEC's policy and contrary to well established case law, the Receiver seeks to sue innocent victims of the Stanford Receivership Defendants' fraud. The Receiver wants to force victims like Mr. Lawson to disgorge their own assets to him, so he can continue to sue other innocent investors based on unprecedented theories, and without actually having filed a claim against them. And he seeks to proceed against these innocent victims:

(i) without having properly served them with complaint;
(ii) despite the fact that many of them, like Mr. Lawson, are owed far more then they ever received from the Stanford Receivership Defendants;
(iii) notwithstanding the court-appointed Examiner's objections;
(iv) while ignoring the repeated inconsistencies in his own claims, which results in anything but "equitable" relief, but instead a smorgasbord of litigation which serves to line the pocket of a myriad of professionals but points to little relief for the victims.

In the Receiver's eyes, "justice" demands that some, but not all, of these innocent victims suffer the full impact of the fraud visited upon them by the very people the Receiver represents. And that they should pay the Receiver and his cadre of advisors, including a public relations firm, to do that to them, so they then get back a small percentage of whatever is left after the Receiver is done dispensing his personal brand of justice. In reality, the primary beneficiaries of the Receiver's proposed rule would be the Receiver, his counsel, and his accountants. If his proposed rule were adopted, they would receive an economic windfall, spending countless hours chasing after innocent victims of the fraud who may have recovered some of their money at any time in the past. Equally troubling to the economic windfall he would receive is the manner in which the Receiver has conducted his handling of the estate and this action.

Other than sue the victims of the fraud, it is not clear what the Receiver has done to preserve the value of the estate. The Receiver has not announced the sale of any of the "good" arms of the Stanford Receivership Defendants' empire. Nor has he indicated that he has attempted to even locate potential buyers for these other divisions. All legitimate areas of inquiry and concern—which are overshadowed by this unprecedented attack on innocent victims of the Stanford Relief Defendants fraud.

To justify the above the Receiver has repeatedly misrepresented facts and advanced arbitrary and inconsistent positions to justify his actions and his questionable approach and conduct of this litigation. For example:

- **The Receiver Misrepresents Who Controlled Mr. Lawson's Accounts**. Mr. Lawson was the sole individual in control of his accounts, with Pershing acting as custodian, until the moment the Receiver seized control of the Stanford Receivership Defendants' estate and froze all of Mr. Lawson's assets. In a Report to the district court dated April 27, 2009 and his Amended Complaint, the Receiver acknowledges that innocent victims like Mr. Lawson possessed and controlled the money that was returned to them. Report of the Receiver, April 23, 2009, at 13 (attached hereto as Exhibit C) (Case 3:09-cv-00298-N, Doc. 336); Receiver's Amended Complaint, USCA5 204 ¶8. But in his brief before this Court he argues that the Stanford Receivership Defendants controlled that money. (Receiver's Br. at 20-21.) That is false. The accounts were Mr. Lawson's exclusive property, existing solely in his name and control at all times.

- **The Receiver Improperly Named Mr. Lawson As A Relief Defendant**. The Receiver casts the "innocent investors" as "relief defendants" in an attempt to bring their funds within his grasp. However, according to well-settled law, "relief defendants" have no ownership interest in the property claimed. By the Receiver's own admissions regarding the investors' property rights, these investors are by no means proper relief defendants. He likely employed that fiction because he cannot state a direct claim against Mr. Lawson.

- **The Receiver "Set Up" Innocent Victims With His Claim Form**. Via his website, the Receiver instructed investors who had lost money in the Stanford Receivership Defendants' alleged Ponzi scheme to fill the form out, sign it and send it in to the Receiver to receive payment from the Receiver or release of an account. The Receiver used the forms to identify and obtain jurisdiction over individuals he intended to sue. Instead of returning assets, the Receiver attempted to force these innocent investors to "disgorge" through summary proceedings thie rown assets, notwithstanding the losses they may have sustained and without providing the notice required by the Federal Rules of Civil Procedure.

- **Mr. Lawson Was Not A Chosen Investor**. The Receiver tries to cast the large and diversely situated relief defendants as a classic Ponzi scheme's "chosen few", alleging that all money should be returned to the estate because a small minority of individuals should not profit because the defendants specifically chose to enrich them. Mr. Lawson recovered some of his funds because the Stanford CDs he had purchased matured. He was not the beneficiary of favoritism by the engineers of the allegedly corrupt investments.

- **The Receiver's Arbitrary Decisions**. Trumpeting the slogan "equity is equality," the Receiver seeks to inflict upon the "relief defendants" the full measure of the fraud perpetrated on them previously by the Stanford Receivership Defendants. Yet, it appears that he is targeting only those with over $250,000 in investments that filled out his claim form. His arbitrary decision about who to sue is not equity.

- **The Receiver Misrepresents The Law**. The Receiver claims that his efforts are routine duties of a receiver but the law he cites does not support his unprecedented and sweeping attempts to disgorge money recovered by innocent investors that does not constitute profits.

This conduct does not befit a Receiver. The Receiver was appointed to marshal the assets of the Stanford Receivership Defendants for the benefit of the injured investors. Other than sue innocent victims of the fraud, it is not clear what the Receiver has done to carry out his charge. The Stanford Receivership Defendants allegedly had many robust, legitimate business lines. Has the Receiver sold any of those assets? Has he solicited any bids? Rather than attend to that serious business, the Receiver seems intent on racking up fees (thereby further depleting the estate) while chasing after the people who were defrauded.

Despite the Receiver's shenanigans, this is a simple case. Mr. Lawson invested $2.9 million in Stanford CDs. Due to the alleged fraud, he has lost $1.6 million of that investment and remains a creditor of the estate for that amount. He recovered only $1.3 million of his total investment when certain of his Stanford CDs matured – well before the Receiver was appointed.

The Receiver concedes that Mr. Lawson is an innocent victim. He further concedes that he has no actual claim against Mr. Lawson. Nevertheless, on behalf of the thieves' estate, the Receiver seeks to force Mr. Lawson to "disgorge" $1.3 million. Indeed, the Receiver seeks permission to sue any investor who ever received any money back from Stanford International Bank in connection with the Stanford CDs, unless he arbitrarily exempts you from this process.

The Receiver's argument and his action fail because Mr. Lawson is not an appropriate relief defendant. A proper relief defendant does not have any interest in the property at issue. Classic examples of relief defendants include trustees, agents, and depositories. These categories of people have no ownership interest in or legitimate claim to the property at issue. They are disinterested. As a result, federal courts can order relief against proper relief defendants provided that the relief defendant possesses ill-gotten gains and has no legitimate claim to those gains.

As either a party to an enforceable contract or a tort creditor who was victimized by the Stanford Receivership Defendants' fraud, Mr. Lawson has an ownership interest in and legitimate claim to the money he got back. Accordingly, he is not an appropriate relief defendant.

The district court erred by not first addressing the threshold issue of whether Mr. Lawson was an appropriate relief defendant. Had the district court addressed this issue, it would have concluded that Mr. Lawson is not a proper relief defendant. As a result, the Court lacked subject matter jurisdiction to entertain the action. Instead, the court overlooked this threshold issue and went straight to the heart of the issue, when can the receiver sue, and for what? The district court concluded correctly that there exists no basis for the Receiver to try to recover the original contributions recovered by innocent investors in the Ponzi scheme. The district court held further that the Receiver could bring an action to recover "interest" received. That decision was in error because it implied that the Receiver could bring such claims in equity against investors as "relief defendants." He cannot. Moreover, to the extent the district court concluded that the Receiver could sue investors who suffered a net loss, but received "interest" on a particular Stanford CD, the decision was also in error. The Receiver can seek to recover total "profits" from innocent investors, but he must do so through a claim under the Texas Fraudulent Transfer Act.

STANDARD OF REVIEW

Whether the District Court had subject matter jurisdiction over the Receivers action against Mr. Lawson as a "relief defendant" is subject to *de novo* review. *Sealed Appellant v. Sealed Appellee*, 130 F.3d 695, 697 (5th Cir. 1997) ("We review jurisdictional issue de novo."). Likewise, whether an IRA can be subject to the asset freeze is a question of law subject to *de novo* review.

ARGUMENT

I. Because Mr. Lawson Is Not A Proper Relief Defendant, The District Court Lacked Subject Matter Jurisdiction And Should Have Dismissed The Receiver's Action

The Receiver has not alleged any claim against Mr. Lawson. Instead, he named Mr. Lawson as a "relief defendant" and sought to engage in summary proceedings to disgorge money that Stanford International Bank had returned to Mr. Lawson months before the Receiver was appointed. The district court did not address whether Mr. Lawson was an appropriate relief defendant. Because Mr. Lawson is not a proper relief defendant, the district court lacked subject matter jurisdiction and should have dismissed the Receiver's action in its entirety.

The notion of a "relief defendant" has been characterized as an "obscure common law concept." *Commodity Futures Trading Commission v. Kimberlyn Creek Ranch, Inc.*, 276 F.3d 187, 191-192 (4th Cir. 2002). A "relief" or "nominal" defendant "can be joined to aid the recovery of relief without an assertion of subject matter jurisdiction only because he has no ownership interest in the property which is the subject of litigation." *SEC v. Cherif*, 933 F.2d 403, 414 (7th Cir. 1991). Classic examples of a relief defendant are a trustee, agent, depository, or recipient of a gift. *See SEC v. Ross*, 504 F.3d 1130, 1141 (9th Cir. 2007); *SEC v. Founding Partners Capital Management*, 2009 WL 1606491, at *3 (M.D. Fla. 2009) (citing *SEC v. Colello*, 139 F.3d 674, 676 (9th Cir. 1998)). The relief defendant "holds the subject matter of the litigation 'in a subordinate or possessory capacity as to which there is no dispute.'" *Cherif*, 933 F.2d at 414 (quoting *Colman v. Shiner*, 163 F. Supp. 347, 351 (W.D. Mich. 1958)). The relief defendant is "not a real party in interest . . . because he has no interest in the subject matter litigated. His relation to the suit is merely incidental and 'it is of no moment [to him] whether one or the other side in [the] controversy succeeds.'" *Id.* (quoting *Bacon v. Rivers*, 106 U.S. 99, 104 (1882)). "Because of the non-interested status of the nominal party, there is no claim against him and it is unnecessary to obtain subject matter jurisdiction over him once jurisdiction over the defendant is established." *Id.* Even though a relief defendant is not accused of any wrongdoing, federal courts may order equitable relief against them provided that the relief defendant: (1) has received ill-gotten funds; ***and*** (2) does not have a legitimate claim to those funds." *SEC v. Cavanaugh*, 155 F.3d 129, 136 (2d Cir. 1998) (emphasis added).

A. <u>The Money Returned to Mr. Lawson Belongs To Him</u>

Here, Mr. Lawson is not a proper relief defendant because he has a "legitimate claim" to the returned funds. Mr. Lawson paid $2.9 million to Stanford Bank in exchange for the Stanford CDs. He was owed that money plus interest. He received only $1.29 million. As soon as this money was returned to Mr. Lawson, it became his money. The money does not belong to the Stanford Receivership Defendants' estate. Mr. Lawson took it in good faith and with no knowledge of the alleged fraud. Moreover, Mr. Lawson demonstrated his ownership of the money by directing that it be deposited into his investment account with Pershing, which he controlled. Mr. Lawson then used some of this money to pay off a mortgage and for other personal expenses. Although the Receiver now argues otherwise, previously, he conceded that investors like Mr. Lawson possessed and controlled the funds that were returned to them:

> *These people own securities and other assets that are held in separately identifiable* accounts in their names or for their benefit that they established with the Stanford companies. . . . *Although the assets in these accounts belong to the account owners, the accounts were frozen at the outset of the Receivership pursuant to the Court's order.*

Report of the Receiver, April 23, 2009, at 13 (attached hereto as Exhibit C) (Case 3:09-cv-00298-N, Doc. 336) (emphasis added).[2] *See also* Receiver's Amended Complaint, USCA5 204 ¶8 (stating that money returned to investors by Stanford International Bank was placed into "accounts in the name of or controlled by the Relief Defendants").

Under both contract law and tort law, the money Mr. Lawson received belongs to him. When Mr. Lawson invested in the Stanford CDs, he entered into a contract with Stanford International Bank. Pursuant to that contract, after a period of time passed, Mr. Lawson was entitled to receive his initial contribution as well as interest earned thereon at the agreed upon rate. When two of his Stanford CDs matured, Stanford International Bank honored its contract, returning to Mr. Lawson the money due him. And the Receiver has no basis for retroactively disturbing the performance of the contract.

Although the contract is not void, it is voidable by Mr. Lawson, the innocent party. *See, e.g., Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 387 (1970); *Commodity Futures Trading Commission v. Hanover Trading Corp.*, 34 F. Supp. 2d 203, 206 (S.D.N.Y. 1999). But even if Mr. Lawson voided the contract, he would still be entitled to retain the money returned to him because he would be a tort creditor. *Donnell v. Kowell*, 533 F.3d 762, 772, 775 (9th Cir. 2008).

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[2] Mr. Lawson will file a Motion to Supplement the Record on Appeal to include this report. Counsel for the Receiver has indicated that they will oppose that Motion and try to keep this document out of the record.

Mr. Lawson would be a tort creditor up to the $2.9 million he invested in the Stanford CDs, and could keep up to that amount of returned money. It does not matter that others are similarly situated. Mr. Lawson has a legitimate claim of ownership of the money, he is entitled to receive it and retain it, and remains a creditor for the amount he has not yet recovered. *Id.* at 775.

Furthermore, the Receiver has no support for his position that Mr. Lawson is an appropriate "relief defendant." The Receiver does not cite a single case in which a receiver was allowed to bring a suit in equity against an innocent investor as a relief defendant to disgorge money that had been legitimately returned to the investor, but did not exceed the investor's contributions. However, ample authority establishes that where the test for the relief defendant is not satisfied, the action should be dismissed. *E.g., Ross*, 504 F.3d at 1141; *Cherif*, 933 F.2d at 414; *Founding Partners*, 2009 WL 1606491, at *4; *Commodity Futures Trading Commission v. Sarvey*, 2008 WL 2788538 at *4 (N.D. Ill. July 17, 2008); *Picard Chem. Inc. Profit Sharing Plan v. Perrigo Co.*, 940 F. Supp. 1101, 1136 (W.D. Mich. 1996).

Recently, under similar circumstances involving a Ponzi scheme, a court rejected the SEC's attempt to label innocent, third-party Sun Capital a relief defendant merely because it received money from the Ponzi scheme pursuant to a contract. *Founding Partners*, 2009 WL 1606491, at *3. In that case, the SEC named Sun Capital as a relief defendant and sought to freeze $550 million of assets that Sun Capital received from defendant Founding Partners, which had fraudulently raised those funds. Sun Capital had received these assets pursuant to loan agreements with Founding Partners. The court agreed with the SEC that the first prong of the relief defendant test was satisfied because the money provided to Sun Capital was ill-gotten gains that had derived from the fraud committed by Founding Partners. But the court concluded that the second prong of the test was not satisfied because Sun Capital had an "ownership interest" in the property. As a result, the court concluded that Sun Capital "is not a proper relief defendant." *Id.* at *3.

As in *Founding Partners*, here, the Receiver cannot satisfy the second prong of the relief defendant test with respect to Mr. Lawson. Assuming *arguendo* that the money paid to Mr. Lawson was stolen from other investors and that other investors also have claims against the Receivership estate, that does not diminish Mr. Lawson's ownership of the returned funds.

The Receiver implicitly concedes this point when he admits that employees who perform services or vendors who provide materials have a legitimate claim to the money they received in exchange, all of which, the Receiver claims was stolen from investors. (Receiver's Br. at 27.) This circumstance is no different. Whether analyzed under contract law or tort law, Stanford Bank owed Mr. Lawson at least the $2.9 million he paid it in exchange for the Stanford CDs. Thus, Mr. Lawson has given more than full consideration for the $1.29 million that was returned to him.

Furthermore, because the returned funds are less than Mr. Lawson's contributions, the return of these funds has had no effect on the estate of Stanford Bank. *See Donnell, 533 F.3d at 772; Scholes v. Lehman*, 56 F.3d 750, 757 (7th Cir. 1995). It is as if these funds were never transferred to Stanford International Bank. As Judge Posner observed in *Scholes*, where full consideration is given, "then even if there is intent to defraud [on the part of the Ponzi Scheme,] there can be no harm to creditors, since the debtor's estate has not been depleted by a cent." *Id.* Accordingly, in *Scholes*, the Seventh Circuit held that an innocent investor in the Ponzi scheme could keep all of the money he paid into the Ponzi scheme. *Id.* at 757-758. The court required the investor, who the receiver had sued as a defendant under the Illinois Fraudulent Transfer Act, to return only his profit—the difference between what he put in and what he received.[3]

B. <u>The Receiver's Attempt To Proceed Against Mr. Lawson As A Relief Defendant Shocks The Conscience</u>

Although he acknowledges the standard for a relief defendant, the Receiver ignores it. (Receiver's Br. at 16-17). The Receiver does not and cannot explain how the money recovered by Mr. Lawson belongs to the Stanford Receivership Defendants and not Mr. Lawson. He says only that the money paid out by the Stanford Receivership Defendants was stolen from other investors. As demonstrated above, that is insufficient to satisfy the second prong of the relief defendant test.

Indeed, a simple comparison of Mr. Lawson with Pershing LLC, who is the custodian of Mr. Lawson's accounts, illustrates that Mr. Lawson is not a proper relief defendant. Here, the Receiver has named both Mr. Lawson and Pershing as relief defendants. Pershing is a depository that holds money owned by Mr.

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3 In his brief in this case, the Receiver questions why there should be a distinction between claims by a receiver to take profit and claims to take the original contributions from innocent investors. (Receiver's Br. at 28.) The reason is obvious. As the Seventh Circuit discussed in *Scholes*, profits are distinct from contributions because the investor did not give equivalent value for the profit. As a result, his retention of the profit would deplete the estate's resources. This would be to his benefit, but at the expense of the other innocent investors. Because Mr. Lawson did not profit, but instead suffered a substantial loss, he is entitled to retain the full amount of what he recovered.

Lawson. As a result, if the Receiver could state a claim against Mr. Lawson as a direct defendant, Pershing would be an appropriate "relief defendant". Because the money in Mr. Lawson's investment account does not belong to Pershing, it has no real interest in whether Mr. Lawson keeps that money or not. In contrast, Mr. Lawson is not an appropriate relief defendant. He is not holding the money in his account for anyone else. He owns that money; and no one has a more significant interest in whether he keeps that money than he does.

Under these circumstances, it is shocking that the Receiver contends that Mr. Lawson is a proper relief defendant. Even more surprising, the Receiver tried to disgorge millions of dollars from Mr. Lawson and others on the fly. The Receiver filed the amended complaint just a few days before the hearing, did not serve it on Mr. Lawson as required by the Federal Rules of Civil Procedure, and then argued that the district court could conduct summary proceedings, require the Examiner to stand in as counsel for all investors, and grant the requested relief. That is absurd.

Equally appalling is the Receiver's willingness to misrepresent the facts and his intentions to this Court. For example, as noted above, previously, the Receiver represented to the district court that the money in these accounts belonged to the investors, like Mr. Lawson. *See* Report of the Receiver, April 23, 2009, at 13 (Case 3:09-cv-00298-N, Doc. 336); Receiver's Amended Complaint, USCA5 204 ¶8. Yet, before this Court, the Receiver now claims that the money is controlled by the Stanford Receivership Defendants. (Receiver's Br. at 20-21.) That is false. Likewise, before this Court, the Receiver argues that he is only seeking leave to sue those defrauded investors whose accounts he was able to freeze and then only to the extent those accounts contain "proceeds" of the CDs. But the order the

Receiver sought went well beyond that limited class. He sought leave to sue any CD investor who ever got money from Stanford International Bank. Moreover, if such suits are permitted, the Receiver will undoubtedly seek to sue those victims for pre-judgment interest as well, further victimizing them.

The Receiver's request for the broad expansion of his powers is unprecedented and his conduct thus far has been unsuitable. Mr. Lawson is not an appropriate relief defendant, and the Receiver knows it.

C. The Receiver's Own Allegations Establish Mr. Lawson's Entitlement To The Money He Recovered

The Receiver's allegations establish that Mr. Lawson owns the money he recovered. There is no dispute that: (1) Mr. Lawson is an innocent investor, who had no knowledge of the fraud; (2) he paid $2.9 million to Stanford International Bank in exchange for the Stanford CDs; and (3) he recovered only $1.29 million of his money. That is all that is necessary to establish Mr. Lawson's ownership interest in these funds. *See Donnell*, 533 F.3d at 771 ("The parties do not dispute that Kowell acted with good faith at all times; therefore, the issue of who bears the burden of proof is not before us.").

Because Mr. Lawson has a legitimate claim to the funds he recovered, the Receiver has not and cannot show that Mr. Lawson is an appropriate "relief defendant." Accordingly, the district court lacked subject matter over the action. The district court should have dismissed the action in its entirety and ordered Mr. Lawson's accounts unfrozen and released.

II. The Receiver Lacks Standing To Sue The Innocent Investors On Behalf Of The Stanford Receivership Defendants' Estate

The Receiver likely resorted to the "relief-defendant" fiction because he recognizes that he has no standing to pursue any direct claims against Mr. Lawson. "[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III" of the Constitution. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). "The party invoking federal jurisdiction bears the burden of establishing" the three elements of standing. *Id.* at 561. First, that party must establish that it "suffered an injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized . . . and (b) actual or imminent, not conjectural or hypothetical." *Id.* at 560 (internal citations omitted). Second, the injury must be "fairly . . . trace[able] to the challenged action of the defendant and not . . . the result [of] the independent action of some third party not before the court." *Id.* (quoting *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976)). And, third, it must be likely, rather than merely speculative that the injury will be "redressed by a favorable decision." *Id.* at 561 (quoting *Simon*, 426 U.S. at 38, 43). The Receiver cannot meet the standing requirement with respect to any claim he may bring against Mr. Lawson, and the district court cannot convey standing on the Receiver by means of its equitable authority.

A receiver "has no greater rights or powers than the corporation itself would have." *Eberhard v. Marcu*, 530 F.3d 122, 132 (2d Cir. 2008) (quoting *Flemming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990)). As a result, the receiver "stands in the shoes of the corporation and can assert only those claims which the corporation could have asserted." *Eberhard*, 530 F.3d at 132. Here, the Receiver represents the Stanford Receivership Defendants. He stands in their shoes. He does not represent the investors. The Receiver does not allege (or even articulate) any claim that Stanford International Bank (or any other of the Stanford Receivership Defendants) has against innocent investors like Mr. Lawson, who were victims of the fraud and lost money. Therefore, he lacks standing and this action should be dismissed.

Courts dismiss actions in which a receiver lacked standing to pursue the alleged claims. *See, e.g.*, *Eberhard v. Marcu*, 530 F.3d 122 (2d Cir. 2008). For example, in *Eberhard v. Marcu*, the Second Circuit concluded that the receiver in that case lacked standing to bring a claim to set aside a purported fraudulent conveyance. 530 F.3d at 133-135. The receiver for Eberhard believed that Eberhard had fraudulently conveyed stock in a company to his mother. *Id.* at 133. The Receiver sought to set aside the alleged fraudulent conveyance under New York law and bring that property into the receivership estate. *Id.* at 127. The Second Circuit concluded that only creditors of the transferor had standing to bring claims under the New York fraudulent conveyance statute. *Id.* at 133. Because the receiver represented the transferor, and not a creditor of the transferor, the Second Circuit held that he lacked standing to bring the claim. *Id.*

Moreover, the lack of standing is a constitutional issue that goes to the federal court's authority to hear a case. *See Eberhard*, 530 F.3d at 133-135; *Founding Partners*, 2009 WL 1606491, at *4. A district court cannot cure a lack of standing through use of its equitable powers. As the Supreme Court has stated, while the "remedial powers of an equity court must be adequate to the task, . . . they are not unlimited." *Whitcomb v. Chavis*, 403 U.S. 124, 161 (1971). In rejecting the *Eberhard* receiver's argument that the district court's equitable powers could somehow overcome the state statutory scheme and give him standing to pursue the claim, the Second Circuit concluded that "federal law does not give a receiver, or a district court, the authority to re-write or ignore state law." *Eberhard*, 530 F.3d at 134. *See also Scholes*, 56 F.3d at 761 (stating that judges are reluctant to rewrite statutes, "especially when it is a state statue and federal judges").

Likewise, in rejecting the SEC's argument that the district court's equitable powers could allow it to proceed against Sun Capital without standing, the district court in *Founding Partners* reached the same conclusion: "None of the cases . . . hold that the inherent power of a court in equity creates jurisdiction." *Founding Partners*, 2009 WL 1606491, at *4. The court added that "jurisdiction is required first before the Court may invoke its inherent power." *Id.*

It is not enough that the Receiver wants to bring property into the receivership estate. As with any plaintiff in any action, the case must be dismissed unless the Receiver can establish that he has standing. And the district court's equitable power cannot change that constitutional mandate. Here, because the Receiver has not and cannot show that he has standing to pursue any claims against Mr. Lawson, the action should be dismissed.

III. This Court Should Reject The Receiver's Proposed Rule

No court has authorized a receiver to disgorge contributions that innocent investors made but got back from a Ponzi scheme. That is because the Receiver's proposed rule would further punish innocent investors who were victims of the fraud, require federal district courts to substitute a receiver's judgment for the judgment of state legislatures that have addressed the issue through fraudulent transfer statutes, and constitute horrible public policy. Unsurprisingly, the biggest winner under the Receiver's proposed regime would be receivers and their advisors.

The Receiver proposes a rule under which a receiver should pursue innocent investors who got any money back from a Ponzi Scheme, disgorge that money into the receivership estate and then distribute the money pro rata to investors. No court has adopted that proposed rule. On the contrary, numerous cases, many of them cited by the Receiver, demonstrate that innocent investors who recovered some or all of their contributions to a Ponzi scheme before a receiver was appointed were allowed to retain that money. *E.g., SEC v. Forex Asset Management LLC*, 242 F.3d 325, 328 (5th Cir. 2001); *Donnell*, 533 F.3d at 772; *Scholes*, 56 F.3d at 757-758. Only where investors recovered money in excess of their contributions were they required to pay the profits to the receivership estate. *E.g., Donell*, 533 F.3d at 776; *Scholes*, 56 F.3d at 757-758. Moreover, such claims are typically adjudicated pursuant to the state statutory regime governing fraudulent transfers. *E.g., Warfield v. Bryon*, 436 F.3d 551 (5th Cir. 2006); *Donell*, 533 F.3d at 776; *Scholes*, 56 F.3d at 753.

A. <u>Pro Rata Distribution Is Neither A Means Nor A Reason To Bring Assets Into A Receivership Estate</u>

Perhaps recognizing the terminal weakness of his action, the Receiver attempts to recast the dispute as an argument about pro rata distribution. It is not. No one is questioning whether pro rata distribution is an appropriate means of ***distributing*** the estate's assets. The law is clear that while a district court is not required to approve a plan of pro rata distribution, it certainly has discretion to do so; and many courts have concluded that in the context of a Ponzi scheme pro rata distribution is particularly appropriate. *See SEC v. Forex Asset Management LLC*, 242 F.3d 325, 328 (5th Cir. 2001); *SEC v. Credit Bancorp, Ltd.*, 290 F.3d 80, 89 (2d Cir. 2002). However, pro rata distribution ***is not a mechanism or reason to bring assets into the receivership estate***.

In fact, this Court's decision in *SEC v. Forex* undermines the Receiver's argument. In *Forex*, this Court affirmed the district court's order approving a receiver's plan to distribute the assets in the estate pro rata to the injured investors. 242 F.3d at 327. This Court did not authorize the receiver in *Forex* to try to disgorge money that innocent investors had already recovered pre-receivership. Indeed, in *Forex,* this Court observed that 45 of the 87 investors had previously had their investments returned to them. *Id.* at 328 n.3. Even the investor who objected to the pro rata distribution plan recovered and was allowed to keep $22,000 of his investment, which had been returned to him before the receiver had been appointed. *Id.* at 328 n.4. This Court said nothing to suggest that the receiver should have sued the investor for the $22,000 or the other 45 people who got all their principal back. As a result, rather than support the Receiver's argument, this Court's decision in *Forex* undermines it.[4]

The Receiver argues that there should not be a distinction between money paid to investors before the SEC acted and stopped the Ponzi scheme and money that was in the estate at the time the SEC acted. The difference is as important as it is obvious. Whereas the money that was in the estate at the time the receiver was appointed belongs to the estate, the money received by an innocent investor pre-receivership does not belong to the estate. That money belongs to the investor. Essentially, the Receiver wants to rescind the transactions in which Stanford International Bank returned the money. But as a receiver for the entities involved in the fraud, he has no power to do so.

In addition, although the Receiver relies heavily on *SEC v. George*, that case does not support his argument. In fact, *George* is of little or no persuasive value. In *George*, the Sixth Circuit ordered that three investors in a Ponzi scheme turn-over their original investment and the "return" on that investment to the SEC. That case is distinguishable because the SEC—and not a receiver—sought disgorgement of the money. While a receiver acts for specific parties, usually wrongdoers, the SEC acts for the public good. Furthermore, the SEC went after the three investors

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[4] The weakness of the Receiver's argument is further illustrated by his reliance on the Third Circuit's unpublished, *per curiam* decision in *SEC v. The Infanty Group Co.*, 226 Fed. Appx. 217 (3d Cir. 2007). In that case, an investor put his money into the Ponzi scheme shortly before the SEC publicly revealed it as a Ponzi scheme and froze its assets. The Ponzi scheme had deposited the investor's cashier check two days before the SEC acted. Appearing *pro se*, the investor argued that because his bank had a three day waiting period before the funds were released, the Ponzi scheme never had access to his funds and the money should be returned to him. The district court disagreed. It concluded that these funds were part of the receivership estate and ordered all the receivership estate's assets distributed pro rata. In affirming the district court's decision, the Third Circuit did nothing more than agree that money in the receivership estate can be distributed pro rata. *Id.* at 218.

in *George* because it concluded that they were not "innocent." *See* Transcript of Proceedings, USCA5 28-30. Indeed, before the district court here, the SEC made clear that its policy is not to disgorge money from innocent investors, but only seek the return of any profit the innocent investor may have received from the Ponzi scheme.

Moreover, the absence of analysis (along with the fact that the three investors appeared *pro se*) renders the Sixth Circuit's opinion of little, if any, persuasive value. The Sixth Circuit's discussion of pro rata distribution indicates that like the Receiver here, the Sixth Circuit overlooked the fact that pro rata distribution is a means of distributing assets that belong to an estate, not a mechanism or reason to include certain assets within an estate. In fact, in its cursory discussion of this issue, the Sixth Circuit cited *Forex*, which, as discussed above, does not suggest that a receiver can recover an innocent investor's principal contribution.

Accordingly, the Receiver's lengthy discussion of pro rata distribution is a distraction and has no bearing on whether the receiver can disgorge the innocent investor's money.

B. Because The Texas Legislature Has Specifically Addressed This Issue Via Statute, The District Court Should Not Exercise Its Equitable Powers To Reach A Different Result

Principles of federalism also require this Court to reject the Receiver's proposed rule because it contradicts the rule and policies enacted by the Texas legislature in the Texas Fraudulent Transfer Act. Tex. Bus. & Com. Code Ann. §24.005 (2009). Under that statute, the Texas legislature chose to permit suits against innocent investors in a Ponzi Scheme for the profits recovered by those investors. *See id.* at §24.001 et. seq. (2009). The statute limits how far back such suits can reach by including a four year statute of repose. *Id.* at §24.010(a)(1) (2009). The policy decision made by the Texas legislature in allowing some claims but not others is reasonable. And the legislature, not a court, is the government entity best suited to make those kinds of determinations. *See Scholes*, 56 F.3d at 761 (observing that the legislature is the appropriate body to make policy determinations). The Texas legislature could have adopted a scheme like that urged by the Receiver now. But it did not do so. And there is nothing inequitable or improper about letting innocent investors keep the money that they recovered—which was stolen from them in the first place.

At oral argument, the Receiver admitted that he was aware of Texas' remedial scheme, but elected not to proceed under it. (USCA5 49.) Instead, appealing to the district court's equitable powers, in effect, the Receiver argued that the district court should disregard the Texas legislature's considered approach and substitute in its place the Receiver's opinion as to what the law should be. The district court correctly rejected the invitation because "federal law does not give a receiver, or a district court, the authority to re-write or ignore state law." [5] *Eberhard*, 530 F.3d at 134. *See also Scholes*, 56 F.3d at 761 (stating that judges are reluctant to rewrite statutes, "especially when it is a state statue and federal

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[5] Although the district court erred in concluding that the Receiver could pursue investors who profited from their investment in the Stanford CDs, that error sounds in procedure and nomenclature. It appears that the district court recognized and sought to be consistent with the Texas statute, which permits suits in certain circumstances to recover the "profits" of innocent investors. The district court erred by not explicitly stating that such suits must be brought directly against such defendants pursuant to the statute and only for the "profits." As worded, the district court's order would permit the receiver to proceed against innocent investors as "relief defendants" and that it could do so for "interest." To the extent the district court concluded that the Receiver could sue investors who suffered a net loss, but received "interest" on a particular Stanford CD, the decision was in error.

judges"). While "remedial powers of an equity court must be adequate to the task, . . . they are not unlimited." *Whitcomb,* 403 U.S. at 161.

Accordingly, pursuant to principles of federalism, this Court should reject the Receiver's invitation to create a common law rule of receivership that would displace the bright line rule regarding fraudulent transfers provided via state statutory law.

C. The Receiver's Proposed Rule Would Be Bad Policy

Other than the Receiver, no one supports his proposed rule. The Texas legislature did not enact it. The SEC and court-appointed examiner oppose it. And no court has adopted it. There is a very good reason why—it is bad policy. If adopted, the Receiver's proposed rule would undermine state law, thereby disrupting settled expectations for an *ad hoc* rule to be carried out at the discretion of one person. It would further punish innocent victims of Ponzi schemes who happened to get back some of their money, deny investors any repose, and deplete the resources of the estate from which the investors could recover. The proposed rule could also lead to more suits against receivers, further depleting the estate's assets. And, finally, the Receiver's proposed rule would injure the judiciary by undermining public confidence in the judicial system, and further burdening the limited resources of the courts with ancillary suits. The only true winners under the Receiver's proposed rule would be receivers, their counsel, and their accountants.

1. The Receiver's Proposed Rule Would Undermine State Law And Disrupt Settled Expectations.

As discussed above, the Receiver's rule would essentially replace Texas' carefully crafted statutory regime with the Receiver's opinion about what is equitable in a particular circumstance. In addition to the federalism issue, that proposed rule would undermine settled expectations by replacing the bright line statutory rule with the discretion of one person, the Receiver. Whatever lines were drawn by a particular receiver would vary depending upon the individual receiver and the circumstances of that case. The Receiver's actions to date illustrate the potential perils of replacing a bright line rule with discretion invested in a single individual. With no explanation for the discrepancy, the Receiver has treated different classes of investors differently. Here, he attacks investors like Mr. Lawson who happened to have accounts with Pershing, and has frozen their money. But he has already allowed investors who had less than $250,000 in their accounts to take that money and walk away. Likewise, he has not even attempted (and almost certainly will not be able to) locate and sue every investor who received any proceeds from purchasing the Stanford CDs. Therefore, the Receiver's decisions to date provide an excellent example of why creating a federal common law that contradicts state law and upsets settled expectations in the area of investments would be bad policy.

2. The Bright line Rule Adopted By Texas Protects Investors And Reduces Transaction Costs

Whereas the Receiver's rule would allow receivers to reach back indefinitely in pursuit of money innocent investors received from the Ponzi scheme, under the Texas statutory scheme, innocent investors (even those who derived a profit) cannot be sued after four years. In cases with a long-running fraud like this one, a receiver could go back ten years or more to sue innocent victims. And, although the Receiver has not yet broached the subject, one expects that he will demand pre-judgment interest from the innocent victims as well, further injuring them. The four year statute of repose protects investors from being victimized again years later. It also protects investors from having to disrupt their lives to find money that presumably has been spent on other things or saved for an express purpose, like retirement.

Furthermore, the bright line rule reduces transaction costs in several ways. First, it conserves the limited resources of the estate by reducing the scope of the investigation to be conducted by the receiver. Under the Receiver's proposed rule, every receiver could sue any investor who ever recovered any money from an alleged Ponzi scheme at any time. Under the existing statutory scheme, the receiver need only look into instances where innocent investors profited from their investment during the last four years or circumstances in which the investor was not innocent.

Moreover, the statutory scheme reduces the risk that an innocent investor will be forced to engage in other transactions (such as selling stocks or property) to pay money to the receivership estate. While that possibility still exists for those who profited from their investment within the last four years, the impact is much more limited than it would be if a receiver could reach back indefinitely. Furthermore, this is precisely the type of weighing and balancing of interests for which the legislature is well-suited.

3. The Bright Line Rule Also Protects Receivers

Although the Receiver's proposed rule would undoubtedly result in more work, and hence, more fees for the Receiver and his advisors, it also would create more risk. If the Receiver is placed in the position of being required to decide which innocent investors get sued and which do not, he opens himself to lawsuits from disappointed investors who may contend that he acted arbitrarily. For example, here it appears that the receiver has released the accounts of any investor who received less than $250,000 and allowed them to take that money. That is precisely the type of arbitrary decision that will result in increased litigation should the Court adopt the Receiver's proposed rule. Obviously, those types of suits would further increase transaction costs and deplete an estate's limited resources.

4. The Receiver's Proposed Rule Would Undermine Confidence In The Judicial System And Increase The Burden On Judicial Resources

Finally, if adopted, the Receiver's proposed rule would undermine public confidence in the judicial system and result in more cases taking up the limited time and resources of the judiciary. The Receiver's proposed rule would allow a receiver acting on behalf of a Ponzi scheme's estate to reach back into the pockets of innocent victims of the fraud and through summary proceedings disgorge money that those victims thought they had gotten back. That rule would do violence to due process and undermine the public's confidence in the judicial system.

In addition to this intangible cost, the Receiver's proposed rule would also inflict tangible, increased costs on the judicial system. Along with the near limitless expansion of the receiver's power would come an increase in litigation brought both by and against the receiver. That ancillary litigation would further burden the limited resources of the judiciary. Large scale frauds like the one at issue already put tremendous strain on the limited resources of our courts. There is no reason to exacerbate the problem by creating a federal common law rule that would broadly result in an increase in ancillary litigation.

In short, the Receiver's proposed rule is contrary to law and has been widely rejected. Texas has already put in place a means of resolving these issues and that scheme should be upheld, not supplanted by a new federal common law rule, let alone a bad one.

IV. MR. LAWSON'S IRA ACCOUNTS SHOULD NOT BE FROZEN

An overwhelming majority of states have enacted laws protecting individualized retirement accounts from being attached, frozen or otherwise seized. *See, e.g., Dunn v. Doskocz*, 590 So. 2d 521 (Fla. Dist. Ct. App. 1991) (interpreting Florida's statute, and stating that it was the legislature's intent in protecting IRAs to promote the "financial independence of IRA and pension plan beneficiaries in their retirement years--in turn reducing the incidence and amount of requests for public financial assistance"). Texas has joined these states in adopting legislation to exempt IRA accounts from attachment or seizure. Tex. Prop. Code § 42.0021 (2009); *See, e.g., In re Laxson*, 120 B.R. 843 (Bankr. N.D. Tex. 1989) ("the exemption statute allows debtors to exempt various retirement accounts from creditors" and was "passed by the Texas legislature as a result of 'an erosion of the protection traditionally provided for retirement benefits'"). Therefore, in accordance with Texas law, the Court should lift the freeze on Mr. Lawson's IRA account.

CONCLUSION

For the foregoing reasons, this Court should hold that Mr. Lawson is not an appropriate relief defendant, dismiss the Receiver's action against Mr. Lawson for lack of subject matter jurisdiction, and order the asset freeze be lifted as to Mr. Lawson's accounts.

Respectfully submitted,

COZEN O'CONNOR

Gene Creely

Gene F. Creely, II
State Bar No. 05060550
COZEN O'CONNOR
1221 McKinney Street,
Suite 2900
Houston, Texas 77010
Telephone: (832) 214-3900
Telecopier: (832) 214-3905

Of Counsel:
Thomas S. Harty*
John V. Donnelly III*
COZEN O'CONNOR
1900 Market Street
Philadelphia, PA 19103

Counsel for Appellee-Cross Appellant
James Ronald Lawson

*Application for admission to the bar of this Court pending

September 30, 2009

CERTIFICATE OF SERVICE

I certify that 7 copies of this Brief and Exhibits were filed with the clerk of the court via Federal Express, next day delivery, on this 30th Day of September, 2009.

I certify that a copy of Brief of Appellee James Ronald Lawson in paper and electronic form was served by U.S. mail, postage prepaid, on this 30th day of September 2009, to the following counsel of record:

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

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

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

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

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

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

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

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

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

Hank Mills
2623 Kleinert Avenue
Baton Rouge, LA 70806

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

John V. Donnelly III

John V. Donnelly, III

Certificate of Compliance

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 10,891 words, excluding parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type of style requirements of Fed. R. App. P. 32(a)(6) because: this brief has been prepared in a proportionally spaced typeface using Microsoft Office XP (2002) in Times New Roman 14-point typeface.

Respectfully submitted,
COZEN O'CONNOR

By: Gene F. Creely, II
State Bar No. 05060550
COZEN O'CONNOR
1221 McKinney Street,
Suite 2900
Houston, Texas 77010
Telephone: (832) 214-3900
Telecopier: (832) 214-3905

Index of exhibits

TAB A	List of additional interested persons
TAB B	Affidavit of James Ronald Lawson
TAB C	Excerpt from Report of the Receiver April 23, 2009, Case 3:09-cv-00298-N, Doc. 336