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

SECURITIES AND EXCHANGE COMMISSION,	§	
Plaintiff,	§	
v.	§	**CIVIL ACTION NO. 3-09-CV 0298-N**
STANFORD INTERNATIONAL BANK, LTD., *et al.*,	§	
Defendants.	§	

EXAMINER'S REPLY BRIEF IN SUPPORT OF
HIS REPORT AND RECOMMENDATION NO. 1

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John J. Little, Examiner, respectfully submits his Reply Brief in further support of his Report and Recommendation No. 1, filed May 21, 2009 [Doc. No. 393] ("R&R No. 1"). The Reply Brief focuses primarily upon the Examiner's recommendation that the Court order the immediate release of all brokerage accounts[1] that remain frozen. The Examiner will touch only briefly upon the other issues raised in R&R No. 1 -- the propriety of pursuing claw back claims against innocent Investors and the Receiver's process for releasing Stanford accounts.

I. NOW IS NOT THE TIME TO DECIDE IF CLAW BACKS WILL BE PURSUED.

In R&R No. 1, the Examiner acknowledged that it was premature for the Court to now consider the extent, if any, to which the Receiver should pursue claw back claims:

> The Examiner recognizes that, at this juncture, it is premature for the Court to consider the propriety of "claw back" claims that thus far have not even been asserted by the Receiver against even a single Stanford customer.

[1] The Examiner's Report and Recommendation No. 1 focused upon the Stanford customer accounts that remain frozen at Pershing or JPMorgan. The Examiner wants to make clear that his recommendation that the account freeze come to an end extends to accounts that remain frozen at Stanford Trust Company (such accounts being held at SEI Private Trust Company) and to the accounts of most former Stanford Financial Advisors.

R&R No. 1 at 5. Nevertheless, the Receiver devotes almost half of his Response to R&R No. 1 to an argument about the propriety of claw back claims that, at least as to Investor accounts, still have not been filed.[2] Because the Receiver acknowledges that he is still in "the earliest stages of his investigation" of any potential claw back claims, *Receiver's Response at 12 [Doc. No. 441]*, the Examiner continues to believe it is premature for the Court to consider the merits of the Receiver's pursuit of those claims.

A few points concerning the Receiver's substantive argument supporting the assertion of claw back claims are worth making.

First, the Receiver's citation of a February 6, 2009 email from Frans Vingerhoedt to Allen Stanford is a red herring. That email suggests that funds may have been wired to "people of influence in certain countries." *Doc. No. 442, Ex. A.* The Receiver has not even suggested (and certainly has offered no evidence) that any of the Stanford customers whose accounts remain frozen at Pershing, JP Morgan or SEI Trust are "people of influence" in any country, nor that any of those customers received preferential treatment.[3]

Second, the Examiner understands that the outstanding CD liability of Stanford International Bank, Ltd. ("SIB") at the time this action was filed was approximately $7.2 billion. The Examiner is also mindful of the unprecedented, worldwide financial and credit crisis that was unfolding in the six months prior to the filing of this action. In light of the total outstanding CD liability and the global financial crisis, CD withdrawals of $750 million during the twelve months preceding the filing of this lawsuit are not necessarily an indicator of anything improper.

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[2] The Receiver has filed an action against sixty-six (66) Stanford financial advisors through which he seeks to claw back commissions, loans and other compensation paid to those financial advisors. *Doc. No. 2, Civil Action No. 3:09-CV-00724-N.*

[3] The Examiner encourages the Receiver to pursue claw back claims against any individuals or entities that he believes received "preferential treatment."

Third, the authorities cited by the Receiver do not uniformly support claims to claw back both the principal invested by Stanford customers in CDs and the interest earned on those CDs. In *Mays v. Lombard*, 1998 WL 386159 (N.D. Tex. 1998), Judge Kendall decided that a receiver could recover from an otherwise innocent investor the profits -- those dollars that exceeded his original investment -- that the investor received from his investment in a Ponzi scheme. *Id.* at *2. *Donell v. Kowell*, 533 F.3d 762 (9th Cir. 2008) similarly limited a receiver's recovery from an innocent investor in a Ponzi scheme to "amounts above Kowell's initial investment transferred within the limitations period." *Id.* at 776. *See also Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995)(innocent investor required to return net profits; "the difference between what he put in at the beginning and what he had at the end").

The Court will have an opportunity to determine the propriety of the Receiver's claw back claims when the Receiver concludes his investigation and decides what claw back claims he is going to pursue against Stanford customers.

II. THE CONTINUING ACCOUNT FREEZE MUST END.

As it pertains to the continuing freeze of customer and other accounts, the Receiver and the Examiner agree upon one thing -- whether the freeze continues or is terminated is, for the most part, an equitable decision committed to the sound discretion of this Court. The Examiner respectfully submits that the continuing asset freeze is both unlawful and inequitable and that this Court should bring it to an end.

A. The Account Freeze is Unlawful.

The Receiver's Response cites a plethora of cases to attempt to justify the freezing of assets belonging to innocent Investors who are not parties to any action and who have not been accused of doing anything wrong. None of the cases cited by the Receiver support the freeze that is in place in this case.

Certain cases cited by the Receiver support freezing the assets of defendants. *See e.g.*, *SEC v. ETS Payphones, Inc.*, 408 F.3d. 727 (11th Cir. 2005)(freeze applied to assets of defendant who promoted scheme); C*FTC v. American Metals Exchange Corp.*, 991 F.2d 71 (3d. Cir. 1993)(defendant's assets frozen). Other cases support an asset freeze being applied to "nominal defendants" or "relief defendants."[4] S*EC v. Cavanagh*, 155 F.3d 129 (2nd Cir. 1998); *SEC v. Elfindepan, S.A.*, 2002 WL 31165146 (M.D.N.C. 2002)(freeze applied to both defendants and "relief defendants"). The Receiver cites one case for the proposition that a freeze can extend to the assets of a third party. *SEC v. Hickey*, 322 F.3d 1123, 1131-32 (9th Cir. 2003). That case is wholly distinguishable; in freezing the assets of the purported third party, the *Hickey* court expressly relied upon the "total and complete control" that the defendant exercised over the third party whose assets were frozen. *Id.* at 1131.

None of the cases relied upon by the Receiver support freezing the assets of individuals who are accused of no wrongdoing, are not parties, are not "relief defendants" or "nominal defendants" and are not alleged to be alter egos of, or under the control of, parties. That is precisely the freeze that is in place here -- it reaches the assets of Stanford customers and financial advisors who have been accused of no wrongdoing, are not parties, are not relief defendants, and are not under the control of any parties. This freeze is unsupportable as a matter

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[4] A "relief defendant" is "a person who can be joined to aid the recovery of relief without an additional assertion of subject matter jurisdiction only because he has no ownership interest in the property which is the subject of litigation." *SEC v. Elfindepan, S.A.*, 2002 WL 31165146 (M.D.N.C. 2002) at *4, citing *Commodity Futures Trading Comm'n v. Kimberlynn Creek Ranch, Inc.*, 276 F.3d 187, 191 (4th Cir.2002) (quoting *SEC v. Cherif*, 933 F.2d 403, 413-14 (7th Cir.1991); citing *SEC v. Colello*, 139 F.3d 674, 675-77 (9th Cir.1998)). The Examiner questions whether the Receiver can legitimately contend that the Stanford account holders with frozen accounts have "no ownership interest" in those accounts.

of law and must come to an end.[5]

B. The Account Freeze is and has been Inequitable.

In addition to the dearth of legal support for the existing account freeze, the Examiner respectfully submits that this Court should terminate the freeze for at least three separate reasons. First, the SEC -- the original proponent of the freeze -- has concluded (as has the Examiner) that the freeze should be terminated. Second, the "benefits and burdens" of the freeze are being distributed among Stanford account holders purely by chance, and not in any manner that can conceivably be viewed as equitable. Finally, there is nothing particularly equitable or "temporary" about the current freeze, nor is there anything "expeditious" about the Receiver's review of frozen accounts for possible release.

1. The SEC Supports Terminating the Freeze.

The Orders freezing all Stanford customer accounts originally were obtained at the request of the SEC. *Docs. No. 8, 10.* While the Receiver may believe that continuing the freeze is appropriate, the SEC does not share that belief. Instead, the SEC has joined the Examiner in urging the Court to terminate the freeze:[6]

> Second, continuing an ongoing freeze of those funds prolongs any hardship Stanford's fraud has created for individual investors. The Commission believes that the Examiner summed up the core issue by noting that "[w]hile the freeze [of these accounts] arguably made sense when it was imposed on February 17, 2009, it does not make sense over three months later." [Examiner's Status Report at p. 6].

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[5] The Receiver urges that this Court has already ruled on, and rejected, the merits of the Examiner's recommendation. *Receiver's Response at 13.* That strikes the Examiner as unlikely given that the Court's order appointing the Examiner, *Doc. No. 322*, and the Court's Order relied upon by the Receiver, *Doc. No. 321*, were entered on the same day. Even if the Receiver's contention were correct, the Court is still free to reconsider the equities of the asset freeze given that almost two months have passed since the Court entered the Order relied upon by the Receiver.

[6] The SEC and the Examiner differ only with respect to their views of the freeze as it pertains to former Stanford Financial Advisors.

Doc. No. 443 at 2. This Court should similarly conclude that the account freeze is no longer justified and that it should now be terminated.

2. The Account Freeze is Imposing Great Hardship in Random Fashion.

The Receiver acknowledges that "the disadvantages and possible deleterious effect of a freeze must be weighed against the considerations indicating the need for such relief." *Receiver's Response at 21, citing SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082, 1106 (2nd Cir. 1972). He contends that the existing account freeze is "narrowly tailored"[7] and "the product of exactly that kind of weighing process." *Id.* The Examiner respectfully disagrees. The existing account freeze is imposing great hardship upon a relatively small number of innocent Stanford account holders, and is doing so in a completely random manner.

On March 5, 2009, this Court authorized the Receiver to release Stanford customer accounts for customers whose accounts were worth less than $250,000. *Doc. No. 117.* In seeking that authority, the Receiver reserved his right to pursue claw back claims against the holders of those accounts and acknowledged that it would be "more burdensome for the Receiver to pursue" CD proceeds in those accounts once they were released. *Doc. No. 96 at 1, 4.* Pursuant to the March 5 Order, the Receiver released 12,600 accounts from the freeze. *Doc. No. 336 at 15.* Those accounts held an aggregate value of some $500 million. *Doc. No. 176 at 8.*

By definition, any or all of the accounts released pursuant to the March 5 Order could have contained CD proceeds (whether interest or principal) of up to $249,999.[8] Put differently,

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[7] The Receiver has determined that there are approximately 21,500 holders of SIB CDs. *Doc. No. 336 at 12.* There were also approximately 50,000 brokerage accounts at Stanford Group Company and an additional 1,438 accounts at Stanford Trust Company in Louisiana.[7] *Id. at 14.* Apparently, the Receiver's view is that the current account freeze is "narrowly tailored" because it freezes a relatively small number of accounts. *See Receiver's Response at 22.*

[8] The Examiner does not know if the Receiver has analyzed the accounts released pursuant to the March 5 Order to determine the extent to which those accounts held CD proceeds.

at least some of the holders of those released accounts today have ready access to the same sort of CD proceeds that the Receiver is trying to keep frozen for a small fraction of Stanford's customers.

In contrast, accounts that remain frozen are little different from those that were released back in March. The Receiver currently is holding 149 Pershing accounts (held by 53 account holders) whose value is less than the amount of CD proceeds the account holder allegedly received.[9] Included among the accounts that remain frozen because the account value is less than the CD proceeds received is an account owned by CLG[10] that has a net worth of $250,007. For this account holder, the princely sum of $8 has kept his account frozen and deprived him of access to his funds. Additionally, had the Receiver's March 4 motion seeking to release accounts under $250,000 instead sought to release accounts under $275,000, 6 of the 53 account holders whose accounts remain wholly frozen would instead have full access to their accounts -- including the account holder who has remained frozen over $8.

The Receiver is also holding an additional 632 accounts (held by 204 account holders) that are eligible for a stipulated partial release.[11] Included among these 632 accounts are approximately 90 accounts (held by approximately 30 account holders) that have been frozen for the past four months because the account holders received CD proceeds of less than $50,000. Another 88 accounts, held by 32 account holders, have been frozen because the account holders

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[9] The Receiver provides the Examiner with reports concerning his account review and release process on a daily basis. The numbers set forth in this section are derived from the Receiver's reports dated as of June 11, 2009.

[10] The Examiner has used the account holder's initials to protect his privacy. The account is listed as no. 118 on the Receiver's June 11, 2009 list of accounts that remain frozen.

[11] "Stipulated partial release" accounts are those held by customers who have received proceeds (either interest or principal) from SIB CDs. As to these Customer Accounts, the Receiver's current position is that the customer must agree to a "hold back" of an amount equal to any SIB CD proceeds that were received by the customer.

received CD proceeds in excess of $50,000 but less than $100,000. There is nothing equitable, "narrowly tailored," or balanced about a freeze that has deprived these account holders of access to their funds for five months while other account holders, each of whom could easily have received more CD proceeds, have had access to their funds since the Court entered its March 5 Order.

The on-going account freeze is also imposing great hardship upon those customers whose accounts remain trapped. Among those whose accounts remain frozen at Stanford Trust Company and/or Pershing are a number of retirees in and around Baton Rouge, Louisiana, whose life savings have been and remain frozen (to the extent they weren't lost to SIB CDs). A few of their stories, as related by them to the Examiner, are reprinted below:

> My wife and I live in Maurice, Louisiana. In March 2005, I retired from ExxonMobil in Baton Rouge at age 55. Our Stanford broker rolled all of my lump-sum retirement funds and my thrift savings into a Stanford Trust IRA account (2 CD's) in the SIBL. Also, at that time a portion of our ExxonMobil stock went into the IRA account and was later converted to cash and put into a 3rd CD. The initial total was around $700K.
>
> In December 2008, we were advised to redeem the CD's early, because our broker informed us he had concerns about the economy and banking crisis that was in the news. The actual redemption date was 10 February 2009. The total redemptions were $902,406.55 and this amount remains frozen in SEI. It also represents all of our retirement funds (we have no pension or SS).
>
> * * *
>
> I am one of the victims of Stanford. I apparently lost a significant portion of my lifetime savings because I was invested (about 40% of total) in the International Bank. I do understand this portion of my savings may be lost. However, since Feb 16th the remaining 60% of my savings remains confiscated.
>
> I worked for 30 years for Georgia Gulf Corporation, Ferro Corporation and then owned a small business. My husband spent 30 years working for Totalfina Chemicals. Over that period my husband and I maximized our 401 K investments to save for our retirement. We struggled and sacrificed to save and have security for our retirement. Now I am 53 years old and my husband is 63 years old. I was forced to sell our small business in 2006 because my husband was diagnosed with acute leukemia and given a 10% chance of living 1 year. The ONLY chance for his survival was a clinical trial at MD Anderson which required that we relocate to within 3 miles of the hospital for not less than 6 months. When I sold the business I gave the money to my broker and he invested it in short term CD's in Antigua because we had significant expenses related to my husband's

> treatment and care and I knew that I would need this money to pay the huge expenses that we incurred while we were in Houston.
>
> I have three accounts. Two of these accounts are IRA accounts and 1 account is basically a cash or checking account that was used when I cashed in the non IRA CD's from the sale of our business. I have not removed any money from the 2 Pershing brokerage accounts because they are IRA accounts so there is NO WAY they could have been tainted in any way when I cashed in the non IRA short term CD's that were money from the sale of my business. Nor have I taken any money from the IRA CD's in Antigua. The only money I removed was from the sale of the business and put into short term non IRA CD's because I knew I would need to spend the money on medical and medical related expenses.
>
> * * *
>
> We are victims of the Stanford Financial Group and the Bank of Antigua. We have lost our entire Exxon retirement with Stanford. Our Pershing accounts are frozen and so is our account from the bank.
>
> My husband worked 32 1/2 years for this retirement and then another 3 years after that to be sure everything was workable according to our "life expectancy chart". He has now had to have open heart surgery as well as lung surgery and a new pace maker put in. The stress it is taking on a 63 years old man is heart breaking, especially to me. [12]
>
> * * *

The hardships imposed by the continuing freeze are not limited by geography -- a Stanford investor in Florida related his story to the Examiner:

> My wife and I never heard about Stanford, prior to our discussion with Dan. We had confidence in the recommendation from Dan who has represented us for many years. We went along with his suggestion to purchase the CD for $1,000,000.00. I am 87 years old, and this CD was a major part of our retirement and the fact that it is frozen, since February, is causing irreparable harm to my wife and to myself. I am suffering from Parkinson's and therefore had to retire from active practice of law.

Similar stories come from foreign investors:

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[12] The neighbors of this couple have also communicated with the Examiner, both with respect to their own retirement funds that remain frozen because they received CD proceeds and to express their concerns about their neighbors' well-being:

> My poor neighbors are almost giving in to the stress. They depended on their retirement and their bills are constantly mounting. I talk to her every day because I'm worried that the stress is really getting to her and her husband. They live right next door to us. Her husband isn't working and can't find a job. They were living on their retirement. I can hear in her voice how exhausted they both are. My heart breaks for them. She's been in and out of the hospital 3 or 4 times this past year.

> My husband and I have worked hard all our lives and saved all our money for retirement and our children. For decades we successfully ran a funeral home in Curacao (in the Caribbean) and finally sold it a couple of years ago as we entered retirement. We have now lost millions in the Stanford International Bank and all our family accounts at SGC are frozen. We desperately need that money as we live from it for our retirement. We have no other source of income.
>
> The receiver has not responded to any of our concerns. He has our SGC accounts frozen because according to our lawyers he wants to 'claw back' any monies that were wired between SIB and SGC.

For those who do not need to worry about how they will pay their bills, it is easy to suggest that the hardships imposed by the account freeze are "temporary" and "inevitable." The words of the frozen Stanford account holders present a far more accurate picture of the impact of the freeze on otherwise innocent people.

3. There is No Evidence that Funds will be Dissipated.

Throughout his response, the Receiver urges that there is a significant risk that Stanford account holders will dissipate their funds if the freeze is lifted. Two points are worth making as to that contention. First, the Receiver has offered no evidence of any sort to support this contention. Second, when the Receiver sought and received the authority to release funds with a value under $250,000, he acknowledged that such a release would make it more burdensome to pursue his claw back claims. *Doc. No. 96 at 4.* The Receiver offers no rationale for why he was willing to accept that burden for the 12,000 accounts that were released pursuant to the March 5 Order but is unwilling to accept that same burden with respect to the accounts that remain subject to the freeze.[13]

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[13] As of March 16, 2009, the freeze was in effect for 3,988 accounts. Over 2,000 accounts have since been released.

4. The Freeze Should Not Apply to All Stanford Financial Advisors.

Initially, the freeze applied to 434 accounts that were owned by Stanford Financial Advisors. By May 8, 2009, 14 of those accounts had been released,[14] leaving 420 still frozen. Since that date, the Receiver apparently has not processed any additional release applications from Stanford Financial Advisors and has not released any accounts owned by such Financial Advisors.

The Examiner recognizes that the Receiver has brought an action seeking to recover commissions, loans and other compensation from 66 Stanford Financial Advisors. As to those individuals, the Examiner agrees that the freeze order should remain in effect for now.[15] There are many Financial Advisors who are not named parties to that action as to whom the continuing account freeze is imposing hardships no different from the hardships being experienced by Stanford customers.

The Examiner has also communicated with Financial Advisors who did not receive commissions as a part of their compensation, did not sell SIB CDs, do not have any outstanding loans,[16] and did not receive any CD proceeds. If they were Stanford customers, their Pershing accounts presumably would already be released. Because they are Financial Advisors, the

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[14] The Examiner does not know why these 14 accounts were processed and released to the exclusion of the remaining 420.

[15] The Examiner has grave concerns as to the propriety and extent of the freeze order as it is being applied to these 66 Stanford Financial Advisors, and will likely investigate the status of their accounts and the manner in which the freeze is being applied to them so that he can report to the Court with respect to those matters. Those Advisors and their accounts are beyond the scope of the recommendations made in R&R No. 1.

[16] A number of Stanford Financial Advisors received "forgivable loans" when they began their employment with Stanford. For some, the loan was something of a "signing bonus." For others, it was compensation paid to a broker who sold his independent brokerage business to Stanford. At present, the Receiver is treating all such loans as Stanford assets that must be collected. While these loans are likely beyond the scope of R&R No. 1, they are another item as to which the Examiner intends to investigate and report to the Court.

Receiver has not even begun to review their applications. There is nothing equitable about putting otherwise innocent account holders at the end of the line (if they are even in the line) simply because they also happened to be employed by Stanford.

With respect to Stanford Financial Advisors, the Examiner respectfully suggests that the Court should terminate the account freeze unless (a) the Financial Advisor is a "relief defendant" in the action brought by the Receiver or (b) the Financial Advisor has an outstanding loan to Stanford.

5. The Receiver's Account Review Process has not been "Expeditious."

For the Stanford account holders (including the Financial Advisors), there is nothing "temporary" about an account freeze that is about to extend into its fifth month. For those who have been deprived of their life savings and have been unable to pay their monthly obligations, five months is an eternity.

In his Response, the Receiver says he is working "expeditiously" to complete his account review process. The experience of the account holders says otherwise. Moreover, the Receiver has not been using the authority that the Court has given him -- including expanded authority originally suggested by the Examiner -- to accelerate the process.

Consider the following time line as an example:[17]

February 17, 2009	Customer accounts frozen
April 6, 2009	Customer filed Receiver's application on line
May 6, 2009	Review completed; customer eligible for partial release
May 19, 2009	First contact from Baker Botts
May 28, 2009	Release Stipulation executed and filed [Doc. No. 413]
June 12, 2009	Customer Assets received from Pershing

[17] This time line was provided to the Examiner by the customer, unsolicited, via email on June 12, 2009.

There is simply no reason that it should have taken the Receiver over five weeks to get this customer's accounts released once it was determined that they were eligible for release, nor is there any excuse for the thirteen day delay between the Receiver's determination that the accounts were eligible for partial release and the Receiver's initial contact with the customer.

By its Order dated May 21, 2009, Doc. No. 394, the Court gave the Receiver authority to release accounts for account holders who had received only *de minimus* CD proceeds.[18] As noted above, there are approximately 90 accounts held by approximately 30 customers that received CD proceeds of less than $50,000. Those accounts can and should be released without delay pursuant to the Receiver's authority to release accounts with de *minimus* proceeds, yet the Receiver has failed to release them.[19] To make matters worse, the Receiver continues to prepare and file release stipulations for customers whose accounts can and should be released without any such stipulations. *See Doc. No. 436* (filed June 4, 2009; CD proceeds of $23,101.67); *Doc. 456* (filed June 9, 2009; CD proceeds of $14,373); *Doc. No. 463* (filed June 11, 2009; CD proceeds of $31,155.70).[20] There is no reason for the Receiver to persist in obtaining written stipulations to release accounts that he can and should release without such stipulations, nor is there any conceivable justification for paying the fees that have been and are being charged by Baker Botts to prepare and file those stipulations.

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[18] That authority was originally suggested to the Receiver by the Examiner in order to reduce both the time it was taking to complete partial releases and the costs of completing the paperwork required for such releases. The Receiver made application for that authority and the Examiner supported the granting of that authority.

[19] The Examiner has sent the Receiver lists of these accounts on June 2 and again on June 10, urging that the Receiver simply release these accounts. The accounts have not been released, nor has the Receiver offered any basis for his failure to release them.

[20] The release application that resulted in Doc. No. 463 was one of the first to be fully reviewed and deemed eligible for a partial release. That decision was made on May 6, 2009.

III. CONCLUSION.

For the reasons set forth in this Reply, in his R&R No. 1, and in the SEC's response to R&R No. 1, the Examiner respectfully requests that this Court adopt his recommendation that the account freeze be immediately terminated as to all customer accounts still frozen at Pershing or JPMorgan, as to all customer accounts still frozen at Stanford Trust Company, and as to all frozen Stanford Financial Advisor accounts, excepting only those Advisor accounts held by Advisors who are relief defendants in the Receiver's pending action or who have outstanding loans payable to Stanford.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On June 12, 2009 I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

____/s/ John J. Little____