

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

**SECURITIES AND EXCHANGE
COMMISSION,**

Plaintiff,

v.

**STANFORD INTERNATIONAL
BANK, LTD., *et al.*,**

Defendants.

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CIVIL ACTION NO. 3-09-CV 0298-N

**EXAMINER'S REPORT AND RECOMMENDATION NO. 1
(Customer Account Freeze and Release Procedures: May 21, 2009)**

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**EXAMINER'S REPORT AND RECOMMENDATION NO. 1
(Customer Account Freeze and Release Procedures: May 21, 2009)**

John J. Little, Examiner, submits his Report and Recommendation No. 1.

I. Preliminary Statement.

Pursuant to the Court's Order dated April 20, 2009 [Doc. No. 322], the Examiner's task is to convey to the Court such information as he determines may be helpful to the Court in considering the interests of the Investors.¹ The Examiner is to convey this information, in part, by periodically filing a Report and Recommendation with the Court. Doc. No. 322 at 2.

Report and Recommendation No. 1 ("Report No. 1") addresses the continued freeze of certain Stanford Group customers' brokerage accounts held at Pershing (the "Customer Accounts"), the account release procedures that are being followed with respect to those Customer Accounts, and the "clawback" claims that the Receiver has indicated he might

¹ The "Investors" include any "investors in financial products, accounts, vehicles or ventures sponsored, promoted or sold by any Defendants in this action." Doc. No. 322 at 1.

prosecute against Stanford customers who received proceeds from their investments in SIB CDs.²

This Report No. 1 also responds (though not directly) to certain issues currently pending before the Court in the following Motions:

- a. Joint Emergency Motion to Reconsider the Order Approving Procedures to Apply for Review and Potential Release of Accounts [Docs. No. 248, 324 and 359]; and
- b. Hannah Peck's Motion to Intervene, Motion to Unfreeze Assets, and Motion for Leave to Proceed with Lawsuit in Another Jurisdiction [Doc. Nos. 293, 357 and 391].

Both Motions address, at least in part, the propriety of the Court's order freezing Customer Accounts and the Receiver's process for considering whether to release those Customer Accounts.

II. Factual Background.

On February 17, 2009, this Court entered a temporary restraining order [Doc. No. 8] and an Order Appointing Receiver [Doc. No. 10].³ The Receiver has indicated that the temporary restraining order froze the assets of Stanford customers, including approximately 32,000 Customer Accounts held by Pershing.⁴ Doc. No. 231 at 3. Through its Orders dated March 5, 2009 [Doc. No. 117] and March 12, 2009 [Doc. No. 154], the Receiver has estimated that the Court authorized the release of approximately 28,500 Customer Accounts. Doc. No. 231 at 6.

On March 26, 2009, the Receiver filed his Unopposed Motion to Approve Procedures to

² The Receiver has indicated that "he is considering filing" "claims to 'claw back' proceeds received by a number of customer holders from redemption of SIBL CDs, or interest paid on SIBL CDs." Report of the Receiver dated April 23, 2009 [Doc. No. 336] at 27. The Receiver characterizes these "claw back" claims as claims "against third parties." *Id.*

³ On March 12, 2009, the Court entered an Amended Order Appointing Receiver [Doc. No. 157]. That Order modified the Order originally entered on February 17, 2009, but not in any way that is material to the issues addressed herein.

⁴ Some 170 Customer Accounts held at JPMorgan also were frozen by the temporary restraining order.

Apply for Review and Potential Release of Accounts. [Doc. No. 231]. The Court entered its Order granting that Motion on March 27, 2009 [Doc. No. 239]. On April 6, 2009, the Receiver began to accept applications seeking the release of frozen Customer Accounts. As of that date, the Receiver has indicated that 3,988 Customer Accounts remained frozen.⁵ For a variety of reasons addressed on the Receiver's Website, he did not begin to review release applications until April 29, 2009.

By its Order dated April 20, 2009, the Court appointed the undersigned to serve as Examiner. In the thirty days since the Examiner's appointment, the Examiner has devoted substantial attention to the Customer Account freeze and the Receiver's process for releasing those Accounts. The Examiner has had a number of meetings with the Receiver, his professionals, and representatives of the SEC at which these matters were addressed. The Examiner has also had multiple conference calls with the Receiver and his professionals to address these matters, and has had almost daily contact with the Receiver and his professionals via both phone and email concerning the release process. The Examiner has also had extensive contact -- through meetings, conference calls, individual telephone calls, email, and mail -- with more than two hundred individual Stanford investors, with approximately sixty lawyers representing several thousand additional Stanford investors, and with a victim's group with over five hundred investor members.

Because the Court's temporary restraining order (and subsequent orders) effectively froze all the Customer Accounts at Pershing, the Examiner understands (and has explained to many Stanford customers) that the Receiver can release Customer Accounts only with Court approval

⁵ This information is published on the Receiver's website: www.stanfordfinancialreceivership.com. The Receiver's website will be cited herein as "Receiver's Website."

or through a process approved by the Court. Pursuant to the most recent information provided to the Examiner by the Receiver,⁶ the Receiver has received applications seeking the release of 2,732 accounts. 2,155 of those applications have been fully reviewed, resulting in the full release of 1,515 accounts. An additional 433 accounts have been deemed eligible for a partial release.⁷

III. The Receiver's "Claw Back" Claims.

As noted above, the Receiver has indicated that "he is considering filing" "claims to 'claw back' proceeds received by" customers where those proceeds derive from either the redemption of SIB CDs or interest payments in respect of SIB CDs. Report of the Receiver dated April 23, 2009 [Doc. No. 336] at 27. To date, the Receiver appears to be focused primarily (if not solely) upon his ability to assert such "claw back" claims against the Stanford customers whose frozen Customer Accounts contain CD proceeds. The Examiner has significant reservations as to whether it is appropriate or equitable for the Receiver to pursue "claw back" claims against a relatively small number of Stanford customers who (i) have done nothing wrong, and (ii) are being targeted for such "claw back" claims simply because those customers have assets that are frozen at Pershing. The Examiner does not believe it appropriate for the Receiver to pursue only a fraction of the innocent Stanford CD investors, simply because those investors present "low-

⁶ The Receiver provides the Examiner with certain reports relating to the account release process on a daily basis, such that the Examiner receives on average five sets of reports per week. The information set forth in this paragraph is from the reports of May 20, 2009.

⁷ "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. That agreement must be reflected in a written stipulation between the Receiver and the customer. In his Motion filed May 18, 2009 [Doc. No. 387], the Receiver asks that the release procedures be modified to permit him to finalize these partial releases simply by filing a stipulation, eliminating the need for a motion and Court approval. The Examiner initially suggested and supports this modification.

hanging fruit" that is ripe for the taking.

In discussions with the Examiner and others, the Receiver and his counsel have relied primarily upon *S.E.C. v. George*, 426 F.3d 786 (6th Cir. 2005), to support the propriety of such "claw back" claims. The Examiner acknowledges that *George* is supportive of the broad principle that compelled disgorgement is proper in some circumstances, even from wholly innocent persons. However, neither *George* nor any of the decisions cited therein considers a situation truly analogous to that before this Court. The Examiner's review of the authorities has failed to uncover a decision that matches the circumstances present in this case.

This case may present an occasion requiring more detailed scrutiny of the power of a receiver to pursue some but not all innocent holders of CD proceeds. Can the Receiver here pick and choose from among the otherwise innocent Stanford customers who received CD proceeds, pursuing "claw back" claims against those whose assets are conveniently available while ignoring the rest?⁸ If "equality is equity" is the goal, *Cunningham v. Brown*, 265 U.S. 1, 13 (1924), how is equity served by a Receiver who pursues only the most handy victims in his efforts to add to the asset pool ultimately available for distribution?

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. Nevertheless, the prospect that these "claw back" claims may someday be filed and adjudicated is the sole justification for the continued freeze of

⁸ There likely are hundreds, if not thousands, of Stanford customers who have received CD proceeds but as to whom the Receiver cannot assert a viable "claw back" claim. The Antigua Liquidators have estimated that U.S. residents represented only 15% of the investors in SIB CDs (by number) and 20% (by value). The Examiner does not believe that the Receiver can assert "claw back" claims against CD investors who are foreign nationals, received CD proceeds, and never deposited those proceeds in a U.S. account or financial institution. At present, neither the Receiver nor the Examiner has information sufficient to quantify the number of CD investors (or the amount of proceeds they received) who might be beyond the reach of any "claw back" claim.

Customer Accounts held at Pershing. Moreover, the threat of such claims is adding significantly to the hardships already being imposed upon Stanford customers who have lost their CD investments and seen their other assets frozen for over three months.

The Examiner respectfully recommends that the Court schedule in the next few weeks a status conference with the SEC, the Receiver, the Examiner and all other parties to address the Receiver's intentions with respect to the assertion of "claw back" claims and to attempt to fashion some schedule for the assertion and adjudication of those claims.

IV. The Seizure of Customer Accounts to Support Possible "Claw Back" Claims.

At the beginning of this action and Receivership, the Court understandably froze any and all Customer Accounts so that the Receiver would have an opportunity to preserve the assets while he tried to determine which assets belonged to the Receivership Estate and which assets did not. While the freeze arguably made sense when it was imposed on February 17, 2009, it does not make sense over three months later.

For reasons that will be discussed at some length below, the Examiner respectfully recommends that the Court order that all remaining Customer Accounts held at Pershing or JPMorgan for the purpose of supporting the Receiver's "claw back" claims be released to their owners.⁹ In summary, the Examiner makes this recommendation for three reasons. First, the continued freeze of these Customer Accounts effectively creates a "pre-judgment attachment" that is unsupportable as a matter of law. Second, the imposition and maintenance of the freeze,

⁹ The Examiner recognizes that certain Customer Accounts are frozen for reasons that have nothing to do with the Receiver's possible assertion of "claw back" claims. For example, some accounts remain frozen because the customer has an outstanding loan payable to Stanford secured by the account. Other Customer Accounts are frozen because they are owned by Defendants or Stanford-affiliated entities. The Examiner is not recommending that accounts of this sort be released. The Examiner's recommendation does include accounts owned by Stanford Financial Advisors.

the defense of the satellite litigation the account freeze has ignited, and the implementation and administration of the account release process have unquestionably already cost the Receivership Estate millions of dollars, and will likely continue to do so. Third, the continued freeze is imposing severe hardships upon individuals who have done nothing wrong, against whom no claim is even pending, and as to whom the Receiver might not be able to collect a judgment, should he ever seek and obtain one, absent the continuing account freeze.¹⁰

A. The Customer Account freeze is contrary to law.

The Receiver "is considering" bringing claims against various Stanford customers in an effort to "claw back" SIB CD proceeds received by those customers. Doc. No. 336 at 27. No such claims have been filed by the Receiver, and the Receiver has given no indication as to when (or if) he will file those claims. Through the freeze order, the Receiver has effectively accomplished a pre-judgment attachment of assets owned by individuals (and entities) against whom he has asserted no claims, and as to whom he has offered no evidence of any sort that would support that sort of relief under Texas (or any other state's) law.

The Receiver has never offered any legal justification for this continued account freeze. None of the cases cited by the Receiver to support the ultimate viability of the "claw back" claims he is contemplating support the pre-judgment attachment the Receiver has achieved with respect to the Customer Accounts.

Rule 64 makes it clear that pre-judgment attachment is available in this Court. FED. R. CIV. P. 64(b). The availability of such an attachment must be determined, in the first instance,

¹⁰ The Examiner notes that many of these Customer Accounts are accounts that typically would not be subject to attachment or execution by a judgment creditor; for example, IRA accounts and various forms of pension and retirement accounts. The Examiner will not address these particular issues in this Report, but may need to investigate and report upon these sorts of issues if these Customer Accounts remain frozen.

under Texas law. FED. R. CIV. P. 64(a).¹¹ Texas law views pre-judgment attachment as an oppressive and harsh remedy available only through strict compliance with the statutory requirements of the remedy. Those requirements are set forth in TEX. CIV. PRAC. & REM. CODE §§ 61.001 through 61.005. In this action, the Court need look no further than section 61.003 to determine that pre-judgment attachment is not available. Section 61.003 makes it clear that a writ of attachment "may not be issued before a suit has been instituted." With respect to the continuing Customer Account freeze, that is precisely what has happened. The Receiver has effectively "attached" the frozen Customer Accounts without having filed an action against any of the customers whose accounts are frozen. Such an attachment is improper and should not be permitted to continue.

There is also ample authority for the proposition that, in an SEC-instigated receivership, it is improper to freeze assets that belong to a third party who has done nothing wrong. The Third Circuit has held that it is improper for a district court to freeze assets owned by third parties who are not alleged to be "wrongdoers," as contemplated by 15 U.S.C. §78u (d) and (e), when those assets are not the property of any defendants. *S.E.C. v. Black*, 163 F.3d 188, 196 (3d Cir. 1998). The Third Circuit ultimately concluded that a district court may freeze accounts of an investor only where (i) the funds in the account actually belong to a defendant in the pending lawsuit, or (ii) the investor is a "wrongdoer" as described in 15 U.S.C. §78u (d) and (e). *Id.* at 196-198.

The Seventh Circuit reached a similar conclusion in *S.E.C. v. Cherif*, 933 F.2d 403 (7th Cir. 1991). *Cherif* stands for the proposition that a district court may not take the assets of a non-culpable third party because 15 U.S.C. §78u (d) and (e) permit the district court to exercise its

¹¹ Rule 64(a) states that "every remedy is available that, under the law of the state where the court is located, provides for seizing a person or property to secure satisfaction of the potential judgment."

equitable powers only over the defendants or other persons before the court. 933 F.2d at 413. The Seventh Circuit noted that there was nothing "in the case law that suggests that 15 U.S.C. §78u(d) or (e) authorizes a court to freeze the assets of a non-party, one against whom no wrongdoing is alleged." *Id.* at 414. While the Court acknowledged that the S.E.C. had a legitimate and understandable desire to recover ill-gotten gains, it refused to find that it was appropriate to freeze assets owned by third parties. Instead, the proper procedure to obtain relief against the third parties was to name them as nominal defendants and then seek to recover any ill-gotten gains. *Id.* at 413-415.¹²

The reasoning in *Black* and *Cherif* is equally applicable here. The law simply does not support a continuing freeze of Customer Accounts that belong to third parties (the customers) who have done nothing wrong. The Customer Accounts should be released immediately to the customers. If and when the Receiver files his "claw back" claims, and if and when he obtains a judgment in his favor with respect to those claims, he can seek to collect them like any other party in whose favor a judgment has been entered.

B. The Customer Account freeze has drained millions out of the Receivership.

In his recently filed Fee Application [Doc. No. 384], the Receiver seeks this Court's approval of more than \$19.9 million in fees and expenses incurred by the Receiver and his team of professional firms. Apart from estimating that approximately \$1 million has been spent on "defensive litigation," the Receiver's Fee Application does not make any effort to allocate the fees sought among the various tasks that the Receiver was required to perform with respect to

¹² The Examiner wishes to acknowledge that the legal argument set forth in the preceding two paragraphs was borrowed in large part from Hannah Peck's Reply Brief [Doc. No. 391] with respect to her Motion to Intervene. The Examiner thanks Ms. Peck's counsel, Ashlea Brown, Esq., of Newland & Associates, PLLC, for her work on the argument.

this Receivership. The Examiner (and many others) would be very interested in knowing how much money has been spent by the Receiver to (a) obtain and maintain the Customer Account freeze, (b) move for and obtain Court approval of the first two releases of Customer Accounts, (c) create, obtain approval of, and implement the account release process, (d) "develop and integrate a complex array of data regarding [CD] transactions"¹³ for use in the account release process, (e) administer the account release process on a daily basis since it was approved, and (f) defend the dozens of motions to intervene (and affiliated proceedings) that were filed by Stanford customers seeking to have their Customer Accounts released.

C. The Customer Account freeze is imposing untenable hardships upon victims.

The Examiner also respectfully submits that the continuing freeze of Customer Accounts should come to an end because it is imposing untenable hardships upon people who have done nothing wrong and who have, to a large extent, already been victimized. The Examiner has heard from many individual customers whose frozen Customer Accounts contain all (or virtually all) of the customer's assets.

As an example, the Examiner has had extensive contact with a retired couple living in Louisiana. Their life savings were invested in two Stanford accounts (one of which was at Stanford Trust in Louisiana). They submitted the Receiver's application forms on or about April 8, 2009. Both accounts remain frozen because the Receiver has determined that the customers received CD proceeds in excess of the balance remaining in their accounts. The customer's own words describe the situation more eloquently than the Examiner could hope to:

We are not able to pay our bills and now run the risk of the utilities for our home being cut off. If we do not get help soon we will also lose our medical insurance.

These customers will be poverty-stricken if the Receiver is permitted to maintain his hold

¹³ Receiver's Website.

on their accounts.

These customers are not an isolated case -- many of the customers whose accounts remain frozen find themselves in similar circumstances. The Examiner has communicated with customers who cannot make their mortgage payments, who cannot pay for monthly prescription costs, who cannot pay for necessary medical care -- all because all (or virtually all) of their assets remain frozen in their Customer Accounts. Many are also suffering loss on multiple sides; they are Stanford victims who have lost significant amounts because they were invested in SIB CDs on February 17, 2009, and they cannot access their remaining assets because they are lodged in frozen Customer Accounts.

A final point with respect to these customers is worth making; that is, the customers whose accounts remain frozen are likely only a small fraction of the customers who received proceeds from SIB CDs. The account freeze does not extend and has never extended to all customers who redeemed SIB CDs, or who received interest payments with respect to SIB CDs. It reaches only those customers who (a) received CD proceeds, and (b) had accounts at Pershing (or JPMorgan) on February 17, 2009. Customers who received CD proceeds but who did not maintain a Pershing account have had no assets frozen.¹⁴

In summary, the continuing freeze of the Customer accounts is neither lawful nor equitable. The Court can and should bring it to an end.

V. The Release Process.

The Examiner recognizes that the Court may not be inclined to immediately order the

¹⁴ The Examiner does not have information available to him to identify the number of customers who received CD proceeds but who are not subject to the account freeze.

release of all remaining Customer Accounts (as recommended above), and/or that the Court may elect to consider such an order only after the Receiver and other parties have an opportunity to brief the issue. Accordingly, to the extent that the Receiver's existing release process will remain in operation for any additional time, the Examiner offers below his observations and recommendations concerning that process.

The Examiner has engaged in many discussions with the Receiver and his professionals concerning the release process established by the Receiver and proposed modifications to that process. During those discussions, the Examiner proposed and the Receiver agreed to adopt certain modifications to the Release process, particularly with respect to how the process was applied to Customer Accounts held by customers who were believed to have received SIB CD proceeds. The net result of those discussions is reflected in the Motion filed by the Receiver on May 18, 2009 [Doc. No. 387].

A. The Examiner recommends that the Court promptly enter the Agreed Order that was submitted by the Receiver with respect to Doc. No. 387.

The Receiver's Motion filed May 18, 2009 [Doc. No. 387] incorporates a number of modifications initially proposed by the Examiner that have been adopted by the Receiver. Those modifications are addressed briefly below:

1. Clarify that the Receiver has the discretion to release Customer Accounts that hold *de minimus* CD proceeds.

The Receiver's analysis of release applications it has received reflects that a number of Stanford customers received nominal proceeds from their SIB CDs. Based upon the most recent information provided by the Receiver, over one-fourth of the customers with accounts deemed eligible for a "partial release" have received total CD proceeds in an amount under \$50,000.

Many of those have received less than \$15,000 in CD proceeds.¹⁵

The Court's Order [Doc. No. 239] approving the Receiver's initial account release procedures gave the Receiver ample discretion to determine, based upon the information submitted to the Receiver, which Customer Accounts could be released:

the Receiver is authorized, upon review of applications submitted pursuant to the Release Application Procedures, to release accounts from the Freeze Order that the Receiver in his discretion deems eligible for release

Doc. No. 239 at 2 (emphasis added). It was and is the Examiner's view that the foregoing language alone is sufficient to authorize the Receiver to release Customer Accounts that hold only *de minimus* proceeds from SIB CDs. The Examiner has urged the Receiver to release such accounts without further process; the preparation and filing of a stipulation to freeze \$3,412¹⁶ in CD proceeds will doubtless cost the Receivership more than the Receiver could hope to recover if he was eventually deemed entitled to that entire amount.

The Agreed Order submitted with the Receiver's Motion [Doc. No. 387] clarifies and re-emphasizes that the Receiver has the discretion to release Customer Accounts where only *de minimus* CD proceeds have been received.

2. Eliminate the need to obtain Court approval of each "partial release."

The Court's Order [Doc. No. 239] approving the Receiver's initial account release procedures required the Receiver to obtain Court approval of a decision to release Customer

¹⁵ Pursuant to the information provided by the Receiver on May 20, 2009, there were 433 Customer Accounts eligible for a partial release. Those accounts were held by 99 customers (or related groups of customers). Of those 99 customers, 27 had received proceeds under \$50,000, and 12 had received proceeds under \$15,000.

¹⁶ This amount is one of the smaller amounts that is causing the Receiver to continue to hold Customer Accounts.

Accounts if that decision reflected a "compromise and settlement" between the Receiver and the customer. Specifically, the Court's Order authorized the Receiver to:

engage in negotiations with applicants and seek to compromise and settle with applicants on such terms as the Receiver in his sole discretion deems are in the best interest of the Receivership Estate, subject to Court approval.

Doc. No. 239 at 2. The Receiver has read this provision to apply to decisions to do a "partial release" of Customer Accounts, and has filed Motions [Doc. Nos. 291, 297] seeking Court approval of the only two "partial releases" accomplished to date.

The Examiner respectfully submits that Court approval is not required (and ought not be required) with respect to a "partial release" pursuant to which a Customer Account is released if the customer agrees to leave behind a "hold back" amount determined by the Receiver. This is so for two separate reasons.

First, the agreement between a customer and the Receiver pursuant to which the Receiver retains a "hold back" amount is not a "settlement or compromise" between the customer and the Receiver. The stipulations executed by Greiner and MacDonald [Docs. No. 291, 297] make it clear that no final adjudication has occurred with respect to the parties' respective claims to the "hold back" amounts. The Court's Orders approving the Greiner and MacDonald releases made the same point -- that there had been no final adjudication of the parties' respective claims to the "hold back" amounts. [Docs. No. 344 and 345.] Thus, the agreements between the customer and the Receiver are the antithesis of a "settlement and compromise" -- the parties make it clear that they are not settling or adjudicating anything with respect to the "hold back" amounts.

Second, the Examiner does not believe that there have been any real "negotiations" with respect to these agreements. The form of the agreement (the stipulation) was established by the Receiver's account release procedures and this Court's Order [Doc. No. 239] approving those

procedures. While the form of the agreement may be changed somewhat by the Receiver's pending Motion [Doc. No. 387], it will not be changed by any "negotiations" with the customer. More importantly, the Examiner does not believe there have been any "negotiations" with respect to the amount of the "hold back." The Receiver has identified the amount to be "held back," and the customer has had but one choice to make -- agree to the Receiver's amount and secure the release of the Customer Account, or reject the Receiver's amount and leave the Customer Account frozen.

The Examiner supports the Receiver's Motion [Doc. No. 387] to the extent that it seeks to eliminate the need to seek Court approval for the "partial release" of Customer Accounts.

3. Require that any amounts "held back" by the Receiver as part of a partial release be deposited in a separate, interest-bearing account.

While some Stanford customers received only *de minimus* CD proceeds, there are other customers who have been deemed eligible for a "partial release" who will be required to let the Receiver "hold back" amounts in excess of \$1,000,000 if they want access to the rest of their money. Because there is no current timetable for the adjudication of the Receiver's "claw back" claims (nor even for the filing of those claims), the Examiner urged that any "hold back" amounts be deposited into a segregated, interest-bearing account. The Receiver has agreed to that suggestion and included it in his Motion [Doc. No. 387], as well as in the form of Stipulation that will be used to document any additional "partial releases."

4. Expressly acknowledge that any amounts "held back" by the Receiver are not subject to the expenses of the Receivership Estate until such time as the Court determines the Receiver's entitlement to those amounts.

As has been discussed previously, the Receiver's purpose in "holding back" certain amounts as a condition to releasing Customer Accounts is to secure his ability to collect in the event that he prevails in "claw back" claims he asserts against customers who received proceeds

from SIB CDs. The Court's initial Order approving the Receiver's release procedures [Doc. No. 239] specifically provided that the Court was not finally adjudicating the Receiver's claim to any frozen accounts (or amounts contained therein). The Court's Orders approving the first two "partial releases" presented by the Receiver [Docs. No. 344 and 345] contained similar language.

The Examiner proposed, and the Receiver agreed, that it would be appropriate for the Court to clarify that any amounts held by the Receiver (whether in a frozen account or as a "hold back" when an account was released) were not subject to the expenses of the Receivership. Such amounts would only become subject to Receivership expenses if the Court concludes that the Receiver is entitled to such sums and that the customer is not. The Receivers' Motion [Doc. No. 387], and revised form of Stipulation, both now make clear that such amounts are not subject to Receivership expenses.¹⁷

B. The Examiner recommends two additional modifications to the Release Process.

In addition to the proposals made by the Examiner that were adopted by the Receiver and included in his Motion [Doc. No. 387], the Examiner made two additional recommendations with respect to the release process that the Receiver was either unable or unwilling to include in that Motion. The Examiner will address those additional recommendations below.

1. Release immediately Customer Accounts that the Receiver does not need to retain his desired "hold back" amount.

Most of the customers whose accounts have been deemed eligible for a "partial release" hold multiple Stanford accounts. Some customers have two or three different accounts, some

¹⁷ The Receiver's Motion [Doc. No. 387] and proposed Order do not specify that these modifications apply equally to the amounts held pursuant to the first two "partial releases," *see* Doc. Nos. 344 (MacDonald) and 345 (Greiner); however, the Examiner understands that the Receiver intends to apply those modifications to any amounts "held back" with respect to the Customer Accounts of MacDonald and Greiner.

have more than ten. In many cases, such customers have sufficient assets in a single account to supply the Receiver's desired "hold back" amount. In his conversations with the Receiver and his counsel, the Examiner has urged the Receiver to release any accounts that he does not need to keep frozen in order to secure the retention of his desired "hold back" amount. To date, the Receiver has been unwilling to do so.

The Customer Accounts owned by Ms. Hannah Peck, the movant in the pending motion to intervene [Doc. No. 293] are an instructive example. Ms. Peck is the owner of four accounts (either directly or through trusts for which she serves as trustee). Based upon the information provided to the Examiner by the Receiver, Ms. Peck and the Receiver agree upon the amount of CD proceeds that Ms. Peck has received from SIB.¹⁸ Each of Ms. Peck's four accounts has a balance in excess of the amount of CD proceeds that the Receiver might want to "hold back" with respect to Ms. Peck. Pursuant to the authority granted to him in the Court's Order approving his release procedures [Doc. No. 239],¹⁹ the Receiver can and should release three of Ms. Peck's Customer Accounts immediately, while keeping "frozen" a single account that contains sufficient assets to satisfy the Receiver's desired "hold back."

The Examiner has reviewed the "partial release" information provided to him by the Receiver as of May 20, 2009. At that date, there were 433 Customer Accounts deemed eligible for partial release, held by 99 different customers. Fifty (50) of those customers (including Ms. Peck) are in the situation described above -- they hold multiple accounts and have at least one

¹⁸ In order to keep Ms. Peck's account information confidential, the Examiner will not identify the specific amount of CD proceeds she received nor the amounts that are held in each of her four accounts. The Examiner will make the specific information available to the Court for *in camera* inspection if same is desired.

¹⁹ "[T]he Receiver is authorized, upon review of applications submitted pursuant to the Release Application Procedures, to release accounts from the Freeze Order that the Receiver in his discretion deems eligible for release." Doc. No. 239 at 2 (emphasis added).

account that alone has sufficient assets to supply the Receiver's desired "hold back" amount. As to these 50 customers, the Examiner believes that the Receiver can release immediately approximately two hundred forty (240) Customer Accounts without impairing in any way his ability to retain his desired "hold back."²⁰

The Examiner respectfully recommends that the Court either order the Receiver (i) to immediately release any accounts that he does not need to keep frozen in order to obtain his desired "hold back," or (ii) show cause, on an accelerated basis, as to why such Customer Accounts should not be released.

2. Authorize the Receiver to review and release Customer Accounts where customers have not submitted the Receiver's application materials.

At the time the Receiver proposed his release procedures, he acknowledged that he did not have complete records with respect to at least some of the Customer Accounts that had been frozen. Doc. No. 231 at 6. The Examiner believes that the Receiver now possesses far better information concerning the frozen Customer Accounts; in fact, the Receiver has been able to review some Customer Accounts on a hardship basis without having received the completed application materials.

²⁰ The release of these two hundred forty (240) accounts would also give the customers access to vast sums of their money as to which the Examiner has no conceivable claim. Without specifically identifying any particular customers, the Examiner notes the following examples:

- a. seven Accounts holding in excess of \$7.4 million remain frozen to secure a claimed "hold back" of \$435,094;
- b. eight Accounts holding in excess of \$3.6 million remain frozen to secure a claimed "hold back" of \$144,700; and
- c. ten Accounts holding in excess of \$17.7 million remain frozen to secure a claimed "hold back" of \$1,299,424.

There are many other, similar examples, but the Examiner will not belabor the point here.

Additionally, the Examiner notes two problems that he has repeatedly observed with respect to the Receiver's application process. First, there are a number of customers who simply are unable to complete the Receiver's application. Some lack the records they need to complete the application. Some simply do not understand the form or the language used in the form. Many do not have the financial resources to retain counsel to assist them with the form. Second, many customers (and their counsel) have raised objections to the Receiver's form. Among the more common objections that have been raised are the following:

- a. the form requires the customer to provide the Receiver with "post-judgment" discovery by requiring the customer to furnish information concerning the customer's use of any CD proceeds the customer received;
- b. the form requires the customer to consent to jurisdiction in this Court and also requires the customer to "irrevocably waive any right I or any entity I control may otherwise have to object to any action being brought in the Court or to claim that the Court does not have jurisdiction over the matters relating to my account;"²¹ and
- c. the form requires the customer to "prove a negative" when it requires a statement explaining why the customer should not be viewed as a participant in a fraud.

The Examiner views the last objection as particularly worthy of note. For the vast majority of the customers whose accounts remain frozen, this requirement adds insult to injury. Many of these customers are SIB CD investors who have been defrauded, their other, remaining assets have been frozen, and they are being required by the Receiver to demonstrate that they were not participants in the fraud that victimized them in order to regain access to their remaining assets.²²

²¹ The aspect of this language that the Examiner finds particularly troubling is the requirement that a customer waive rights for entities that the customer controls even if those entities have no involvement with the Customer Accounts that are at issue.

²² The Examiner respectfully suggests that there is no purpose to the statement required by the Receiver. It is highly unlikely that a customer who was, in fact, a participant in the fraud will confess his/her participation on the Receiver's account release application.

Based upon the most recent reports available to the Examiner, release applications have been submitted with respect to 2,732 frozen Customer Accounts. Of that number, 577 have yet to be reviewed. Once these remaining applications have been reviewed and their fate determined, the Receiver ought to begin a review of the remaining Customer Accounts.

For some 1,256 Customer Accounts,²³ no release applications have been filed with the Receiver. To the extent that the Receiver has available to him the account information necessary to determine (i) whether the customers who own these Customer Accounts ever received CD proceeds, and (ii) the amount of such proceeds, the Examiner respectfully recommends that the Court authorize the Receiver to review these Customer Accounts, with or without a completed application, and determine, in his discretion, which accounts are eligible to be released.

C. Procedural Recommendations for Moving Forward.

In addition to the substantive recommendations contained in this Report No. 1, the Examiner respectfully makes the following procedural recommendations to the Court with respect to matters relating to the frozen Customer Accounts and the account release process.

1. The Examiner recommends and requests that the Court schedule a status conference with the SEC, the Receiver, the Examiner and all other parties to address the Receiver's intentions with respect to the assertion of "claw back" claims and to attempt to fashion some schedule for the assertion and adjudication of those claims.

2. The Examiner recommends and requests that the Court shorten the time for the Receiver and others to respond to the recommendations made in this Report No. 1, such that responses will be filed on or before June 1, 2009 and the Examiner's reply will be filed on or before June 8.

²³ The Examiner derives this number by subtracting the number of applications submitted through May

WHEREFORE, the Examiner respectfully submits his Report and Recommendation No. 1 to the Court and respectfully recommends to the Court the following actions:

- a. that the that the Court order that all remaining Customer Accounts frozen at Pershing or JPMorgan be released;
- b. that an Order granting the Receiver's Motion filed May 18, 2009 [Doc. No. 387] be promptly entered so that the account release process can be accelerated;
- c. that the Court order to the Receiver to immediately release any accounts that he does not need to keep frozen in order to obtain his desired "hold back" amount;
- d. that the Court authorize the Receiver to review and release Customer Accounts, in his discretion, as to which the Receiver's application has not been submitted;
- e. that the Court schedule a status conference with the parties to address the Receiver's contemplated "claw back" claims; and
- f. that the Court shorten the time for the parties to respond to the recommendations made by the Examiner in this Report No. 1, as set forth above.

May 21, 2009

Respectfully submitted,

/s/ John J. Little

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20, 2009 (2,732) from the number of frozen accounts at April 6, 2009 (3,988).

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CERTIFICATE OF SERVICE

On May 21, 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