UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

FAYE B. FEINSTEIN,

Plaintiff,

v.

Civil Action No. 11-CV-00058

BRIAN W. BENDER, *et. al.*,

Defendants.

DEFENDANTS' RESPONSE TO PLAINTIFF'S CIVIL L.R. 7(h) AND 7(i) EXPEDITED NON-DISPOSITIVE MOTION FOR LEAVE TO FILE "SUR-REPLY"

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Attorneys for Defendants, Brian W. Bender, *individually and in his capacity as trustee of the Brian W. Bender Personal Revocable Trust and the Brian W. and Marianne P. Bender Joint Revocable Trust, and* ***Marianne P. Bender****, individually and in her capacity as trustee of the Brian W. and Marianne P. Bender Joint Revocable Trust*

Rightfully concerned that the SEC's thinly-veiled "Sur-Reply" was not going to save the Receiver's meritless claims, the Receiver now requests leave to file her own "Sur-Reply," with exhibits totaling 77 pages. (ECF No. 23.) Defendants object to the Motion as procedurally improper, mistaken, and not helpful to the Court.

The Receiver fails to cite a single authority that would permit her to file a "Sur-Reply." Indeed, the phrase "Sur-Reply" does not appear in the Federal Rules of Civil Procedure, the Local Rules, or this Court's Preferred Procedures for Litigants, and the clear import of Civil L. R. 7 is that the moving party is entitled to the last pleading. Having failed to cite any authority that would allow her to file a "Sur-Reply," the Receiver's Motion for Leave should be denied.

Moreover, the purported basis for the Receiver's request -- that the Reply raised new arguments -- does not make sense. Defendants' Reply arguments were all made in response to the Receiver's arguments in her Response Brief. (ECF No. 11.) There is nothing unusual about responding to Response arguments in a Reply. Indeed, that is precisely the point of a Reply.

More importantly, the ***only*** section of the proposed "Sur-Reply" that even purports to address "new" arguments has to do with *Janvey*, where the Receiver claims that she was somehow blindsided by Defendants' description of "the underlying district court lawsuits." (ECF No. 23-1 at 2.) This claim is incredible and does not reflect the actual record. Defendants' initial Brief devoted nearly two pages to a somewhat exhaustive summary of the case history and issues in *Janvey*. (ECF No. 9 at 8-9.) In her Response, the Receiver argued (albeit erroneously) that the *Janvey* receiver "*did not bring any claims against [the innocent investors]*."[1] (ECF No.

[1] This argument does not lose its absurdity now that the Receiver has attached a copy of the two underlying complaints. For example, paragraphs 30-31 of the "1329 Complaint" allege -- exactly as the Receiver does here -- that the transfers were made to innocent investors "for the purpose of concealing and perpetuating the fraudulent scheme. . . . Therefore, the [innocent investors] do not have any rightful ownership interest that could justify their retaining possession of these funds, which are properly considered assets of the Receivership Estate." It then (despite being a complaint) cites some of the same fraudulent transfer cases the Receiver cites in her Response -- *e.g.*, *Donell v. Kowell*, 533 F.3d 762 (9th Cir. 2008); *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995) -- as alleged

11 at 6.) Defendants' Reply reiterated that the *Janvey* receiver had in fact brought separate, "ancillary" lawsuits against the innocent investors. (ECF No. 17 at 5-6.) Thus, the Receiver's Motion does not show that Defendants' Reply raised new arguments, and the proposed "Sur-Reply" is simply the Receiver's attempt to get the last word on what happened in *Janvey*. As such, leave to file the proposed "Sur-Reply" should be denied. *See Lewis v. Rumsfeld*, 154 F. Supp. 2d 56, 61 (D.D.C. 2001) (denying leave to file sur-reply where plaintiff failed to show that the reply raised new arguments).

The Receiver's "Sur-Reply" is also an unauthorized Reply to the SEC's unauthorized motion (ECF No. 19), and Defendants' Response thereto (ECF No. 21). It also continues the SEC's failed attempt to make *Janvey* seem inapposite or divert attention from the law the SEC cited, which shows that the Receiver's claims to recoup principal are without legal foundation.

The Receiver here still fails to cite a single *decision* that would allow a receiver to recover "principal only" payments under either a fraudulent transfer or unjust enrichment theory. And as to the *Janvey* receiver's likelihood of success with his amended complaint, the SEC's take is again instructive. For example, in the district court, the SEC filed an "Emergency Motion" because "[t]he Receiver's clawback claims against innocent investors seeking the return of *principal* are not supported by case law and are contrary to Commission practice." (Jeffrey J. Liotta Declaration ¶ 2, Ex. A at 1.) In fact, discussing the cases cited in the 724 and 1329 "complaints," the SEC argued that "[n]one of the cases offered by the Receiver support the broad proposition that a receiver can sue wholly innocent investors for the return of *principal*, and the Receiver has misinterpreted the authority upon which he relies." (*Id.* at 4.)

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support for its position that recovery of an innocent party's investment is permissible. (*Id.* ¶ 31.) The complaint concludes by requesting the same relief the Receiver is requesting here -- a clawback of innocent investors funds that were not in the receivership estate at the time the *Janvey* receiver was appointed. (*Id.* ¶ 35.) The fact that the claim was not successful does not change the fact that the *Janvey* receiver was bringing a claim.

Then, at oral argument in the Fifth Circuit, the SEC argued that even if the *Janvey* receiver had filed unjust enrichment claims, they "would also certainly fail because it wouldn't be inequitable . . . for the investors to keep the benefit that they received up to the amount of their initial investment." (Hr'g Trans. at 45.)[2] As to a possible fraudulent transfer claim, the SEC explained: "[I]f the investors are not proper relief defendants, the receiver could assert claims against investors such as these in this case under the Fraudulent Transfer Act. ***Those claims, however, would be dead on arrival*** . . . ." (*Id.* at 47) (emphasis added.)

The rest of the Receiver's proposed "Sur-Reply" does not even purport to address "new" arguments, and is instead an impermissible attempt to have the last word on Defendants' Motion to Dismiss. For example, clarifying a defendant's "mischaracterization" is not sufficient grounds to file a "Sur-Reply," *see Lewis*, 154 F. Supp. 2d at 61 (denying leave when the "contention does not involve a new matter but rather an alleged mischaracterization . . . ."); nor is the Receiver's attempt to challenge Defendants' explanation of case law, *see Interphase Garment Solutions, LLC v. Fox Television Stations, Inc.*, 566 F. Supp. 2d 460, 467 (D. Md. 2008) (sur-reply not permitted when plaintiff "seeks merely to re-open briefing on the issues raised in [a] motion to dismiss and challenge [the movant's] explanations of cited case law.").

WHEREFORE, Defendants respectfully request that the Court deny the Receiver's Motion for Leave to File a "Sur-Reply," and strike the proposed "Sur-Reply" from the record.[3]

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[2] A copy of the Fifth Circuit Hearing transcript is available on the *Janvey* receiver's website. http://stanfordfinancialreceivership.com/#MTDBB (under title "Transcript of Appeals Court Hearing Regarding Claw Backs") (last visited May 19, 2011). Page references refer to the numbered pages from the same.

[3] The Receiver's Motion should be denied. If it is not, because the relevant rules and time-worn practice dictate that the moving party is entitled to the final pleading, Defendants respectfully request the Court's permission to file their own six page Response, and supporting documentation, to the Receiver's "Sur-Reply."

Date: May 23, 2011.

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN
GREEN BAY DIVISION

FAYE B. FEINSTEIN,

Plaintiff,

v.

Civil Action No. 11-CV-00058

BRIAN W. BENDER, *et. al.*,

Defendants.

DECLARATION OF JEFFREY J. LIOTTA IN SUPPORT OF DEFENDANTS' RESPONSE TO PLAINTIFF'S CIVIL L.R. 7(h) AND 7(i) EXPEDITED NON-DISPOSITIVE MOTION FOR LEAVE TO FILE "SUR-REPLY"

JEFFREY J. LIOTTA, ESQ., an attorney of law duly admitted to practice before this Court, hereby declares the following:

1. I am a shareholder at Whyte Hirschboeck Dudek S.C., attorneys for Defendants in the above-captioned action. I submit this Declaration in support of Defendants' Response to Plaintiff's Civil L.R. 7(h) and 7(i) Motion for Leave to File "Sur-Reply" (ECF No. 23).

2. Attached hereto as Exhibit A is a true and correct copy of the Securities and Exchange Commission's *Emergency Motion to Modify Receivership Order*, which was filed on July 20, 2009, in the United States District Court for the Northern District of Texas in *Securities and Exchange Commission v. Stanford International Bank, Ltd., et. al.*, Case No. 3:09-cv-00298-N (ECF No. 613), the underlying SEC action at issue in the *Janvey* litigation. This copy was taken directly from the United States District Court for the Northern District of Texas's ECF system.

I declare under the penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Date: March 25, 2011.

s/ Jeffrey J. Liotta
Jeffrey J. Liotta, Esq.

EXHIBIT A

The Securities and Exchange Commission's *Emergency Motion to Modify Receivership Order*, which was filed on July 20, 2009, in the United States District Court for the Northern District of Texas in *Securities and Exchange Commission v. Stanford International Bank, Ltd., et. al.*, Case No. 3:09-cv-00298-N (ECF No. 613).

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

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No.: 3:09-cv-0298-N
	§	
STANFORD INTERNATIONAL BANK, LTD., STANFORD GROUP COMPANY, STANFORD CAPITAL MANAGEMENT, LLC, R. ALLEN STANFORD, JAMES M. DAVIS, and LAURA PENDERGEST-HOLT,	§	
	§	
Defendants,	§	
and	§	
	§	
STANFORD FINANCIAL GROUP, and THE STANFORD FINANCIAL GROUP BLDG INC.,	§	
	§	
Relief Defendants.	§	
	§	

PLAINTIFF'S EMERGENCY MOTION TO MODIFY RECEIVERSHIP ORDER

Plaintiff Securities and Exchange Commission requests that the Court modify the Amended Order Appointing Receiver to grant the Commission exclusive authority to pursue, in its discretion, claims against investors. The Receiver's clawback claims against innocent investors seeking the return of *principal* are not supported by case law and are contrary to Commission practice. The Commission understands that the Receiver will file possibly hundreds of additional claims against innocent investors on or before August 3, 2009. After great consideration, and for the reasons stated below, the Commission now seeks to modify the authority that earlier was granted to him at the Commission's request. The Commission respectfully seeks emergency consideration of this motion to prevent the tremendous litigation

expense that would be incurred by innocent investors as well as the receivership estate should the Receiver continue to file clawback claims.[1]

The Receiver's Clawback Claims

Paragraph 5(c) of the Receivership Order broadly authorizes the Receiver to institute actions and proceedings against third parties who are in possession of assets traceable to the estate. The Receiver has used this provision to assert claims against third parties who have not voluntarily turned over assets to the Receiver, and against brokers who received exorbitant commissions from the sale of Stanford CDs.[2] In these instances, the Commission and the Examiner have supported the Receiver's efforts to pursue and recover funds on behalf of the estate.

Unfortunately, the Receiver has filed "clawback" claims against wholly innocent Stanford investors who – by happenstance -- hold in domestic brokerage accounts proceeds from redemptions of Stanford Bank CDs and/or interest payments on those CDs.[3] In each of these actions, the Receiver concedes that the relief defendants are "innocent investors" who did not participate in the underlying fraudulent scheme or otherwise commit any wrongdoing. The Receiver does not allege that any of the relief defendants received funds in preference to other investors, received an unreasonable amount of funds, acted in bad faith, or had knowledge of the

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[1] Should the Receiver file additional claims, the Commission will find itself in the strange position of having to intervene in those actions, seeking leave of Court to present the views expressed here. After careful consideration, the Commission moves for the relief requested herein in order to pursue the relief it deems appropriate and consistent with the public interest.

[2] With respect to the claims against the former brokers (*see* Receiver's Complaint Naming Stanford Financial Group Advisors as Relief Defendants, Case No. 3-09-CV-00724-N (April 20, 2009)), the Commission supports the Receiver's efforts to clawback commissions. To the extent that the brokers hold funds in a frozen account, the commissions should remain frozen but the balance of funds in the account should be released to the brokers immediately.

[3] Receiver's First Supplemental Complaint (Bell), Case No. 3-09-CV-00724-N (June 22, 2009); Receiver's Second Supplemental Complaint Naming Additional Relief Defendants (Haddad), Civ. No. 3:09-CV-00724-N (June 25, 2009); Complaint (*Janvey v. Letsos*, Civ. No. 3:09-CV-01329-P (July 16, 2009)).

fraud.[4] The Receiver has filed these cases because the investors have funds frozen at Pershing LLC, and according to the Receiver, their principal investment *and* all interest paid to them should be turned over to the Receiver as a matter of law. The Receiver has advised the Commission that he is pursuing claw back claims against innocent investors because he believes he is obligated to do so under the current Receivership Order.

The Commission Should Have the Authority and Discretion to Pursue Clawbacks Against Investors

The issue presented is not whether there exists ample authority to clawback principal from innocent investors (there is little if any authority, however), or even whether it is appropriate to do so. While differing views of those issues clearly form the backdrop of this motion, the critical question is whether the Commission, as plaintiff, should have the ability to shape its case and determine the type and scope of relief sought.

The Commission is the government agency charged with the responsibility of enforcing the federal securities laws. Every year the Commission brings charges against Ponzi scheme operators who engage in fraud, and aggressively pursues meaningful relief for investors. In many cases, the Commission seeks the appointment of a Receiver to assist in the collection and distribution of assets to victims. While a receiver necessarily has a great deal of discretion to pursue claims, the Commission has expertise in these matters and has developed measured practices regarding the relief that is appropriate and in the public interest in cases like this one. Based on this experience, the Commission simply does not make a practice of suing innocent victims of Ponzi schemes for the return of *principal*, and applies a great deal of discretion and consideration before asserting claims against victims for the return of *interest* payments received by them. As plaintiff, the Commission deserves a high degree of deference in shaping the case

[4] In the absence of allegations of bad faith, a preference, a windfall or involvement in the fraud, the Receiver's claims for principal against the innocent investors are not likely to be sustained.

and the type of relief sought. Here, the Commission would not pursue claims against innocent victims absent compelling reasons to do so. Such reasons are not present in the pending motions, and the Commission is not aware of any compelling reasons to support the anticipated motions. Modification of the Receivership Order is therefore appropriate so that the Commission can pursue the relief it deems appropriate in this law enforcement matter.

Receiver's Claims Are Unsupported

None of the cases offered by the Receiver support the broad proposition that a receiver can sue wholly innocent investors for the return of *principal,* and the Receiver has misinterpreted the authority upon which he relies. In each of the pending actions, the Receiver recites the following: "The fact that the Relief Defendants are innocent investors and committed no wrongdoing does not entitle them to retain proceeds [including principal and interest] received from the fraudulent SIB CDs."[5] *None* of the cases cited by the Receiver in apparent support of this view, however, involved claims for the return of principal against innocent investors, and therefore lend no support to the Receiver's position. In fact, there were compelling and specific reasons for pursuing the relief defendants in the cited cases – reasons which the Receiver concedes are absent in this case. More specifically:

- In *Warfield v. Bryon*, 436 F.3d 551 (5th Cir. 2006), an SEC Receiver sued two relief defendants under the Uniform Fraudulent Transfer Act. The relief defendants in *Warfield* were not innocent investors, but "facilitators" of the fraud who received "substantial" fraudulent transfers in bad faith. *Id.* at 554-55.

[5] *See* Complaint, *Janvey v. Letsos*, Civ. No. 3:09-CV-1329-P, ¶ 31 (July 16, 2009) (citing cases).

- In *Quilling v. 3D Marketing, LLC,* 2007 WL 1058217 (N.D. Tex. 2007), an SEC Receiver sought to clawback principal not from a Ponzi scheme victim but from an equity investor in the entity that operated the fraud scheme.[6]

- In *Mays v. Lombard*, 1998 WL 386159, at *3 (N.D. Tex. 1998), an SEC Receiver sought to recover excessive payments to an investor in a Ponzi scheme. The Receiver did not demand that the investor disgorge his principal investment.[7]

The Receiver also relies heavily on *SEC v. George,* 426 F.3d 786 (6th Cir. 2005). There, the Commission brought a disgorgement action against several relief defendants, Dziorny, George, Jackson and Harris, none of which were purely innocent investors.[8]

- Dziorny was the primary defendant's girlfriend who received gifts including a $66,500 diamond engagement ring and cash. She was not an investor.

- George received more than twice the amount of his initial investment prior to the filing of the lawsuit, and a primary defendant funneled additional funds to him *after* the asset freeze was ordered.

- Jackson and Harris schemed to obtain the release of funds from the asset freeze, including all of their principal and interest, even though they had previously received substantial

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[6] The opinion in *Quilling* does not describe in detail the relationship between the primary defendant and 3D Marketing. However, a review of the Complaint filed in that case, and other court records, shows that 3D Marketing did not invest in the Ponzi scheme.

[7] Other cases cited by the Receiver do not support the conclusion that innocent investors are required to disgorge principal they received in a Ponzi scheme. *Donell v. Kowell*, 533 F.3d 762, 779-80 (9th Cir. 2008)(ordering judgment against investor who received false profits); *Scholes v. Lehmann*, 56 F.3d 750, 757, 759 (7th Cir. 1995)(same); *Wing v. Harrison*, 2004 WL 966298, at 85 (D. Utah 2004)(recovery was not from an investor in the underlying Ponzi scheme).

[8] Significantly, the Commission – not an equity receiver – asserted claims against relief defendants in the *George* case. As explained above, the Commission authorized these claims because the relief defendants for various reasons were not *innocent investors*, and it was equitable to pursue claims against them.

Ponzi payments and refused to agree to a set-off. Claims against Jackson and Harris were necessary and appropriate to prevent them from receiving a windfall.[9]

Clawback of Principal is Inequitable

The equities do not support claims against victims who hold principal and interest in domestic accounts like Pershing. Such claims would create further hardship on a small pool of victims, and randomly penalize investors who happen to hold funds in frozen accounts. Further, these claims would come at great cost to the victims and the receivership estate, with questionable benefit to all of the victims of the Stanford scheme. In all probability, these funds will be a small percentage of the billions owed to investors worldwide, not contributing to investor recovery in any meaningful way. It makes little sense to assert claims against these victims.

As the Examiner previously stated, "If 'equity is equality' 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?" Report and Recommendation No. 1 at 5. While the Receiver has the authority to pursue claims, that effort should be guided by discretion and good judgment, not by the temptation to pick low hanging fruit.[10]

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[9] Unfortunately, the Court's opinion in *George* did not detail the reasons why the Commission brought action against the relief defendants (other than the promoter's girlfriend). But those reasons are critical in understanding why the Commission brought the claims. Prior to filing any of the pending clawback claims, the Receiver was fully apprised of the special circumstances in *George*. Nonetheless, he has ignored those circumstances and has repeatedly cited the case as his most significant authority.

[10] Surely the collection against domestic and international investors who do not currently hold funds at Pershing will be far more difficult and costly than collection of pending claims, and likely unattainable in large part.

CONCLUSION

In light of the total magnitude of the Receiver's undertaking in this case and the significant burdens inherent in such an endeavor, the Commission has, to date, been extraordinarily deferential to the Receiver's exercise of discretion. However, deference is not appropriate when the Receiver and his team insist on pursuing a course that contravenes Commission practice and is supported by neither logic nor the law. By seeking to narrow the scope of the Receiver's authority, the Commission has selected a measured approach that hopefully will be sufficient to serve the interest of investors, and that will obviate the need to seek a more profound change in the administration of the receivership estate. Accordingly, for the reasons set forth above, the Commission respectfully requests that the Court modify the Receivership Order in the form attached hereto as Exhibit A.

Dated: July 20, 2009

Respectfully submitted,

s/ David B. Reece

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U.S. Securities and Exchange Commission
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(817) 978-6476 (dbr)
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CERTIFICATE OF CONFERENCE

The Receiver opposes this motion. The Examiner supports the motion. Counsel for Allen Stanford and Laura Pendergest-Holt take no position on the matter. We attempted to confer with counsel for James Davis, but were unable to reach him prior to the filing of the motion.

s/ David B. Reece

CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2009, I electronically filed the foregoing document with the Clerk of the court for the Northern District of Texas, Dallas Division, by using the CM/ECF system which will send notification of such filing to all CM/ECF participants and counsel of record.

s/ David B. Reece

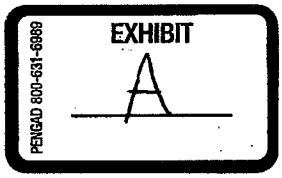
IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	Case No.: 3:09-cv-0298-N
	§	
STANFORD INTERNATIONAL BANK, LTD., STANFORD GROUP COMPANY, STANFORD CAPITAL MANAGEMENT, LLC, R. ALLEN STANFORD, JAMES M. DAVIS, and LAURA PENDERGEST-HOLT,	§	
	§	
Defendants,	§	
and	§	
	§	
STANFORD FINANCIAL GROUP, and THE STANFORD FINANCIAL GROUP BLDG INC.,	§	
	§	
Relief Defendants.	§	
	§	

ORDER

Upon motion of the Securities and Exchange Commission, the Order Appointing Receiver dated February 16, 2009, is hereby modified effective immediately. Paragraph 5(c) of the Receivership Order shall now provide:

> The Receiver shall institute such actions or proceedings to impose a constructive trust, obtain possession, and/or recover judgment with respect to persons or entities who received assets or records traceable to the Receivership estate, and all such action shall be filed in this Court; *provided*, however, that the Securities and Exchange Commission shall have exclusive authority to file claims against persons or entities that purchased Stanford International Bank certificates of deposit.



All other provisions of the Receivership Order remain unchanged pending further Order of the Court.

Signed: _____

_____
DAVID C. GODBEY
UNITED STATES DISTRICT JUDGE