

not oppose the entry of the Preliminary Injunction, and did not appear at the re-scheduled March 12, 2009 hearing. In entering the Preliminary Injunction, the Court found, among other things:

11. Stanford engaged in fraudulent conduct, including misappropriating investor funds, and making material misrepresentations and omissions concerning, among other things, [Stanford International Bank's] certificate of deposit program, the nature and liquidity of SIB's assets, the existence of related party transactions, purported loans from SIB to Stanford, purported capital infusions into SIB, and the SAS program.

The Preliminary Injunction enjoined Stanford from violating the antifraud provisions of the federal securities laws and placed a freeze on his assets "pending a showing to [the] Court that Defendant Stanford has sufficient funds or assets to satisfy all claims arising out of the violations alleged in the Commission's Complaint or the posting of a bond or surety sufficient to assure payment of any such claims." (Preliminary Injunction ¶ IV). Further, the Preliminary Injunction required Stanford to account for his current assets. (Preliminary Injunction ¶ VII). Stanford, however, has not produced an accounting of assets and has not otherwise assisted the Receiver in identifying and marshaling assets for the estate.¹

On April 20, 2009, the day after Stanford moved to modify the Preliminary Injunction, Stanford filed a Notice of Appeal. Stanford is appealing to the Fifth Circuit (1) the Order Appointing Receiver; (2) the Order of Preliminary Injunction against him; and (3) any other orders collateral to adjudicate the appeal. Stanford is contemporaneously requesting the district court to modify the Preliminary Injunction to permit him access to \$10 million of "his frozen funds" for legal fees and expenses.

¹ Rather than produce the court-ordered accounting, Stanford asserted his rights under the Fifth Amendment. (Supp. TRO App. at 0002). Such an assertion has consequences; the Court is entitled to draw adverse inferences against Stanford for purposes of this proceeding. *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 682 (D.D.C. 1995).

Factual Summary

Before commencing this action, the Stanford house-of-cards was imploding. During the last few months of 2008 and continuing in early 2009, Stanford International Bank faced billions of dollars in redemption requests from CD holders. (Stanford Memo at 3). The massive redemptions created a liquidity crisis, causing SIB to place a “moratorium” on withdrawals. (TRO App. at 1118).

Several Stanford executives discovered in late February 2009 that SIB was built on a foundation of fraud and deceit. This discovery prompted at least two senior Stanford executives to resign or threaten to resign if Stanford did not stop selling CDs and accurately disclose the true financial condition of SIB to investors and regulators. (Supp. TRO App. at 0031-36). Additionally, outside counsel for the Stanford Financial Group withdrew his representation in connection with the Commission’s investigation shortly before the Commission filed this action. (TRO App. at 0120-22; Supp. TRO App. at 0037-38).²

The Receiver recently reported on the dire financial condition of the Stanford-related companies. (Receiver’s Report, April 23, 2009). In relevant part, the Receiver reported:

Analysis of Stanford’s financial records and operational data revealed that all the major Stanford U.S. financial businesses depended upon continued CD sales and/or other allegedly fraudulent activities. (Receiver’s Report at 8).

[A]most all U.S. business operations should be ceased to reduce the ongoing costs of unprofitable operations. (*Id.* at 9).

[T]he total value of the assets of the Estate is likely to be only a fraction of the total amount that would be needed to pay all outstanding CDs and other anticipate claims against the Estate. It appears that during the last year, and probably for longer than that, SIBL assets were inadequate to cover the amount to SIBL’s

² Only days before the filing of this matter, the outside counsel advised that the sale of SIB CDs “should cease,” and that distribution of SIB’s annual report should stop until “the financial statements are restated.” (Supp. TRO App. 0037-38). Stanford ignores these facts. He blames the demise of the Stanford entities on the SEC and two former “disgruntled” employees. (Stanford Memo at 4).

liabilities on its issued and outstanding CDs as those liabilities came due. (*Id.* at 13).³

The lack of financial viability was caused in part by the manipulation of financial records of the Stanford companies, in an apparent attempt to hide the true financial condition of the businesses from regulators and other outsiders. (*Id.* at 9-10)(explaining the inappropriate write-up of real estate in order to compromise a debt owed by Stanford to SIB and to prop-up SIB's financial condition).

Stanford's fraudulent activity has profoundly impacted the lives of thousands of people world-wide. Stanford has left 21,500 investors holding certificates of deposit with little value (Receiver's Report at 12); caused the closure of 33 offices and the termination of more than 1,000 U.S. employees (*Id.* at 9); created a long line of service providers and creditors who have little hope of payment. (*Id.*). Stanford has also burdened the receivership estate with \$226.6 million of unpaid personal income taxes for 1999-2003. (*Id.* at 52).

Despite his unsupported claims that Stanford's companies had real assets and profits (Stanford Memo at 1), Stanford has provided no assistance to the Receiver in locating or repatriating assets to the United States. For example, Stanford has provided no assistance in accounting for approximately \$1 billion in cash that the Receiver cannot reconcile with SIB's financial records. (Receiver's Report at 27-28). "Some of this cash may have been spent in ways that are not reflected in any of the available financial records and/or that did not result in the acquisition of assets, such as cash that may have been loaned to Allen Stanford or distributed to him as sole shareholder and then spent on personal consumption by him." *Id.*

³ The Antiguan receiver has reached a similar conclusion: "It has not been possible to identify assets that total an amount close to the liabilities owing to investors . . ." Report to the Antiguan High Court By the Joint Receiver-Managers on Stanford International Bank, Ltd., referenced in Affidavit of Nigel Hamilton-Smith (March 16, 2009). *In re Petition for the Compulsory Winding-Up of Stanford International Bank*, Claim No ANUHCV 126/2009 (pending in the Eastern Caribbean Supreme Court of Antigua and Barbuda).

At present, the Receiver has secured approximately \$66.5 million in cash (net of costs and expenses to date) from all Stanford-related entities, and has identified more than \$300 million of cash held in non-U.S. banks. (Receiver’s Report at 26-27). The Receiver has advised the Commission that approximately \$2.5 million is frozen in bank accounts held by Allen Stanford; however, the Bank of Antigua, which Stanford owned, will not provide the Receiver with Stanford’s account balance.⁴

ARGUMENT

I. THE DISTRICT COURT DOES NOT HAVE JURISDICTION OVER THIS MOTION.

“As a general rule, a notice of appeal ousts the district court of jurisdiction over the judgment or order appealed.” *Coastal Corp. v. Texas Eastern Corp.*, 869 F.2d 817, 819 (5th Cir. 1989)(citing *United States v. Hitchmon*, 587 F.2d 1357 (5th Cir. 1979); accord *Henry v. Independent American Savings Ass’n*, 857 F.2d 995 (5th Cir. 1988)). The Supreme Court has noted that “[t]he filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Accordingly, the Fifth Circuit has ruled that “the powers of the district court over an injunction pending appeal should be limited to maintaining the status quo” *Coastal Corp.*, 869 F.2d at 820; see also *Baum v. Blue Moon Ventures, LLC*, 513 F.3d 181, 190 n.2 (5th Cir. 2008); *Sierra Club v. Cedar Point Oil Co.*, 73 F.3d 546, 578 (5th Cir. 1996).

Stanford’s Notice of Appeal concerns – without limitation – the entry of the Preliminary Injunction and “any other orders collateral to and necessary to adjudicate [the] appeal.” [Dkt.

⁴ Stanford’s operations were dependant on the sale of CDs to new victims. (Receiver’s Report at 8). In the absence of evidence to the contrary, Stanford’s cash on hand must be presumed to have derived from the sale of CDs.

323]. His motion, however, seeks to modify the very order that he has taken up on appeal. Stanford can't have it both ways. In pursuing his appeal, Stanford has effectively stripped the district court of jurisdiction over the Preliminary Injunction, including the asset freeze provisions. Further, seeking a broad modification for the payment of \$10 million in legal fees and expenses – which would represent a substantial portion of the total cash in the receivership estate and greatly exceeds his known personal assets -- would drastically alter the status quo, not preserve it. For this reason alone, Stanford's motion must be denied.

II. ASSUMING THE DISTRICT COURT HAS JURISDICTION, STANFORD IS NOT ENTITLED TO RELIEF.

In freezing Stanford's assets, the Court protected investors and the Commission's ability to obtain disgorgement of wrongfully obtained funds. *See SEC v. Unifund SAL*, 910 F.2d 1028, 1041 (2d Cir. 1990); *SEC v. Am. Bd. Of Trade, Inc.*, 830 F.2d 431, 438-39 (2d Cir. 1987); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972). An asset freeze “assures that any funds that may become due can be collected.” *Unifund*, 910 F.2d at 1041; *SEC v. Hickey*, 322 F.3d 1123, 1125 (9th Cir. 2003))(noting the Court's discretion to freeze assets so long as it is “necessary to protect and give life to the disgorgement” order). In fact, “[t]he Court has a duty to ensure that Defendants' assets are available to make restitution to the alleged victims.” *SEC v. Dobbins*, 2004 WL 957715, *2 (N.D. Tex. April 14, 2004)(Sanders, J.).⁵ The need for such an order is essential in this case, where thousands of investors stand to lose billions of dollars absent an order preserving Stanford's assets.

⁵ Where a defendant has insufficient assets to satisfy a disgorgement order, courts have routinely imposed broad asset freezes over all of a defendant's assets to ensure that funds can be collected. In doing so, courts have acknowledged that “traceability” is not required. In *SEC v. Current Fin. Serv.*, 62 F. Supp. 2d 66 (D.D.C. 1999), for example, the court denied a motion to release funds from an asset freeze to pay attorney's fees, despite defendant's argument that a frozen bank account contained personal funds unrelated to the fraud. The court stated: “To ensure compensation to the victims in this case, the Court finds it reasonable to maintain the freeze order because plaintiff has demonstrated that the potential disgorgement it could receive in this case far exceeds the amount that is frozen in the account.” *Id.* at 68.

Stanford is not entitled to use his ill-gotten gains to pay for his defense. *See SEC v. Cherif*, 933 F.2d 403, 417 (7th Cir. 1991), *cert. denied*, 112 S.Ct. 966 (1992). As the Seventh Circuit noted in *SEC v. Quinn*, 997 F.2d 287, 288 (7th Cir. 1993):

Parties to litigation usually may spend their resources as they please to retain counsel. "Their" resources is a vital qualifier. Just as a bank robber cannot use the loot to wage the best defense money can buy, so a swindler in securities markets cannot use the victims' assets to hire counsel who will help him retain the gleanings of crime.

See SEC v. Current Financial Services, Civ. Action No. 91-3089 SSH, 1999 U.S. Dist. LEXIS 12894 (D.D.C. 1999)("A defendant is not entitled to foot his legal bill with funds that are tainted by his fraud."); *SEC v. Bremont*, 954 F. Supp. 726, 733 (S.D.N.Y. 1997); *SEC v. Grossman*, 887 F. Supp. 649, 661 (S.D.N.Y. 1995), *aff'd sub. nom. SEC v. Estate of Hirshberg*, 101 F.3d 109 (2d Cir. 1996)(to succeed on motion to modify freeze to permit payment of attorneys' fees and other expenses, defendant "must establish that such a modification is in the interest of defrauded investors"); *SEC v. Telecom Marketing, Inc.*, 888 F. Supp. 1160, 1162 (N.D. Ga. 1995)(motion to terminate freeze to permit payment of reasonable and necessary moving expenses and attorney's fees denied); *SEC v. Comcoa Ltd.*, 887 F. Supp. 1521, 1524 (S.D. Fla. 1995), *aff'd sub nom. Levine v. Comcoa Ltd.*, 70 F.3d 1191 (11th Cir. 1995), *cert. denied*, 519 U.S. 809 (1996)("In imposing a freeze of assets there is no requirement that the court exempt sufficient assets for the payment of legal fees."); *SEC v. Coates*, 94 Civ. 5361, 1994 U.S. Dist. LEXIS 11787 (S.D.N.Y. 1994)("[a] defendant is not entitled to foot his legal bill with funds that are tainted by his fraud").

In considering requests to use frozen funds for attorneys' fees, courts properly place investors' interests over those of defendants. *SEC v. Forte*, 598 F. Supp. 2d 689, 692 (E.D. Pa. 2009). A defendant must establish that the frozen assets exceed possible disgorgement, and in

many cases penalties, before releasing any funds. *SEC v. Bremont*, 954 F. Supp. 726, 733 (S.D.N.Y. 1997) (“until such time as the Court can determine whether the frozen assets exceed the SEC’s request for damages, defendants will not be permitted to use any of the frozen assets”). The release of funds for legal fees must also be in the best interests of the victims. *Forte*, 598 F. Supp. 2d at 692; *Dobbins*, 2004 U.S. Dist. Lexis 6362 (N.D. Tex. 2004).

In his motion, Stanford seeks \$10 million of “*his* frozen funds” to pay his lawyers’ fees and expenses. Stanford, however, makes no showing – or argument -- that he has sufficient assets to satisfy a disgorgement order in this case, and makes no showing that he has \$10 million available to fund his defense. Further, Stanford makes no argument explaining how the release of funds to cover his legal bills would benefit the victims of his scheme. Simply put, Stanford has not: (i) accounted for investor funds that he fraudulently obtained; (ii) accounted for his personal assets or the assets of his companies; or (iii) assisted the Receiver in any way to identify or preserve assets for the benefit of the receivership estate. *See Dobbins*, 2004 WL 957715, *2 (denying defendant’s request for legal fees because, in part, the Court did not have the information needed to evaluate the request). Significantly, the fees requested by Stanford would substantially reduce the amount of cash on hand in the receivership estate, creating additional hardship on the estate and the victims, and are not reasonable under the circumstances of this case. *See Forte*, 598 F. Supp. 2d at 692-93 (denying legal fees because, in part, the “paltry assets” that remained made the release of funds “unwarranted”).⁶

The cases cited by Stanford are not helpful, and do not support a broad carve-out of \$10 million from the limited assets identified in this case. In *SEC v. Dowdell*, the court allowed the

⁶ The Commission is investigating whether Stanford has violated the terms of the asset freeze after it was entered by writing a series of checks to the Bellagio Hotel & Casino in the aggregate amount of \$258,480. All of these checks were dated February 19, 2009 (two days after entry of the asset freeze), signed by Stanford, and honored on or about February 24th or 25th.

parties to provide “reasonable estimates of the fees necessary to take [defendants] through the hearing on the preliminary injunction.” 175 F. Supp. 2d 850, 856 (W.D. Va. 2001). In *SEC v. Duclaud Gonzalez de Castilla*, the court continued an asset freeze but permitted payment of legal fees apparently because the “inference upon which the freeze was granted may not be supported by the necessary quantum of proof. . . .” 170 F. Supp. 2d 427, 430 (S.D.N.Y. 2001). In *SEC v. Schiffer*, 1998 WL 307375 (S.D.N.Y. June 11, 1998), the court authorized the payment of legal fees “only as substantiated by [the] court’s careful monitoring.” In *SEC v. Pinez*, the court permitted “limited fees” subject to a determination of reasonableness by a magistrate judge. 989 F. Supp. 325, 337 n.12 (D. Mass. 1997). In *SEC v. Segal*, the court permitted a modification of the asset freeze to provide the defendant \$2,500 in defense costs. 2000 WL 687713 (9th Cir. 2000). None of these cases support the type of broad modification Stanford seeks. Further, based of the uncontested evidence offered to date, the Commission has presented a compelling case of a massive fraud. Under these circumstances, Stanford is not entitled to modify the freeze order.

CONCLUSION

With the exception of the *Madoff* matter, Stanford's fraud is unprecedented in terms of scope and duration. He has victimized thousands of investors who face extreme losses in the billions of dollars. Making matters worse, Stanford has not accounted for his assets, or company assets, or assisted the Receiver in marshaling assets for the benefit of the estate. Under these circumstances, the Court should deny his request for a wholesale release of \$10 million of funds from the limited estate for his legal defense.

May 4, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 4, 2009, I electronically filed the foregoing document with the Clerk of the court using the CM/ECF system which will send notification of such filing to all counsel of record.

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