
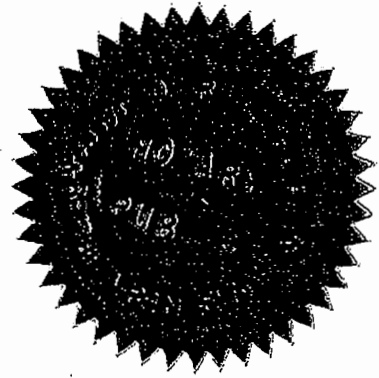


This is Exhibit "P" referred to in the
affidavit of Marcus A. Wide
sworn before me, this 28 day of November, 2014.



A Commissioner, notary, etc.



litigation matters, including securities, intellectual property, breach of contract, antitrust, lender liability, fraud and wrongful terminations. In the litigation context, I have acted as an expert on a variety of economic damage claims and forensic accounting issues. In several cases alleging fraud and other wrongdoing, I have traced funds for potential recovery. I have also been retained by audit committees to assist in investigating allegations of accounting and financial improprieties.

2. The statements made in this declaration are true and correct based on the knowledge I have gained from the many documents I have reviewed and other work my team and I have performed in the course of FTI's investigation on behalf of the Receiver.

3. I use the following acronyms or short-hand terms to refer to certain entities in this declaration:

- Stanford Entities — all legal entities owned, directly or indirectly, by the named Defendants in the SEC action as of the date the U.S. Receivership was instituted.
- SIB — Stanford International Bank, Limited.
- STCL — Stanford Trust Company Limited, an Antigua trust company.
- SFG — Stanford Financial Group, the name given to Allen Stanford's "global network of financial companies."
- SFGC — Stanford Financial Group Company, which provided shared services, including Treasury and Investment services, to SIB and other companies within SFG. A "Data Sheet" created by Stanford's legal department describing SFGC is attached as exhibit **KVT-2**, and a "Services Agreement" between SIB and SFG is attached as exhibit **KVT-3**.
- SGC — Stanford Group Company, a U.S. broker-dealer entity incorporated in Texas.

SEC ACTION AND FTI'S INVESTIGATION

4. On February 16, 2009, the United States District Court for the Northern District of Texas appointed Ralph S. Janvey the Receiver for SIB and the rest of the Stanford Entities. On the same day, the Receiver retained FTI to perform a variety of services, including assisting in the capture and safeguarding of electronic accounting and other records of the Stanford Entities and forensic accounting analyses of those records, including cash tracing. I oversee, and am personally involved in, FTI's forensic accounting and cash tracing activities. The purposes of FTI's work have been, in part, to (a) determine the roles that the various Stanford Entities played in the fraud alleged by the SEC and specifically in the sale and redemption of SIB certificates of deposit ("CDs"); (b) identify the source(s) of income and cash flows of the various Stanford Entities; (c) trace funds to determine how they were allocated and disbursed throughout the Stanford Entities; and (d) review the circumstances relating to the sale of SIB CDs.

5. As part of our work, we have interviewed numerous present and former Stanford Entity employees. These include, but are not limited to, the persons whose names (as well as employer, title, and supervisor) are listed in **KVT-4**. In addition, we have examined the available accounting and other records (including email files of certain former Stanford employees) relating to the Stanford Entities located in and/or gathered from Houston, Texas; Tupelo, Mississippi; Baldwin, Mississippi; Memphis, Tennessee; Miami, Florida; St. Croix, United States Virgin Islands; Antigua; Barbuda; and other Stanford locations within and outside the U.S. We have also reviewed extensive SIB customer records, including but not limited to paper and electronic records documenting SIB CD purchases, interest payments and redemptions.

6. FTI has also obtained and analyzed paper and electronic files from third-party financial institutions where bank accounts of various Stanford Entities are or were located. These financial institutions include Toronto Dominion Bank in Canada, Trustmark National Bank and the Bank of Houston. In addition, FTI has gathered and reviewed electronic and other data from Pershing, LLC and JP Morgan Clearing Corp., both of which have held or currently hold SGC customer accounts and former employee accounts, and SEI, which held or currently holds STC accounts.

7. FTI's analyses of the records of SIB and other Stanford Entities were conducted using reliable practices and methodologies that are standard in the fields of accounting and finance. The findings and conclusions set forth herein are based on these analyses.

THE STANFORD ENTERPRISE WAS A PONZI SCHEME

8. The SEC alleges in its Second Amended Complaint in Case No. 03-CV-0298-N that the Stanford Entities constitute "a massive Ponzi scheme" involving "misappropriat[ion of] billions of dollars of investor funds." James Davis, Chief Financial Officer for both SIB (according to SIB's published financial statements) and SFGC and a long-time business associate and confidant of Allen Stanford, has pled guilty to charges that he conspired with Allen Stanford and others in running a Ponzi scheme in violation of federal securities laws. In connection with his guilty plea, Davis admitted that the Stanford enterprise was a "massive Ponzi scheme whereby CD redemptions ultimately could only be accomplished with new infusions of investor funds." As explained in more detail below, my findings are consistent with the SEC's allegations and James Davis's admission that the Stanford enterprise was a Ponzi scheme. SIB was insolvent (*i.e.*, its liabilities exceeded the

fair value of its assets) from at least 2004 and probably for much longer, yet it continued selling CDs to the end. Investors were induced to buy CDs by the offer of substantially above-market rates, the issuance of financial statements and other data that significantly overstated SIB's earnings and assets, and the misrepresentation of SIB's business model, investment strategy, financial strength, the safety and nature of SIB's investments and other facts important to investors. Stanford-affiliated financial advisors were incentivized to convince their clients to purchase SIB CDs over other kinds of investments by paying the financial advisors above-market commissions and other compensation tied to CD sales and to the retention of the CDs within SIB. SIB's actual (as opposed to reported) earnings and assets, however, were insufficient to meet its CD payment obligations. The Stanford Ponzi scheme could only be continued by selling yet more CDs and using the proceeds to pay redemptions, interest and operating expenses. Significant sums were also diverted to finance Allen Stanford's opulent life style of yachts, jet planes, travel, multiple homes, company credit cards, etc. Davis, Holt and other insiders were paid handsomely for their complicity. Davis, as part of his plea agreement, agreed to forfeit \$1 billion in personal assets derived from the Ponzi scheme.

9. James Davis admitted in his arraignment that the Stanford enterprise was a Ponzi scheme from the beginning, and I have not seen anything in the records I have reviewed to indicate otherwise.

10. Allen Stanford was sole owner, directly or indirectly, of more than 130 separate entities, including SIB and SFGC. These entities comprised a single commonly-owned financial services network called the "Stanford Financial Group," which was headquartered in Houston.

11. Stanford, along with a close band of confidants, controlled SFG (of which SIB and SFGC were a part). These confidants included Jim Davis, CFO of both SFGC and SIB, and Laura Pendergest Holt, Chief Investment Officer for SFGC.

12. SIB was nothing like a typical commercial bank. It did not offer checking accounts and did not make loans (other than to CD investors up to 80% of their CD balance). It had one principal product line—certificates of deposit—and one principal source of funds—customer deposits from CD purchases. The terms of some SIB CDs permitted partial redemptions before maturity upon customer demand.

13. SIB offered CD rates that were significantly greater than those offered in the United States. An SIB 2007 marketing brochure (attached as exhibit KVT-5) tracks SIB's historic CD yield against average US CD yields. SIB's yield ranged from a high of 388% of the US yield in 2002 to a low of 140% of the US yield in 2006. According to the brochure, SIB was able to pay high CD rates by investing in "a well-diversified portfolio of highly marketable securities issued by stable governments, strong multinational companies and major international banks." As a result, the brochure continues, "[SIB] has been consistently profitable since inception." In other words, SIB purported to function like a hedge fund but, unlike a hedge fund, its customers were guaranteed (by SIB) a specified return regardless of the fund's performance. SIB's reported returns were remarkably steady, fluctuating from only 11.7% to 14.9% between 1997 and 2007. SIB showed a profit in good times and in bad. The one exception was the second half of 2008, when financial sector businesses across the globe were struggling for survival and many feared we were on the brink of financial collapse. Even then, SIB's accounting records reflected positive investment earnings, but a small overall loss—just 2% of total (purported) financial assets—after deductions for CD

interest and other expenses. What to some appeared to be too good to be true was indeed untrue. As Stanford himself said at an October 2008 financial advisor conference: “We’re about, as of early October, down about four percent, I guess. . . . I’m not happy with that [but] in this market I guess it’s astounding.”

14. The most significant numbers on SIB’s financial statements—revenue and asset value—were fictitious. Davis states in his plea agreement that assets were inflated to offset CD obligations and that revenue was “reverse-engineered” to arrive at desired levels. My findings are consistent with those admissions.

15. We found within SIB’s accounting records worksheets used to derive fictitious SIB revenue back to 2004. The Ponzi scheme conspirators would simply determine what level of fictitious revenue SIB needed to report in order to both look good to investors and regulators and purport to cover its CD obligations and other expenses. They would then back into that total amount by assigning equally fictitious revenue amounts to each category (equity, fixed income, precious metals, alternative, etc.) of a fictitious investment allocation.

16. The returns were fictitious, and they were based on fictitious asset totals.

(a) SIB’s records reflected that, as of December 31, 2008, it held \$8.3 billion in “financial assets”—presumably actively traded securities and metals, as SIB represented to the public. The reality was much different. As of the end of 2008, SIB held less than \$500 million in securities, or less than 7% of the total CD obligations.

(b) FTI also discovered that \$3.174 billion of SIB’s claimed 2008 assets consisted of two real estate holding entities that had been purchased that same year for only \$63.5 million and whose only assets were tracts of undeveloped

Antiguan real estate. The value of those assets was inflated 50 times the purchase price through a series of paper transactions involving other Stanford-owned entities. These repetitive flips had no apparent economic substance and appear to have been engaged in solely to grossly overstate the value of the assets so as to prop up SIB's balance sheet.

(c) FTI found that another \$1.8 billion in SIB assets consisted of notes receivable from Allen Stanford. Based on my team's investigation, however, ~~Stanford had no significant assets apart from the various Stanford Entities,~~ which collectively owed billions of dollars more than the fair value of their combined assets.

(d) Other assets were similarly overstated. Private equity investments, for example, were recorded on SIB's books at amounts that the Receiver's subsequent sales efforts have revealed to be many times greater than their realizable value. These were valued at \$1.2 billion as of June 30, 2008, but it is expected that the Receivership may realize as little as \$25 million from the private equity assets held as of June 30, 2008.

(e) Moreover, the fact that many of SIB's assets consisted of real estate, unsecured notes from Allen Stanford, and private equity investments was contrary to SIB's assurances to customers that its investments consisted of "highly marketable securities issued by stable governments, strong multinational companies and major international banks" so as to "maintain[] the highest degree of liquidity." See KVT-5 at 3.

17. Misinformation regarding SIB's financial strength, profitability, capitalization, investment strategy, investment allocation, the value of its investment portfolio, and other matters, was regularly disseminated from Stanford, Davis, Holt and others working under them to Stanford financial advisors, for use in inducing potential investors to purchase SIB CDs.

18. SIB CDs were marketed through financial advisors employed by other Stanford-owned entities. The financial advisors were heavily incentivized by above-market ~~commissions and bonuses to steer their clients to SIB CDs rather than other investments.~~

19. At the inception of the U.S. Receivership on February 16, 2009, SIB's total obligation to CD holders was approximately \$7.2 billion (U.S.), versus reported investments valued at \$8.3 billion as of December 31, 2008. Based on my analysis, the market value of all assets for all Stanford Entities (including SIB) combined total less than \$1 billion. At the time SIB was placed into receivership, SIB was insolvent (*i.e.*, its liabilities exceeded the fair value of its assets) by more than \$6 billion.

20. Through analysis of SIB's financial records, FTI has determined that SIB was insolvent by at least 2004 and very likely before then. SIB's reported assets consisted overwhelmingly of "financial assets" and cash. The published balance sheets represented that "financial assets" were reported at "fair value." Of course, cash, by definition, is stated at fair value (assuming correct reporting). We know, however, from our investigation and review of internal SIB records that the fair value of the SIB financial assets was much smaller than reported. Each year, from 2004 forward, SIB's reported asset totals included, without disclosure to the public, notes receivable from Allen Stanford and certain assets with clearly inflated values. When these amounts are deducted from the asset totals contained in SIB's

published financial statements, it is apparent that, from at least 2004, SIB's liabilities exceeded the fair value of its assets. Stanford's promissory notes were of no real value, because his apparent wealth was based on the SIB Ponzi scheme. Moreover, private equity stakes initially held by other Stanford Entities (although likely purchased with SIB CD proceeds) were transferred to Allen Stanford, and then from Stanford to SIB, which recorded them on its books at much inflated values with no apparent economic gain having been achieved. These transfers appear to have been booked for the purpose of giving SIB the false appearance of financial strength. It is likely that other SIB assets were also fictitious or overvalued, as we saw in our analysis of 2008 data. Certainly, persons engaged in conducting a Ponzi scheme would have had no incentive to understate asset values; and, as we have seen, Stanford and his cohorts had a pattern of overstating asset values, ostensibly to induce more people to purchase "safe" SIB CDs.

21. Through an analysis of cash flows for the period January 1, 2004 through February 17, 2009, we have verified that proceeds of CD sales were used to make purported interest and redemption payments on existing CDs. That just confirmed what we knew had to be true anyway, as SIB's assets, reserves and investments were insufficient to fund its redemption and interest payments. For example, SIB's CD transaction records indicate that approximately \$2 billion was paid to investors for principal and interest from January 1, 2008 through February 17, 2009. SIB's principal income-generating assets, which were managed in what was known as "Tier 2," never totaled more than \$1 billion, even when the stock market was at a high and the economy was strong. By the end of 2008, "Tier 2" had declined to less than \$500 million, due to a combination of increasing redemptions and liquidations and falling market values. Even if SIB had fully liquidated all investments in its portfolio, it

would not have realized enough cash flow to cover just the redemptions in 2008 without the influx of new CD purchase money. And in fact, when the market declined, we know that it took only 4 months for liquid assets to substantially deplete, even though \$7.2 billion in CD obligations remained. As a result of this decline, all actual gains earned since 2003 were lost. Thus, although the SIB CD portfolio contained some legitimate investments, the earnings from those investments were negligible in comparison to and could not reasonably have been expected to cover SIB's total obligations to the CD holders.

~~22. SIB necessarily used current CD proceeds to pay existing CD investors in~~
previous years too. Although SIB received some earnings on investments, those amounts were miniscule compared to its cash flow obligations.

23. Based on FTI's analysis to date, I have concluded that from at least 2004 (and likely for much longer), SIB relied on proceeds from the sale of new CDs to make purported interest and principal payments to existing CD investors. This is especially evident from the fact that, when CD sales faltered in 2008, SIB was immediately forced to sell off most of its assets that were readily available for liquidation just to maintain payments for a short time. By using the proceeds of new CD sales to pay interest and redemptions to existing CD holders, Stanford, Davis and their cohorts concealed their fraud and perpetuated the Ponzi scheme.

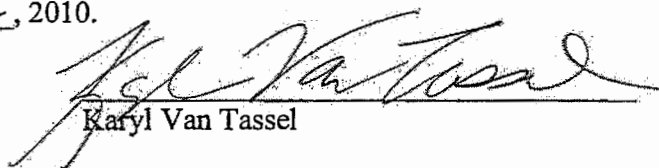
24. CD sales proceeds not used to pay interest, redemptions, and current operating expenses (including commissions and other incentive payments to financial advisors) were either placed in speculative investments (many of them, such as real estate and private equity deals, illiquid), diverted to other Stanford Entities "on behalf of shareholder" (*i.e.*, for the

benefit of Allen Stanford) or used to finance Allen Stanford's lavish lifestyle (e.g., jet planes, a yacht, other pleasure craft, luxury cars, homes, travel, company credit card, etc.).

25. A tipping point was reached in October 2008: That month and every month thereafter, incoming funds from new investors were insufficient to offset outgoing payments to existing investors. Continuing CD sales could no longer cover purported redemptions, interest payments and normal operating expenses. This cash flow crisis caused a rapid depletion of liquid assets, which were inadequate to begin with to cover SIB's CD obligations. ~~By the time the U.S. Receivership was instituted, SIB had already suspended redemptions for certain investors and many Stanford Entities had stopped paying many obligations. For example, SIB received negative publicity concerning its failure, in early February 2009, to fund a \$28 million commitment to a Florida communications company named Elandia International Inc.~~

26. Notwithstanding SIB's insolvency and the rapid liquidation of its investments during 2008 and into 2009, CD sales continued until February 16, 2009, when the SEC and the U.S. Court intervened. These CD purchases were too small, however, to continue to cover for the lack of assets owned by SIB.

Executed this 17 day of December, 2010.


Karyl Van Tassel

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

RALPH S. JANVEY, IN HIS CAPACITY AS §
COURT-APPOINTED RECEIVER FOR §
THE STANFORD INTERNATIONAL §
BANK, LTD., ET AL., §

Plaintiff, §

v. §

DEMOCRATIC SENATORIAL CAMPAIGN §
COMMITTEE, INC.; NATIONAL §
REPUBLICAN CONGRESSIONAL §
COMMITTEE; DEMOCRATIC §
CONGRESSIONAL CAMPAIGN §
COMMITTEE, INC.; REPUBLICAN §
NATIONAL COMMITTEE; and NATIONAL §
REPUBLICAN SENATORIAL §
COMMITTEE, §

Case No. 3:10-CV-346-N

Defendants. §

DECLARATION OF
KARYL VAN TASSEL

I, Karyl Van Tassel of 1001 Fannin, Suite 1400, Houston, TX 77002 state under penalty of perjury as follows:

1. This declaration is intended to supplement my declaration in this matter dated December 17, 2010 ("12/17/2010 Declaration"). Doc. 37, Ex. 2. All of the opinions and statements contained in my 12/17/2010 Declaration are incorporated herein.

2. All definitions of terms contained in the 12/17/2010 Declaration apply here as well. I also use the following short-hand terms in this declaration and define other such terms within the text of the declaration:

- Political Committees - Democratic Senatorial Campaign Committee, Inc.; National Republican Congressional Committee; Democratic Congressional Campaign Committee, Inc.; Republican National Committee; and National Republican Senatorial Committee.
 - OIG Investigation - Investigation by the SEC's Office of Inspector General into SEC's response to concerns regarding Robert Allen Stanford's Alleged Ponzi Scheme, Case No. OIG-526.
 - FWDO: Fort Worth District Office of the SEC.
 - 7/27/2009 Declaration: Declaration of Karyl Van Tassel dated July 27, 2009 and filed as Doc. No. 18 in *Janvey v. Alguire, et al*, Case No. 3:09-CV-0724-N, pending in this Court.
-
- 5/24/2010 Declaration: Declaration of Karyl Van Tassel dated May 24, 2010 and filed in Docs. 444-2, 444-3, and 444-4 in *Janvey v. Alguire, et al*, Case No. 3:09-CV-0724-N, pending in this Court.
3. Attached to this declaration are true and correct copies of the following exhibits:
- KVT-6¹: Report of Investigation, United States Securities and Exchange Commission Office of Inspector General, Case No. OIG-526, dated March 31, 2010 ("OIG Report").
 - KVT-7: 1997 SEC Examination Report Concerning Stanford Group Company, Examination No. 06-D-97-037, which was Exhibit 49 to the OIG Report ("1997 SEC Examination Report").
 - KVT-8: Excerpts of Testimony of Julie Preuit, Assistant Director (former Branch Chief), FWDO Broker-Dealer Examination Group, taken during the OIG Investigation, which excerpts were included in Exhibits 5 and 6 to the OIG Report.
 - KVT-9: Excerpts of Testimony of Mary Lou Felsman, former Assistant District Administrator, FWDO Examination program, taken during the OIG Investigation, which excerpts were included in Exhibit 8 to the OIG Report.

¹ Exhibits KVT-1 through KVT-5 are on file in this matter as attachments to my 12/17/2010 Declaration, all of which are incorporated herein. [See Doc. 37 at 49-87.]. I also reviewed the documents filed as attachments to the Appendix in Support of Notice of Filing in this matter, all of which are incorporated herein and provide bases for the opinions stated herein. [See Doc. 86 (Notice of Filing); Doc. 87 and all attachments thereto (Appendix in Support of Notice of Filing - Part 1); and Doc. 88 and all attachments thereto (Appendix in Support of Notice of Filing - Part 2).]

- KVT-10: Excerpts of Testimony from unidentified examiner² of the FWDO Investment Adviser Examination group of the SEC, taken during the OIG Investigation, which excerpts were included in Exhibit 12 to the OIG Report.
- KVT-11: Letter from SEC to SGC dated July 16, 1998, which was Exhibit 69 to the OIG Report.
- KVT-12: SIB internal presentation and returns chart.
- KVT-13: Letter from SEC to SGC dated September 12, 2005.
- KVT-14: Sales Credit Table.
- KVT-15: Letter from NASD to SGC dated September 27, 2006.
- KVT-16: Email exchange between Doug McDaniel, James Davis, Laura Pendergest-Holt, Juan Rodriguez-Tolentino, et al., between August 29, 2007 and September 4, 2007.
- KVT-17: Email exchange between Robert Ulloa, Jason Green, James Davis, Laura Pendergest-Holt, et al., on March 19, 2008.
- KVT-18: Email exchange between Neal Clement and Scot Thigpen on March 27, 2008.
- KVT-19: Schedules of payments made to C.A.S. Hewlett in 2007-2008 from Trustmark account 3003104594.
- KVT-20: Allocation spreadsheets and accompanying emails concerning payments to C.A.S. Hewlett.
- KVT-21: Email from Jim Davis to SocGen dated May 19, 2005.
- KVT-22: Letter from Jim Davis to SocGen dated February 26, 2003.
- KVT-23: SocGen records filed by Department of Justice in *United States v. Robert Allen Stanford*, C.R. No. 4:09-342-01, pending in the United States District Court for the Southern District of Texas, Doc. No. 245.
- KVT-24: James Davis Plea Agreement.
- KVT-25: 5/24/10 Declaration of Karyl Van Tassel.
- KVT-26: 7/27/2009 Declaration of Karyl Van Tassel.

² The name of this examiner was redacted from the OIG Report. See, e.g., KVT-6, pp. 5, 44.

- KVT-27: Purchase Agreement for Sea Eagle dated November 4, 2002.
- KVT-28: Deed of Trust concerning Houston home purchased by Stanford Development Corporation for Mr. Stanford and his wife.
- KVT-30: Excerpts of Testimony from unidentified examiner³ of the FWDO Investment Adviser Examination group of the SEC, taken during the OIG Investigation, which excerpts were included in Exhibit 17 to the OIG Report.
- KVT-31: 2002 SEC Examination Report Concerning Stanford Group Company, Examination No. IA2003FWDO-012, which was Exhibit 70 to the OIG Report (“2002 SEC Examination Report”).
- KVT-32: 1998 SEC Examination Report Concerning Stanford Group Company, File No. 801-50374, which was Exhibit 55 to the OIG Report (“1998 SEC Examination Report”).
- KVT-33: Letter from SEC to SGC dated December 19, 2002, which was Exhibit 74 to the OIG Report.
- KVT-34: Complaint letter to SEC regarding Stanford Bank dated October 28, 2002, which was Exhibit 76 to the OIG Report.
- KVT-35: Citizen complaint letter regarding Stanford Group forwarded by Texas State Securities Board to SEC on August 4, 2003, which was contained in Exhibits 88 and 89 to the OIG Report.
- KVT-36: Insider complaint letter dated September 1, 2003 and emails forwarding the complaint to the SEC, which were Exhibits 92-94 to the OIG Report.
- KVT-37: 2004 SEC Examination Report Concerning Stanford Group Company, Examination No. BD2005FWDO001, which was Exhibit 98 to the OIG Report (“2004 SEC Examination Report”).
- KVT-38: Appendix in Support of Receiver’s Reply to Defendant R. Allen Stanford’s Opposition to Receiver’s Motion to Approve Procedures for the Sale of the Vessel “Sea Eagle” and Sale of the Vessel Pursuant to Those Procedures.

4. FTI’s continued analysis of the records of SIB, Allen Stanford, and other Stanford Entities was conducted using reliable practices and methodologies that are standard in the fields of accounting and finance. Further, based on FTI’s investigation relating to the Stanford

³ The name of this examiner was redacted from the OIG Report. *See, e.g.*, KVT-6, pp. 5, 44.

Entities, it is my opinion that the SEC reports referenced herein as well as the evidence underlying those reports, all of which are on file in this matter,⁴ are both reliable and trustworthy. Moreover, such reports and evidence are the types of information upon which professionals in the fields of accounting and finance typically rely, when such information is available, during investigations of this nature.

5. Based on FTI's continued investigation of the operations of the Stanford Entities and on the data and documents cited or incorporated herein, it is my opinion that:

- ~~The Stanford Entities were operating as a Ponzi scheme from at least 1999 forward;~~
- SIB was insolvent (*i.e.* its liabilities exceeded the fair value of its assets) from at least 1999 forward;
- The Political Committees received funds from Robert Allen Stanford (Mr. Stanford" or "Allen Stanford") and SFGC, and I have reviewed the schedule of payments made to the Political Committees, which were all made between February 17, 2000 and May 21, 2008;
- Allen Stanford's reported income from at least 1999 forward is comprised almost exclusively from the Stanford Entities, including proceeds from SIB CDs; and
- SFGC was insolvent (*i.e.* its liabilities exceeded the fair value of its assets) from at least 2000 forward and received SIB CD funds.

The following paragraphs discuss specific documents and other evidence and information supporting my opinions.

THE SEC EXAMINERS FOUND THAT STANFORD WAS A PONZI SCHEME AS EARLY AS 1997

6. Beginning in 1997 various departments within the Fort Worth District Office of the SEC found that the Stanford Entities were operating as a Ponzi scheme. *See generally* KVT-

6. These findings were based on, *inter alia*, examinations in which the SEC found that: (1) SIB

⁴ [See Doc. 86 (Notice of Filing); Doc. 87 and attachments thereto (Appendix in Support of Notice of Filing - Part 1); and Doc. 88 and attachments thereto (Appendix in Support of Notice of Filing - Part 2).]

advertised consistent and significantly above-market rates of return to CD holders; (2) SIB paid SGC, and in turn SGC paid financial advisors, commissions that were significantly above market; (3) the returns on invested assets reported by SIB were consistent in volatile markets and were higher than those that would be likely from the type of "safe" investments described to the investors; and (4) SGC and its financial advisers neither maintained nor had access to sufficient information regarding the SIB CDs they were selling or the investment portfolio underlying those CDs. *Id.*

7. In 1997, the FWDO Broker-Dealer Examination group of the SEC reviewed SGC's broker-dealer operations and found that the Stanford operations were a Ponzi scheme. KVT-6, pp. 29-33. This finding was based, in part, on the following findings which were included in the SEC report resulting from the examination:

SIB promotes its products as being safe and secure. A brochure regarding the products offered through SIB, including the FlexCD Account, states that "[F]unds from these accounts are invested in investment-grade bonds, securities and Eurodollar and foreign currency deposits." The brochure indicates a high level of safety for customer deposits. For example: "banking services which ensure safety of assets, privacy, liquidity and high yields", ". . . protects its clients' money with traditional safeguards", "placing deposits only with banks which have met Stanford's rigorous credit criteria", "depository insolvency bond", "bankers' blanket bond", and "portfolio managers follow a conservative approach". Based on the amount of interest rate and referral fees paid, SIB's statements indicating these products to be safe appear to be misrepresentations.

SIB pays out in interest and referral fees between 11% and 13.75% annually. To consistently pay these returns, SIB must be investing in products with higher risks than are indicated in its brochures and other written advertisements.

KVT-6, pp. 30-31; 1997 KVT-7, pp. 2-3. During the OIG Investigation, an SEC employee who was involved in the 1997 examination testified that she "concluded that the SIB CDs' purported above-market returns were 'absolutely ludicrous' and that the high referral fees SGC was paid

for selling the CDs indicated that they were not ‘legitimate CDs.’” KVT-6, p. 31; KVT-8, pp. 24-25. Another member of the examination group testified that when she retired at the end of 1997, she told a colleague to “keep your eye on these people because this looks like a ponzi scheme to me and some day it’s going to blow up.” KVT-6, p. 33; KVT-9, p. 26.

8. In the 1997 Examination Report, the SEC further found that “Stanford Group failed to maintain books and records as they relate to the offer and sale of SIB products” and that “[i]t appears that the RR is recommending a particular product of SIB’s and therefore should have a basis for making that recommendation . . .” KVT-7, p. 3. The same report noted, however, that Lena Stinson, the senior vice president and administrative officer of SGC, told the SEC that “once the application is sent, the RR is no longer involved (other than receiving a referral fee) and all paperwork is maintained by SIB.” *Id.*

9. In 1998, the SEC’s investor advisor group of the FWDO conducted another examination of SGC. *See generally*, KVT-32. The examiner who conducted that examination testified during the OIG Investigation that SGC’s complete lack of information regarding the SIB CDs it was selling amounted to fraud:

We asked for all due diligence information that the adviser or the Stanford Group Company possessed concerning the CDs, whatever they had as to how the money was being invested, performance returns of the portfolio, whatever they had, and as I recall, they produced very, very little. They claimed, we don’t have access to that information.

...

Well, the question is how would you sell it consistent -- in the case of an adviser, consistent with your fiduciary duty to your clients....

So my conclusion was, as I have asked you, give me everything you’ve got about that investment, and they gave me virtually nothing, certainly nothing in my mind that would be a reasonable basis for making a recommendation of an investment. So that’s why -- I think if you see the letter I sent to Stanford as a result of this report, I put in there [Section] 206 language about

it doesn't look like you've got enough information to fulfill your fiduciary duty in making this recommendation. ... And that would have -- in my mind, have been one of the theories to bring a case against the adviser by enforcement that that was such a -- a glaring absence of basis for a recommendation that it amounted to deceit or fraud upon the client.

KVT-6, p. 44; KVT-10, pp. 41-44; KVT-11.

10. Beginning in 1997, the SEC made numerous additional findings over the years relating to SIB CD rates of return, the excessive compensation paid to SGC and financial advisors who sold the CDs, the lack of information possessed by SGC and the financial advisors ~~about the SIB CDs and the underlying investment portfolio, and discovered other facts that~~ support the SEC's conclusion that a Ponzi scheme existed during those years. For example:

- In the 1997 Examination Report, the SEC found that “[d]uring 1996, [Allen] Stanford made a cash contribution of \$19,000,000 to [SGC]. We are concerned that the cash contribution may have come from funds invested by customers at SIB. We noted that SIB had loaned Stanford \$13,582,579. In addition, we noted that SFG had borrowed \$5,447,204 from SIB for a total receivable at SIB of \$19,029,783 directly and indirectly from [Mr.] Stanford. We contacted the general counsel for the Stanford companies regarding our concerns. The general counsel stated that the cash contribution came from personal funds and not from the above loans; however, it seems at least questionable whether Stanford has access to \$19,000,000 in personal funds.” KVT-6, p. 32; KVT-7, p. 3. One of the SEC examiners testified that this was a “red flag,” and that they wanted more information about the origin of Mr. Stanford’s cash contributions but were unable to obtain it. She further testified that the transactions made her assume that [Mr. Stanford] was possibly stealing from investors and that this was an attribute of fraud and potentially a Ponzi scheme. KVT-6, pp. 32-27; KVT-8, pp. 22-23, 26-27.
- The examiner who conducted the 1998 examination testified during the OIG Investigation that at the time of the examination, he was suspicious about “how Stanford was able to achieve these returns with such allegedly safe investments.” He further stated that “extremely high interest rates, extremely generous compensation, [SGC] is extremely dependent upon that compensation to conduct its day to day operations. It just smells bad.” KVT-6, p. 43; KVT-10, pp. 20-21.
- One of the examiners who conducted the 1997 examination and was familiar with the 1998 examination “testified that after the 1998

Examination, both the investment adviser and broker-dealer examiners “knew that it was a fraud.” KVT-6, p. 46; KVT-8, p. 60.

- In 2002, the SEC’s investment adviser examination group conducted yet another examination of SGC. The examiner who conducted the 2002 examination discussed SGC with the examiner who conducted the 1998 examination and described that conversation in his testimony in the OIG Investigation as follows: “[H]e explained to me that he had been there in [1998], and that he had strongly suspected that the affiliated bank of the investment adviser had problems....I can’t remember whether he actually came out and said ponzi scheme or fraud but he made it clear that the bank was taking in deposits and he suspected that, whenever there was a redemption, they were just taking that money out of -- new money from new investors. So, like I said, I can’t remember if he used the word ‘fraud’ or ‘Ponzi’ scheme,” but he made it clear that that’s what he suspected.” KVT-6, p. 47; KVT-30, p. 12.
- The examiner who conducted the 2002 examination testified that there were numerous red flags that caused him to conclude that Stanford had been operating a Ponzi scheme and that it was growing exponentially. *See., e.g.*, KVT-6, p. 48; KVT-30, pp. 68, 96. One of those red flags was the consistent, above-market reported returns, about which the examiner stated, “[W]hen you take the CD rates, the commission, the overhead and added them together...it just seemed very unlikely that they could invest in anything legitimate to earn a return to cover all those expenses.” KVT-6, p. 48; KVT-30, pp. 29-30. Other red flags noted by the examiner in his testimony were the high commissions paid to SGC financial advisers for selling the CDs and SGC’s claimed lack of information about which of its clients had invested in the SIB CDs. KVT-6, pp. 48-49; KVT-30, pp. 30, 66-68.
- The 2002 Examination Report found, in part, as follows: (1) “There was no indication that anyone at SGC knew how its clients’ money was being used by SIB or how SIB was generating sufficient income to support the above-market interest rates paid and the substantial annual three percent trailer commissions paid to SGC;” (2) “[SGC] failed to document adequate due diligence with respect to its clients’ investments in its affiliated offshore bank’s certificates of deposit;” (3) SGC failed to adequately disclose to its customers the referral fees it received annually from the sales of SIB CDs; (4) SGC failed to adequately disclose its “overwhelming reliance on referral fees from sales of the SIB CDs for its financial success.” KVT-31, pp. 1, 10-13. Similar deficiencies and violations were set forth in a deficiency letter from the SEC to SGC dated December 19, 2002. KVT-33.

- In 2002 and 2003, the SEC received multiple complaints or tips, from both insiders and customers, that the Stanford operations were a Ponzi scheme, listing specific concerns ranging, *inter alia*, from high guaranteed rates of return, the secrecy surrounding the SIB CD portfolio, and SIB's use of a small unknown auditing firm on the island of Antigua. See e.g., KVT-6, pp. 53-70; KVT-34; KVT-35; KVT-36. The insider complaint concluded that the Stanford operation was a "Massive Ponzi Scheme." KVT-6, p. 66 and KVT-36.
- In 2004, the SEC conducted yet another examination of Stanford Group Company, and in the resulting report concluded that: (1) "the offering of the SIB CDs may in fact be a very large ponzi scheme, designed and marketed by SIB's and SGC's [sic] to lull investors into a false sense of security by their claims that the SIB products are similar to traditional U.S. bank CDs;" (2) SGC was a high regulatory risk with regard to sales practice issues; (3) that "little, if any of the funds invested into the SIB CDs may actually be invested as represented to investors;" (4) SGC failed or refused to produce documents concerning actual use of the monies invested; (5) SGC's regulatory violations included making misrepresentations and omissions to customers, charging excessive commissions and failing to disclose the amount of commissions charged;" and (6) that the following factors supported the conclusion that SIB CDs were a fraud - excessive commissions, aggressive sales contests, high "interest" rates, high returns every year for the last 10 years, SIB will not disclose its portfolio, and other factors leading the SEC to believe that Allen Stanford may have been engaging in money laundering and using investor funds without any oversight. KVT-6, pp. 70-80; KVT-37.

**SIB'S INVESTMENT RETURNS WERE
TOO GOOD TO BE TRUE FROM AT LEAST 1997 FORWARD**

11. The SEC's findings concerning the unusually consistent and high rates of returns from the SIB CDs are consistent with and support my conclusions contained in the 7/27/2009 Declaration, 5/24/2010 Declaration, the 12/17/2010 Declaration and my opinions stated herein. The high rates of return and consistent profitability of the SIB CD portfolio that were reported by SIB, at a time when the world economy was in crisis, are one factor that leads me to conclude that the rates of return were not the result of actual investment performance, and are more consistent with "reverse-engineered" rates of return that are one of the hallmarks of a fraudulent investment scheme. In fact, there is evidence of this reverse-engineering of revenue both in the

documents we have obtained and in the plea agreement of James Davis. SIB offered CD rates that were significantly greater than those offered in the United States. In its own marketing brochure, SIB included the following comparison in the yields of SIB CDs versus average U.S. Bank CD yields between 1997 and 2006:

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006
SIB Yield (%)	10.13	9.25	8.71	9.625	9.13	7.17	6.38	6.21	6.52	7.13
U.S. Yield (%)	5.8	5.3	4.9	5.85	3.55	1.85	1.78	2.7	4.46	5.08

KVT-5. At their worst, SIB CDs had a rate of return that was 140%, and at their best 388%, of the average rate for U.S. Bank CDs. Even more incredible were the overall rates of return earned by the SIB CD investment portfolio between 1997 and 2007 -- *i.e.* the total amount earned by SIB on its purported investments, not just the amount paid to investors. Specifically, according to internal company documents, the investment portfolio had a 14.9% overall rate of return in 1997, 14.8% in 1998, 14.2% in 1999, 14.1% in 2000, 14.3% in 2001, 14% in 2002, 11.7% in 2003, 11.9% in 2004, 12.1% in 2005, 12% in 2006 and 12.7% in 2007. *See* KVT-12.

12. A comparison of SIB's claimed overall rate of return on its CD investment portfolio to well known index rates of return during the same years further highlights the disparity in performance between the SIB CD portfolio and the world financial markets in general. Over the years, the performance of the SIB CD portfolio often exceeded many of the well-known index rates of return. Even when it did not, however, the returns for SIB were remarkably consistent and steady from year to year, a result that is extremely rare in normal market conditions and even more so during the time period in question. The below chart shows the major index returns for the years 1997 through 2007 as well as the amounts allegedly earned by SIB during those years, all as reflected in SIB's own documents:

	1997	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007
SIB Yield (%)	14.9	14.8	14.2	14.1	14.3	14	11.7	11.9	12.1	12	12.7
Dow Jones Return	22.64	16.10	25.22	-6.18	-7.10	-16.76	25.32	3.15	-0.61	16.29	6.43
Dow Jones Stoxx 50 Return	36.84	32.00	46.74	-2.69	-20.25	-37.30	15.68	6.90	21.28	15.12	6.79
Nasdaq 100 Return	20.63	85.31	101.95	-36.84	-32.65	-37.58	49.12	10.44	1.49	6.79	18.67
S&P 500 Return	31.01	26.67	19.53	-10.14	-13.04	-23.37	26.38	8.99	3.00	13.62	3.53

13. As the chart above reflects, the SIB CD returns were in excess of and/or more consistent than virtually every other stock, CD, fund or other investment to which SIB compared its CDs in its marketing materials.

**SIB'S REFERRAL AND COMMISSION RATE STRUCTURE WAS ECONOMICALLY
UNSUSTAINABLE FROM AT LEAST 1997 FORWARD**

14. The SEC's findings concerning the above-market referral fees paid to SGC and above-market commissions paid to SGC financial advisors are consistent with and support my conclusions contained in the 7/27/2009 Declaration, 5/24/2010 Declaration, the 12/17/2010 Declaration and my opinions stated herein. The fact that SGC financial advisors were paid far above normal market commission rates to sell the SIB CDs raises the question of how SIB could afford to pay those rates on top of extraordinary returns on the CDs. SGC received a 3% commission (also called a "referral fee") on the initial sale of a SIB CD, and 3% annually for the life of the CD. Financial advisors, in turn, received as much as an annual 1% commission on all amounts their customers had in CDs for that year and were eligible for commissions on the initial sale of CDs of 1% or more. As the SEC pointed out in a September 2005 letter to the president of SGC as part of yet another SEC investigation, this commission structure would result in SGC

receiving a referral fee of 15% of the amount invested on a SIB CD with a 60-month maturity, which the SEC said was more than any rate legally allowed. *See* KVT-13. That means the financial advisor for that customer would receive 5% of the amount invested over the life of the CD as the base commission. Moreover, if the financial advisor sold over \$2 million in SIB CDs in any given calendar quarter, he earned an additional 1% quarterly bonus on those sales. By comparison, when an SGC broker sold a typical certificate of deposit issued by a U.S. bank (and insured by the FDIC), the commission to SGC was many times smaller than the normal commission SGC received on a SIB CD. *See* KVT-14.

15. In addition to exceeding payments received for U.S. bank CD products, the SIB CD commission structure for financial advisors was unusual in other ways. The financial advisors received a percentage each year of the amount their clients held in SIB CDs, regardless of whether the financial advisor sold new CDs that year. The “trailing commission,” as it was known, had the obvious impact of causing financial advisors to pressure customers into not redeeming their CDs -- *i.e.* into leaving their money with the bank. In addition, the trailing commission was structured to incentivize financial advisors to continue selling new CDs by increasing — or decreasing — the percentage of their trailing commission depending on the volume of new CDs they sold — or did not sell — in a given year.

16. Commission and bonus structures like that used by SIB are not typical, largely because they cannot be sustained economically -- *i.e.* the investments do not generate enough real returns to cover the stated CD rates of return, commissions and referral fees along with other applicable expenses.

**INFORMATION AVAILABLE TO SGC AND THE FINANCIAL ADVISORS
ABOUT CDS AND THE SIB INVESTMENT PORTFOLIO WAS INADEQUATE**

17. The SEC's findings concerning the lack of information known by or available to SGC and its financial advisors regarding the SIB CDs and the underlying investment portfolio are consistent with and support my conclusions contained in the 7/27/2009 Declaration, 5/24/2010 Declaration, the 12/17/2010 Declaration and my opinions stated herein. The SEC recognized these problems beginning in 1997. FTI's investigation confirmed that these problems continued until the collapse of the Ponzi scheme.

18. The NASD concluded in 2006 that SGC violated NASD rules through "unwarranted and misleading" assertions that SIB's portfolio investments were "prudent"—at a time when SGC admitted that "no one at SGC knows what the investments are." *See* KVT-15. FTI's investigation confirms this conclusion.

19. FTI's investigation uncovered that there was very little information available to the Stanford financial advisors at any time about how SIB purportedly invested funds from the sale of CDs. It was commonly known throughout SGC that SIB was owned and controlled ultimately by Allen Stanford, that James Davis and Laura Pendergest-Holt had principal responsibility for the management of the SIB CD investment portfolio and that specific information regarding the investment portfolio was not readily available.

20. On the few occasions where we have discovered that financial advisors actually inquired about SIB's investments, however, they received extremely limited and generic information, making it impossible for them to evaluate the suitability of the CDs for their customers. They nonetheless continued to sell the SIB CDs to customers and were well paid to do so, in spite of what should have been a "red flag" about this investment scheme.

21. For example, in August 2007, financial advisor Doug McDaniel wrote to James Davis, Laura Pendergest-Holt, and Juan Rodriguez-Tolentino: "I have only done \$3,000,000 of my clients' money (and my own) in the CD product. I have the potential to do much more, but to do that, I would need to become even more comfortable with the product." *See* KVT-16. McDaniel attached a list of questions, noting "some of them may sound like an investigative reporter but I'd like to get as comfortable as I can with the bank." At Davis's suggestion, McDaniel forwarded the questions to Rodriguez-Tolentino, the president of SIB, along with a request for a phone call on the topic. ~~The attached questions included:~~ "My understanding is that from 2000-2002, the Bank's portfolio returns were in the range [of 11% to 15%]. With S&P and EAFE negative for all of those years, and yet a tolerance of up to 50% equity for the bank, how was the bank's portfolio invested"; "What financial instruments and strategies are in place to guard against significant losses in the portfolio, particularly on the equity side? Does each of the managers hedge their own portfolios against loss or do you employ a separate manager to hedge the total bank portfolio."; and "There are many people involved on the investment committee of the Bank. How does this committee ensure that appropriate hedging is in place? This would seem to require some sophisticated calculations outside the expertise of most investment committees." FTI has located no evidence that Tolentino ever answered McDaniel's very basic questions. By late 2008, McDaniel nonetheless had increased his client SIB CD portfolio to over \$13 million. Between April 2006 and February 2009, he received \$134,767 in SIB CD commissions, \$84,359 in SIB quarterly bonuses, and \$1,314,168 in loans.

22. In March 2008, financial advisor Robert Ulloa wrote to Jason Green with a list of similar concerns regarding SIB. *See* KVT-17. Ulloa inquired as to: "SIB's funding sources other than CDs?"; "Which banks provide liquidity funding to SGC?"; "Liquidity funding, how

SGC does it?"; "SIB's Equity Investments, what percentage is private?"; "Have we reduced/increased our exposure to financials?"; "How leveraged is Stanford, is it 30 to 1 like most investment banks?" Although Laura Pendergest-Holt suggested addressing Ulloa's questions on an upcoming all-financial advisor call, noting "I am sure if he has these questions others will as well," FTI has located no record of what, if any, answers were provided to the group. By late 2008, Ulloa had increased his client SIB CD portfolio to over \$165 million. Between 2005 and 2009 he received \$3,585,168 in SIB CD commissions and \$987,973 in SIB quarterly bonuses.

23. Also in March 2008, financial advisors Neal Clement, John Mark Holliday and Scot Thigpen discussed SIB and how to "have a good story to tell prospective clients . . . in these difficult markets." See KVT-18. Thigpen noted that it was "difficult . . . to show [SIB is] able to provide positive returns even in light of horrible market conditions." Thigpen opined that "[a]ccredited investors are pretty savvy investors lots of times" and asked how one could show them the available SIB CD rates without showing them the underlying portfolio returns. Clement responded: "If I have a client that has to see the [SIB] portfolio, the SIB is not for them!!!!!" By 2008, Clement's client SIB CD portfolio exceeded \$20 million and Holliday's exceeded \$3 million. Between April 2006 and February 2009, Clement received \$270,347 in SIB CD commissions, \$163,882 in SIB quarterly bonuses, and \$639,506 in forgivable loans; and Holliday received \$33,358 in SIB CD commissions and \$597,503 in forgivable loans.

24. Thus, the SGC financial advisors had insufficient information upon which to make recommendations to clients regarding the suitability of SIB CDs. The NASD reached the same conclusion as part of a 2006 inquiry into the SIB CD program and SGC's sales practices. Specifically, the NASD concluded that SGC had violated NASD rules through "unwarranted and

misleading” assertions that SIB’s portfolio investments were “prudent”—at a time when SGC admitted that “no one at SGC knows what the investments are.” See KVT-15. This is fully consistent with, and indeed not surprising, given the SEC’s similar findings going back to 1997.

**SIB’S USE AND IMPROPER
COMPENSATION OF A SMALL ANTIGUAN AUDITING FIRM**

25. The complaints received by the SEC about SIB’s use of a small Antiguan auditing firm, referenced above in ¶ 10, and the SEC’s investigation of those issues, are consistent with and support my conclusions contained in the 7/27/2009 Declaration, 5/24/2010 Declaration, the 12/17/2010 Declaration and my opinions stated herein.

26. When customers or financial advisors have concerns or questions about an investment product, one obvious way for them to investigate the product is to determine who the auditor is and contact them directly and to review audit reports. Most multi-billion dollar investment funds go through rigorous audits by large and well-known audit firms and in fact switch auditors every few years to avoid even the appearance of impropriety. This was not the case with SIB. As reported in SIB’s annual statements, and complained about by customers to the SEC as far back as 2002, SIB’s auditing firm from the beginning was C.A.S. Hewlett & Co., Ltd., a very small local firm in Antigua. The Hewlett firm lacked the apparent resources, credentials, reputation, and staff to audit a multi-billion dollar investment portfolio. SIB used this firm even though at least 2 of the Big 4 audit firms and several other international firms had a presence on the island and all of the Big 4 had locations in the Caribbean.

27. My team and I have been able to verify, through tracing, that SIB’s external auditor, C.A.S. Hewlett, was paid, for professional services, \$222,000 (\$18,500 per month) in 2007 and \$274,000 (\$18,500 per month through April and \$25,000 per month thereafter) in 2008, all from a Stanford Financial Group Limited account at Trustmark Bank in Houston,

Texas. FTI's schedules of payments made to C.A.S. Hewlett in 2007 and 2008 from the Trustmark account are attached as KVT-19. The Stanford accounting department allocated these amounts, for internal accounting purposes, among nine different Stanford Entities, including SIB, as evidenced by the allocation spreadsheets attached hereto (with the emails to which they were attached) as KVT-20.

28. We have also discovered that additional payments were made to C.A.S. Hewlett from a Stanford Financial Group, Ltd. ("SFGL") account at a Swiss bank named SG Private Banking (Suisse) S.A. ("SocGen Account"). In his plea agreement, James Davis described the SocGen Account as a "secret" account and stated that it was also used to pay bribes to Antiguan regulators. KVT-24, p. 15.

29. On February 26, 2003, James Davis requested by letter that SocGen increase the monthly payment amount from the secret account to C.A.S. Hewlett from £10,000 sterling to £15,000 sterling effective March 1, 2003. KVT 22. On May 19, 2008, Davis requested by email that SocGen increase the monthly payments to C.A.S. Hewlett again from £15,000 (sterling) to £20,000 effective 15 June 2008. KVT-21. In addition to these monthly payments, however, the SocGen records filed by the DOJ show multiple additional payments from the secret SocGen Account to Hewlett, totaling hundreds of thousands of dollars:

- March 18, 2002 - £80,000 sterling
- September 7, 2005 - £6,000 sterling
- November 3, 2005 - \$125,000
- December 5, 2005 - \$125,000
- February 10, 2006 - \$100,000
- May 2, 2007 - £16,000 sterling
- September 2, 2008 - £60,000 sterling

- September 8, 2008 - £60,000 sterling

These payments were over and above payments for C.A.S. Hewlett's audit services from SFGL's Trustmark account, and FTI has located no allocation records for these payments.

30. The additional payments noted in paragraph 29 are important in considering the efficacy and legitimacy of the audits of SIB by C.A.S. Hewlett as both International Auditing Standards and FRSC regulations require that audits be "independent." Based on our investigation, C.A.S. Hewlett appears not to have audited the vast majority of SIB's reported investments, even though they comprised 90% or more of SIB's assets. Based on that fact, coupled with the large payments to C.A.S. Hewlett apparently unconnected with its audit fees, it appears that C.A.S. Hewlett's independence as an auditor of SIB was severely compromised.

**SIB'S FINANCIAL STATEMENTS WERE
"REVERSE-ENGINEERED" FROM AT LEAST 1999 FORWARD**

31. Davis states in his plea agreement that as far back as at least 1999 assets were inflated to offset CD obligations and that revenue was "reverse-engineered" to arrive at desired levels. KVT-24, pp. 12-15. My findings are consistent with those admissions.

32. We found within SIB's accounting records worksheets used to derive fictitious SIB revenue. The Ponzi scheme conspirators would simply determine what level of fictitious revenue and assets SIB needed to report in order to both look good to investors and regulators and purport to cover its CD obligations and other expenses. They would then back into that total amount by assigning equally fictitious revenue amounts to each category (equity, fixed income, precious metals, alternative, etc.) of a fictitious investment allocation.

33. Based on our review of the worksheets used to derive the fictitious revenue amounts associated with those files, after comparing the figures in the spreadsheets to revenue figures reported on SIB's trial balance and financial statements, and after considering the

statements made by James Davis, I have concluded that such worksheets were used to generate, or “reverse-engineer,” false revenue figures back to at least 1999.

SIB WAS INSOLVENT FROM AT LEAST 1999 FORWARD

34. At the inception of the U.S. Receivership on February 16, 2009, SIB’s total obligation to CD holders was approximately \$7.2 billion (U.S.), versus reported investments valued at \$8.3 billion as of December 31, 2008. Based on my analysis, the market value of all assets for all Stanford Entities (including SIB) combined total less than \$1 billion. At the time SIB was placed into receivership, SIB was insolvent (*i.e.*, its liabilities exceeded the fair value of its assets) by more than \$6 billion.

35. Through further analysis of SIB’s financial records, FTI has determined that SIB was insolvent by at least 1999 forward. SIB’s reported assets consisted overwhelmingly of “financial assets” and cash. The published balance sheets represented that “financial assets” were reported at “fair value.” Of course, cash, by definition, is stated at fair value (assuming correct reporting). We know, however, from our investigation and review of internal SIB records that the fair value of the SIB financial assets was much smaller than reported.

36. Each year, from 1999 forward, SIB’s reported asset totals included, without disclosure to the public, outstanding loans or notes receivable from Allen Stanford. SIB’s financial records show that Allen Stanford’s outstanding loan balances for the years 1999 through 2008 were at least as follows:

- December 31, 1999 - \$52 million
- December 31, 2000 - \$59.5 million
- December 31, 2001 - \$112 million
- December 31, 2002 - \$168 million

- December 31, 2003 - \$335 million
- December 31, 2004 - \$539 million
- December 31, 2005 - \$630 million
- December 31, 2006 - \$1.25 billion
- December 31, 2007 - \$1.45 billion
- December 31, 2008 - \$1.79 billion

37. The loans noted above have been deducted from the assets totals contained in SIB's published financial statements to determine SIB's solvency, since we have concluded that Allan Stanford was either unable to pay the loans back or never intended to do so. As of the date of the Receivership, Mr Stanford was unable to repay the \$1.8 billion loan, and he has stated numerous times that he lacked even sufficient assets to pay for his defense. As noted below, the aggregate amount of non-Stanford income that Mr. Stanford claimed on his tax returns from 1999 through 2007 did not accumulate enough to allow him to buy a house, let alone pay back the SIB loans ranging from \$52 million to \$1.8 billion. These notes were not disclosed to investors or even outside Allen Stanford's inner circle, and they were not separately noted in his tax returns as they should have been, which is discussed further below. The notes were always short term (due within one year), though never repaid, and they were unsecured by any other assets held by Mr. Stanford. The way in which these loans were recorded into the financial statements are not indicative of an appropriate arms-length transaction with a shareholder; instead, they were simply bookkeeping entries to cover up that SIB was sending funds to other Stanford Entities and to Allen Stanford. These loans to Mr. Stanford, which were classified by SIB as "financial assets at fair value," were inconsistent with the types of investments disclosed by SIB to investors. Therefore, these loans are considered uncollectible and have been deducted from the asset totals in SIB's financial statements in determining its solvency.

38. When the above loan balances are deducted from the asset totals contained in SIB's published financial statements, I conclude that, from at least 1999 forward, SIB's reported liabilities exceeded the fair value of its assets and SIB was therefore insolvent. The following table shows, for the years 1999 through 2008, the fair market value of SIB's assets (as reported by SIB), excluding the loans to Allen Stanford, compared to the total reported liabilities of SIB.

Date	Adjusted Assets	Total Liabilities	Surplus/(Deficit)
12/31/1999	623,893,966	628,067,020	(4,173,054)
12/31/2000	771,203,204	777,863,293	(6,660,089)
12/31/2001	1,085,830,292	1,122,829,384	(36,999,092)
12/31/2002	1,545,755,342	1,613,048,535	(67,293,193)
12/31/2003	1,890,506,026	2,090,477,407	(199,971,381)
12/31/2004	2,547,247,277	2,839,878,864	(292,631,587)
12/31/2005	3,428,961,957	3,776,659,957	(347,698,000)
12/31/2006	4,082,245,061	5,025,014,250	(942,769,189)
12/31/2007	5,603,317,128	6,702,960,952	(1,099,643,824)
12/31/2008	5,966,542,565	7,435,718,727	(1,469,176,162)

39. When the above-referenced loan balances are deducted from SIB's asset totals from 2000 forward, SIB's CD liabilities alone exceeded the fair market value of its assets. The following table shows, for the years 2000 through 2008, the fair market value of SIB's assets (as reported by SIB), excluding the loans to Allen Stanford, compared to the CD liabilities of SIB.

Date	Adjusted Assets	CD Deposits	Surplus/(Deficit)
12/31/2000	771,203,204	772,261,025	(1,057,821)
12/31/2001	1,085,830,292	1,116,454,586	(30,624,294)
12/31/2002	1,545,755,342	1,606,062,398	(60,307,056)
12/31/2003	1,890,506,026	2,083,397,998	(192,891,972)
12/31/2004	2,547,247,277	2,827,941,493	(280,694,216)
12/31/2005	3,428,961,957	3,763,011,041	(334,049,084)
12/31/2006	4,082,245,061	5,010,083,767	(927,838,706)
12/31/2007	5,603,317,128	6,689,964,304	(1,086,647,176)
12/31/2008	5,966,542,565	7,431,630,364	(1,465,087,799)

FROM AT LEAST 1999 FORWARD, ALLEN STANFORD'S REPORTED INCOME WAS BASED ALMOST EXCLUSIVELY ON FUNDS FROM THE STANFORD ENTITIES

40. Based on a review of records relating to the Stanford Entities and tax returns obtained from the IRS for Allen Stanford for the years 1999 through 2007, Allen Stanford received very little income from any source other than the Stanford Entities. In three out of nine years covered by the tax returns, his non-Stanford income was less than \$50,000. For two additional years, it was under \$100,000. Even for years when he received over \$100,000 in non-Stanford income, that income exceeded 2% of his total income only one time -- in 2005, when his non-Stanford income was 5.02% of his total income.⁵ The following table shows Allen

⁵ The bulk of the non-Stanford income for 2005 was a capital gain in the amount of \$2,600,620. Although we have classified this amount as non-Stanford income, we actually do not have any information showing the source of that capital gain. Thus, the capital gain may well be traceable to a source associated with the Stanford Entities.

Stanford's income for the years 1999 through 2007, broken down between income that came from the Stanford Entities and income that came from some other external source.

Year	Reported Income			Percent of Reported Income	
	Stanford	Non-Stanford	Total	Stanford %	Non-Stanford %
1999	5,364,783	69,926	5,434,709	98.71%	1.29%
2000	7,390,052	21,672	7,411,724	99.71%	0.29%
2001	15,828,358	136,774	15,965,132	99.14%	0.86%
2002	27,691,286	27,257	27,718,543	99.90%	0.10%
2003	36,770,949	41,093	36,812,041	99.89%	0.11%
2004	298,180,436	85,052	298,265,488	99.97%	0.03%
2005	50,291,392	2,656,808	52,948,200	94.98%	5.02%
2006	43,302,997	457,342	43,760,339	98.95%	1.05%
2007	81,053,128	15,231	81,068,359	99.98%	0.02%
Grand Total	565,873,381	3,511,155	569,384,535	99.38%	0.62%

41. The reported income from Stanford Entities and non-Stanford sources in the above paragraph do not show all of the Stanford funds provided to Allen Stanford. In particular, Schedule F of IRS Form 5471, which was filed by Mr. Stanford for each year from 1999 through 2007, requires that the filer record information regarding loans to stockholders and other related persons. Mr. Stanford, however, failed to record any of his SIB loans on this line item. In fact, from 1999 through 2007, Mr. Stanford never had enough reported income to repay the SIB loans that he had received. For example, in 2003 the amount due on the loan from SIB to Mr. Stanford was approximately \$335 million, while the cumulative reported income from all years 1999

through 2003 was only approximately \$93 million — a full \$242 million less than the amount due on his SIB loan.

42. Moreover, Mr. Stanford diverted millions of dollars to his personal bank accounts from SFGL's SocGen Account, which account James Davis said, in his plea agreement, was both "secret" and funded by CD investor funds. KVT-24, p. 15. Based on the SocGen records filed by the DOJ, Mr. Stanford transferred over \$78 million from the SocGen Account to his personal accounts between 2000 and 2006, specifically:

- 2000 - \$8.9 million
- 2001 - \$500,000
- 2002 - \$5 million
- 2003 - \$39.5 million
- 2004 - \$18 million
- 2006 - \$6.5 million

43. If you exclude any reported income known to be from the Stanford Entities, Mr. Stanford received only \$3,511,155 from other sources between 1999 and 2007. In fact, between 1999 and 2004, his non-Stanford income totaled only \$381,774. Although I do not have access to records concerning all personal expenses incurred by Allen Stanford during this time period, we learned that he purchased a yacht known as the Sea Eagle in November 2002 for \$3.9 million, an amount that exceeds the total non-Stanford reported income Mr. Stanford received between 1999 and 2007. *See* KVT-27. Mr. Stanford's non-Stanford reported income does not even begin to cover the costs of the yacht. In addition, over \$18 million was spent to refurbish the Sea Eagle between June 2003 and February 2005. *See* KVT-38.

44. Although I do not have access to every record of Mr. Stanford's personal expenses incurred during this time period, our investigation has revealed that the vast majority of

expenses that Mr. Stanford incurred, even for items or property used only for personal purposes, was actually paid by one or more of the Stanford Entities. Just by way of example, Stanford Development Corporation purchased a home for Mr. Stanford and his wife in 1999 for a price of at least \$2.15 million, which far exceeds his non-Stanford reported income not only for 1999 but for the entire period of 1999 through 2004. *See* KVT-28.

**LOANS FROM SIB AND TRANSFERS FROM THE SOC GEN ACCOUNT
TO ALLEN STANFORD WERE FRAUDULENT**

45. As discussed in detail above, Allen Stanford received over \$78 million from SFGL's SocGen Account and approximately \$1.8 billion in loans from SIB. I have reviewed section 24.005 of the Texas Uniform Fraudulent Transfer Act. *See* TEX. BUS. & COMM. CODE ANN. § 24.005. In particular, subsection (b) to section 24.005 provides a non-exhaustive list of eleven "badges of fraud" that may be used to determine whether a transfer was made with actual intent to hinder, delay, or defraud creditors. I have determined that most of these badges of fraud are present in the transfers of loans and SocGen funds to Allen Stanford, as follows:

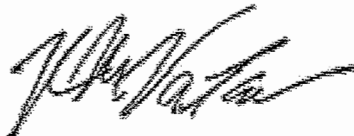
- The transfers of such funds were to an insider — namely Allen Stanford, owner of all Stanford Entities.
- Allen Stanford, who is a debtor himself, retained possession and control of the funds after the transfers and absconded with such funds.
- SIB, SFGL, and Allen Stanford removed the assets transferred to Allen Stanford, and they and other accomplices concealed the transfers of such assets.
- SIB and SFGL did not receive consideration that was reasonably equivalent to the value of the funds transferred to Allen Stanford; in particular, Allen Stanford's promissory notes were of no real value to SIB.
- SIB was insolvent when the transfers were made to Allen Stanford.
- SIB's transfer of funds to Allen Stanford occurred on or around the time that Allen Stanford incurred a substantial debt to repay SIB pursuant to the loans or notes receivable.

**SFGC'S INCOME CAME ALMOST EXCLUSIVELY FROM THE STANFORD ENTITIES,
WITHOUT WHICH IT WAS INSOLVENT**

46. Likewise, without funds from other Stanford Entities, SFGC was insolvent from at least 2000 forward. SFGC was created for the purpose of providing services to SGC, SIB and other Stanford Entities. During the course of our entire investigation since February 2009, we have located no evidence which even suggests SFGC received any significant funds from sources other than the Stanford Entities. I have stated in my prior declarations that the Stanford Entities were funded primarily by the proceeds from the sale of SIB CDs. *See* KVT-26.

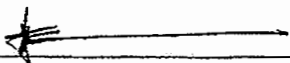
Accordingly, without the funds supplied by the Stanford Entities, SFGC was insolvent from at least 2000 through February 16, 2009.

Executed this 11th day of March 2011.

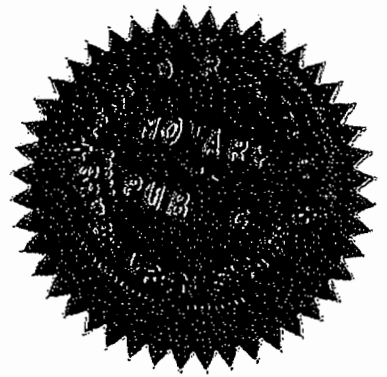


Karyl Van Tassel

This is Exhibit "Q" referred to in the
affidavit of Marcus A. Wide
sworn before me, this 28 day of November, 2014.



A Commissioner, notary, etc.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PEGGY ROIF ROTSTAIN, *et al.*,
on behalf of themselves and all others similarly
situated,

Plaintiffs,

v.

TRUSTMARK NATIONAL BANK, *et al.*

Defendants.

Case No.: 3:09-CV-02384

THE TORONTO-DOMINION BANK'S MEMORANDUM AND
RESPONSE IN OPPOSITION TO THE OFFICIAL STANFORD
INVESTORS COMMITTEE'S MOTION TO INTERVENE

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7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL
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The Toronto-Dominion Bank (“TD”), by and through undersigned counsel, respectfully submits this Memorandum and Response in Opposition (the “Opposition”) to the Official Stanford Investors Committee’s (the “Investors Committee”) Motion to Intervene. The Investors Committee’s Motion to Intervene fails because (1) the Motion to Intervene was not timely filed; and, as Defendant Societe Generale Private Banking (Suisse) S.A.’s argues, (2) the intervenors did not identify any interest that would be impaired if intervention were denied; and (3) the intervenors failed to demonstrate how Plaintiffs’ representation is inadequate. As such, TD respectfully requests that the Court deny the Investors Committee’s Motion to Intervene.

BACKGROUND

A. The Instant Action

This case arises out of an alleged securities fraud perpetrated by R. Allen Stanford (“Stanford”) through various entities under his control (the “Stanford Entities”). On February 16, 2009, the Securities and Exchange Commission (“SEC”) filed a lawsuit against Stanford, several of the Stanford Entities, and a number of Stanford entity executives. Stanford was indicted in June 2009 on criminal charges related to the alleged fraudulent scheme.

Plaintiffs filed a four-count Original Petition in Texas state court on August 23, 2009, which they amended on October 9, 2009. The action was removed from the Texas court to the U.S. District Court for the Southern District of Texas, Houston Division, on November 13, 2009. ECF No. 1, and transferred to this Court on December 15, 2009. ECF No. 7. The suit asserted three causes of action under the Texas Uniform Fraudulent Transfer Act (“TUFTA”) and one common law claim.

After multiple extensions to the briefing schedule, TD filed its Motion to Dismiss on May 26, 2010. Although Plaintiffs responses to Defendants’ Motions to Dismiss were originally due by June 16, 2010, Defendants agreed to repeated requests by Plaintiffs to extend the date until

July 2, 2010; later until July 12, 2010; and later still until September 30, 2011, ECF Nos. 45, 51, 59, and several months of jurisdictional discovery was taken. Instead of filing their opposition on the due date, however, Plaintiffs instead filed a Motion to Stay Proceedings, on September 27, 2010. ECF No. 56. As a result, Plaintiffs sidestepped their obligation to oppose TD's Motion to Dismiss for nearly eighteen months, or until this Court directed them to respond on November 4, 2011. ECF No. 87. Plaintiffs then filed their opposition to TD's Motion to Dismiss on December 5, 2011. ECF No. 94.

~~On the very same day that the issues were joined with regard to the Motion to Dismiss, a~~
Motion to Intervene was filed by the same lawyers already representing the Plaintiffs here. ECF No. 96. The proposed Complaint alleges the very same claims that are already fully briefed and pending decision by this Court.

B. The Official Stanford Investors Committee's Motion To Intervene

During the twenty-five months since this suit was initially filed, a committee was formed to represent the interests of purported victims of the alleged Stanford fraud, on or about March 30, 2010.¹ The Court authorized the Investors Committee by Order dated August 10, 2010. *SEC v. Stanford International Bank, Ltd.*, No. 3:09-CV-00298 (N.D. Tex. Aug. 10, 2010), ECF No. 1149. The committee announced the appointment of its seven members on August 30, 2010.² According to the Press Release, "the mission of the Committee is to assist in maximizing recoveries for all investors in the shortest time reasonably possible." *Id.*

On December 16, 2010, the Receiver and the Investors Committee agreed to a protocol pursuant to which the Investors Committee "would prosecute certain fraudulent transfer claims."

¹ See Press Release, Stanford Financial Group Receivership, Stanford Receiver and Victims Announce Agreement on Formation of Official Committee to Represent Victims' Interests (March 30, 2010) (Appendix at 1-2).

² See Press Release, Receiver, Examiner and Investors' Attorney Announce Composition of Official Stanford Investors Committee (Aug. 30, 2010) (Appendix at 3).

SEC v. Stanford International Bank, Ltd., ECF No. 1208. Their letter agreement attached a schedule listing fraudulent transfer claims to be handled by the Investors Committee; notably the present action is not included in that schedule. The agreement also gave the Investors Committee full access to documents and reports collected by the Receiver. The Court approved the terms of the letter agreement on February 25, 2011. *SEC v. Stanford International Bank, Ltd.*, ECF No. 1267.

The Investors Committee did not file its Motion to Intervene in the present action until December 5, 2011. ECF No. 96. Not coincidentally, this was also the very same day Plaintiffs filed their opposition to TD's Motion to Dismiss – some 18 months after TD initially moved to dismiss the action. The Committee's Motion to Intervene came roughly *21 months after* the formation of the investors committee; approximately *16 months after* the Court authorized the committee; and almost *one year after* the Receiver and the Investors Committee agreed to a protocol for handling pending fraudulent transfer cases. Significantly, the *same lawyers* who represent the *Rotstain* plaintiffs are also counsel on this Motion to Intervene.

ARGUMENT

I. THE INVESTORS COMMITTEE'S MOTION TO INTERVENE IS NOT TIMELY

In its Motion to Intervene, the Investors Committee seeks to intervene by right, FED. R. CIV. P. 24(a), or by permissive intervention, FED. R. CIV. P. 24(b). The rules for both types of intervention require that such a motion be "timely." See FRCP 24(a), (b). "[W]hether intervention is sought as a matter of right or as a matter of law," a motion that is not timely filed must be denied. 7C CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1916 (3d ed. 2007). "Timeliness of intervention depends on a review of all the circumstances, and the Fifth Circuit has identified four factors to consider: (1)

the length of time the intervenor knew or should have known of his interest in the case; (2) prejudice to the existing parties resulting from the intervenor's failure to apply for intervention sooner; (3) prejudice to the intervenor if his application for intervention is denied; and (4) the existence of unusual circumstances." *Trans Chem. Ltd. v. China Nat'l Mach. Imp. & Exp. Corp.*, 332 F.3d 815, 822 (5th Cir. 2003), citing *Stallworth v. Monsanto Co.*, 558 F.2d 257, 264-66 (5th Cir. 1977); *Lowe v. Am. Accounts Mgmt.*, No. 7:08-cv-137-O, 2009 U.S. Dist. LEXIS 41567, *5 (N.D. Tex. May 15, 2009). Consideration of these factors requires that the intervenors' motion be denied.

A. The Investors Committee Knew Of Its Interest In The Case

In assessing the first factor – how long the intervenor knew of the pending action – “the court must consider whether the applicant was in a position to seek intervention at an earlier stage in the case.” WRIGHT & MILLER at § 1916. “When the applicant appears to have been aware of the litigation but has delayed unduly seeking to intervene, courts generally have been reluctant to allow interventions.” *Id.*

In considering the first factor, a court in this District, in *WRR Industries v. Prologis*, found that a motion filed eight months after the intervenor learned of the litigation was untimely. 2006 U.S. Dist. LEXIS 4128, *33 (N.D. Tex. Feb. 2, 2006). In *WRR Industries*, the plaintiffs' counsel also purported to represent the intervenors, which established knowledge of the litigation. *Id.* at *33-34. The Court noted that the intervenors made “no attempt to explain why it waited ... to intervene,” and entirely failed “to explain to the court why its motion [was] timely.” *Id.* at *34.

The same considerations are presented here. Counsel for Plaintiffs is also counsel for the intervenors, as well as an original and current member of the Committee, who has known of the *Rotstain* litigation since it was filed in August 2009. The Investors Committee itself knew or

should have known of the case from at least March 2010, when the Committee was formed. Even the *latest* date on which the committee could have become aware of the *Rotstain* litigation was on August 10, 2010, when “this Court authorized and approved the formation of the Committee and designated the Committee ... under certain circumstances, to bring and take legal actions for the benefit of the Stanford investors.” Motion to Intervene at ¶ 4.

Applying either of these last two dates here makes it clear that the Investors Committee waited between fifteen to eighteen months to seek intervention and, like the intervenors in *WRR Industries*, the Committee fails to explain why it delayed so long, what “triggered” its sudden interest, and how its counsel suddenly determined that his original clients could not represent the Investors Committee’s interests. *WRR Industries*, 2006 U.S. Dist. LEXIS 4128, *33.

Tellingly, in the Joint Report of the Receiver and the Investors Committee Concerning Pending Litigation (the “Joint Report”), filed in this Court on July 7, 2011, the Investors Committee identified this litigation as one of several “class cases brought by Investor Committee counsel.” Joint Report, *In re Stanford Entities Securities Litigation*, No. 3:09-cv-00298-N at 30-35 (N.D. Tex. July 7, 2011), ECF No. 1416. In the Joint Report, the Investors Committee explains that this action was filed “in late 2009” and that Defendants have motions to dismiss pending before the Court. *Id.* at 33-34.

Although the Intervenor imply that this case was somehow stayed or “held in abeyance,” Motion at 4, thus “justifying” their delay, in fact this case was never stayed. There simply were no legal impediments that prevented their request to intervene for more than a year after motions to dismiss were filed.

B. Prejudice To Defendants

The Court in *WRR Industries* found that existing litigants are prejudiced by an intervenor's "failure to apply for intervention as soon as it actually knew or reasonably should have known of its interest in the case." *WRR Industries*, 2006 U.S. Dist. LEXIS 4128, *34-35. Considering that the intervenors were "seeking the same relief" as the plaintiffs and the parties had engaged in "extensive briefing," the Court declined to force the parties to "relitigate the identical issues." *Id.* at *35-36. The Court reasoned:

~~Coupled with the lack of any explanation by [the intervenor] for the dilatory nature of its motion to intervene, and given the numerous missed opportunities it had to intervene prior to the day of the hearing wherein the court took up the identical issues it now seeks to raise by intervention, this second factor weights in favor of the court's finding of untimeliness.~~

Id. at *36.

TD heres face the same type of dilatory and prejudicial actions. Its Motion to Dismiss was filed eighteen months ago, but the intervenors conveniently waited to file their Motion to Intervene until the *same day* that Plaintiffs finally filed their Opposition. The intervenors attach to their motion a "Proposed Intervenor Complaint" that is nearly identical to Plaintiffs' First Amended Complaint, and asserts identical causes of action under TUFTA. If permitted, intervention will force TD to essentially relitigate the exact same issues, which now are fully briefed and pending before the Court, to say nothing of months of expensive and time consuming foreign jurisdictional discovery the parties have completed. The Motion to Intervene essentially provides the same set of lawyers with a "second bite at the apple," a tactic universally thought to be unfair and prejudicial.

The proposed Intervenor claim to be suddenly motivated by their concerns about the standing of the original plaintiffs to bring this action, and/or by concerns about the Court's jurisdiction over two of the foreign banks. Motion at 5-6. Yet neither off these arguments is

newly discovered or was unfairly hidden by the Defendants. The arguments were publicly filed and openly disclosed when motions were filed in May 2010. Indeed, several months of expensive jurisdictional discovery ensued. All the while, however, the proposed Intervenor sat on the sidelines, voicing no concern and taking no action for over seventeen months.

The Investors Committee argues that no prejudice will result from their intervention because “no merits discovery has been conducted,” Motion to Intervene at ¶ 20, and they go on to complain that “this Court and the Receivership Estates should have the benefit of at least such documentary evidence before dismissing significant claims of the Stanford investors and the Receivership Estates.” *Id.* This representation is untrue and flies in the face of facts known to the Investors Committee. At the Receiver’s request, and in accordance with this Court’s orders, TD has made some 20 productions to the Receiver’s counsel and their forensic consultants, FTI Consulting, comprised of 13 DVDs, numerous Microsoft Excel spreadsheets, and sundry hard copy documents. TD’s first production was made on or about March 27, 2009, and it continued until on or about March 2, 2011. *See* Letter from Robert Plotkin, McGuireWoods LLP, to David Arlington, Baker Botts LLP (April 1, 2011) (summarizing TD’s productions to the Receiver’s counsel) (Appendix at 4-5); Letter from Robert Plotkin, McGuireWoods LLP, to David Arlington, Baker Botts LLP (April 6, 2011) (summarizing TD’s productions to the Receiver’s counsel) (Appendix at 6). TD also made substantially similar productions to the SEC, totaling approximately 137,000 pages.

The proposed Intervenor have had an ongoing right of access to “non-privileged documents, books, records, and other information” in the Receiver’s possession, including “source documents necessary to support the Committee’s analysis and pursuit of claims.” *SEC v. Stanford International Bank, Ltd.*, ECF No. 1149 at ¶ 5. In light of this access to TD’s

substantial productions, the Investors Committee's argument that it is somehow prejudiced or delayed by the lack of discovery rings hollow.³ It also ignores the already-completed jurisdictional discovery.

The prejudice to TD in duplicative briefing, discovery and ongoing lengthy delays is clear. Thus, this factor also weighs in favor of denying intervenors' motion.

C. No Actual Prejudice To The Investors Committee Will Result

As to the third factor, prejudice to the Intervenor if the petition is denied, there exists no ~~legitimate indication that the Investors Committee would be prejudiced if the Court denies its~~ Motion to Intervene.

The Court in *WRR Industries*, addressing this factor, determined that the intervenor would suffer no prejudice if its request to intervene was denied, 2006 U.S. Dist. LEXIS 4128, *36-37, because the Plaintiffs had already "been litigating all of the legal claims that [the intervenors sought] to raise," and the intervenors were "seeking the same relief" as the existing plaintiffs. *Id.* at *37. Thus, the Court there concluded that the third factor weighed in favor of the Court's finding of untimeliness. *Id.*

Plaintiffs and intervenors here are likewise seeking exactly the same relief based on exactly the same claims represented by exactly the same lawyers. Plaintiffs have even agreed that any monies recovered from the Defendants in this litigation – if any – will go to a fund that benefits the same people whose interests the Investors Committee represents. The TUFTA claims set out in the "Proposed Intervenor Complaint" are now fully briefed and are being litigated by the same set of lawyers who seek to intervene here.

³ In their motion, the intervenors complain that they have had no access to production from the foreign bank defendants, noting that "[o]ne defendant ... is still engaged in protracted litigation with the Receiver ... concerning whether it is even required to comply with ... document turnover requirements." Motion to Intervene at ¶ 20. Those banks dispute the Receiver's authority to compel production on jurisdictional due process grounds. The Intervenor says nothing, however, about the tens of thousands of documents that were timely produced to the Receiver by other banks and are currently available to the Investors Committee for review.

While the Investors Committee disingenuously suggests “that its interests may not be adequately represented by the current Plaintiffs,” their argument is groundless and unsupported by the record. Motion to Intervene at ¶ 13. Both sets of litigants are represented by the same counsel. The Motion to Intervene itself states: “if this motion to intervene is granted, the Committee will be represented in this action by the attorneys who are also representing the putative class.” Motion to Intervene at ¶ 9. The Investors Committee cannot mean to argue that class counsel is somehow inadequate.⁴

~~The Investors Committee has not attempted to intervene in other “class cases brought by investor committee counsel.”~~ Joint Report at 30. “[T]here are at least nine (9) pending class action lawsuits in which one or more members of the Committee are serving as counsel,” including *Rotstain*. *Id.* at 1-2. Counsel for the *Rotstain* Plaintiffs represents the putative classes in five of the nine cases brought by a member of the Investors Committee. Though some of those cases have been dismissed by the Court and are on appeal, as of the date of this filing, neither the Receiver nor the Investors Committee has attempted to intervene in any other lawsuits being prosecuted by a member of the Investors Committee *except Rotstain*. The intervenors do not even attempt to explain this inconsistency.

⁴ In addition, the Investors Committee suggests in a footnote that they may face statute of limitations problems in pursuing a TUFTA claim against Defendants if their Motion to Intervene is denied. Motion to Intervene at 9, n.1. Rather than propping up an otherwise untimely motion, however, this revelation underscores the indefensible nature of the Investors Committee’s protracted delay. The Investors Committee, which has been aware of the pending litigation against the banks for at least twenty-one months, should have moved to intervene sooner if it believed the relevant statute of limitations might otherwise hinder any claim they might have against Defendants. Moreover, while the Investors Committee purports to proceed with the Receiver’s “consent,” it appears the Receiver does not share the committee’s concern about the statute of limitations. Indeed, in August 2011, the Receiver’s counsel informed TD that, “It has been determined that under the circumstances the immediate necessity for the Receiver to proceed with a [statute of limitations] tolling agreement is no longer present.” Email from Kevin Sadler, Baker Botts LLP, to Kurt Wolfe, McGuireWoods LLP (Aug. 23, 2011, 16:37 EST) (Appendix at 7).

D. There Are No Unusual Circumstances That Favor Intervention

The fourth factor concerns any unusual circumstances particular to the case. At first, the alleged international Ponzi scheme involved here may appear to create “unusual circumstances,” especially when viewed from February 2009, when this Court first issued its original orders. Today, however, the view is very different, as one might expect after nearly three years of significant activity.

The “circumstances” must be viewed as of now, when the Motion to Intervene was ~~actually filed and is pending before the Court. It is now some thirty-four months since the~~ Receivership case was initiated. Assets have been identified, and tens of thousands of documents and other records have been obtained and secured. Witnesses have been interviewed and deposed, dozens of fraudulent transfer actions have been initiated. Significant legal and forensic resources have been made available: the Receiver, his counsel and the Examiner have been paid millions in fees, plus significant expenses for various consultants and experts, as well as coordination with government agencies and their lawyers. A number of private law firms, working on yet to be paid contingencies, are also sharing the work. All of these personnel have access to all of the available Stanford records, as well as to extensive documentation from a multitude of third parties, including most of the bank defendants. While this is a large and complex case, over time it has been organized and staffed with the necessary resources approved by the Court. There simply is no longer any justification for this lengthy delay to seek intervention.

Indeed, to the extent there any “unusual circumstances” with respect to the Investors Committee’s Motion to Intervene, they are only the Committee’s extraordinary delay and sudden, inexplicable interest in intervening. This Motion is not timely and should be denied.

* * * * *

Timeliness of intervention depends on a review of the four factors above. *Trans Chem. Ltd.*, 332 F.3d at 822. Considering those factors in this case, the Investors Committee's lengthy, unnecessary and unexplained delay in seeking intervention is patently clear. The would-be intervenors have been aware of the *Rotstain* litigation for *at least* eighteen months, and perhaps as long as two and one-half half years. While Defendants, acting in good faith, briefed and filed motions to dismiss under Federal Rule of Civil Procedure 12(b), the intervenors remained silent, took no action, and permitted the putative class to pursue its TUFTA claims, just as it did in all other putative class actions brought by a committee member. The Investors Committee's sudden, mysterious foray into this action as intervenors is not timely and is not equitable. For these reasons, the Investors Committee's Motion to Intervene should be denied.

II. TD JOINS DEFENDANT SOCIETE GENERALE PRIVATE BANKING (SUISSE) S.A.'S MOTION OPPOSING INTERVENTION

TD joins in Defendant Societe Generale Private Banking (Suisse) S.A.'s Response to the Investors Committee's Motion to Intervene, which argues that the committee's request for intervention under Federal Rule of Civil Procedure 24 should be denied because the Investors Committee (1) did not identify any interest that would be impaired if intervention were denied; and it (2) failed to demonstrate how Plaintiffs' representation is inadequate.

III. CONCLUSION

Applying all the relevant factors for determining timeliness, the Court should find that the Investors Committee's Motion to Intervene is untimely and, as such, the Investors Committee should not be permitted to intervene, and its motion should be denied.

Date: December 22, 2011
Dallas, Texas

Respectfully submitted,

THE TORONTO-DOMINION BANK

By: /s/ Robert Plotkin

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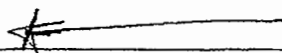
Local counsel for The Toronto-Dominion Bank

CERTIFICATE OF SERVICE

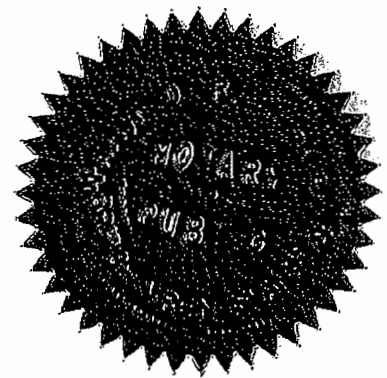
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A Commissioner, notary, etc.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PEGGY ROIF ROTSTAIN, *et al.*,
on behalf of themselves and all others similarly situated,

Plaintiffs,

and

THE OFFICIAL STANFORD INVESTORS COMMITTEE,

Intervenor,

v.

TRUSTMARK NATIONAL BANK, *et al.*

Defendants.

Case No.: 3:09-CV-2384

**THE TORONTO-DOMINION BANK'S MOTION TO DISMISS THE OFFICIAL
STANFORD INVESTORS COMMITTEE'S INTERVENOR COMPLAINT**

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The Toronto-Dominion Bank (“TD”) hereby moves to dismiss the Official Stanford Investors Committee’s (“OSIC”) Intervenor Complaint (“IC”) under Federal Rules of Civil Procedure 8(a), 9(b), and 12(b)(1) and (6), and respectfully submits this brief in support.

PRELIMINARY STATEMENT

TD provided routine correspondent banking services to the Stanford Entities.¹ TD has never been charged with any wrongdoing in connection with the Stanford matters by any governmental authority. Yet the Bank is sued in this class action as a conspirator or an aider and abettor. It is sued not because of any wrongdoing it committed, but because the Stanford Entities are insolvent and TD is seen as a “deep pocket.” Because federal securities law does not permit aiding and abetting claims, *Stoneridge Inv. Partners LLC v. Scientific Atlanta*, 552 U.S. 148 (2008), a class action was filed in Texas state court. Now that action also may be precluded by federal law,² so class counsel seeks to end-run federal law by using OSIC to stand in for the actual investors.

Nowhere in the IC is there *any* allegation that TD played any role in creating, marketing or selling the Stanford Certificates of Deposit (“CD”). Aside from boilerplate assertions that TD “knew or should have known” about Stanford’s criminal enterprise, the IC never states a single particular allegation pertaining to TD or any of its employees, officers or agents. The IC never identifies (a) any TD-related individual *who* actually had knowledge of the fraud; (b) *what* fraud TD knew about; (c) *when* TD supposedly learned that information; (d) *any* specific overt acts TD took to conspire with, or to assist, Stanford in its fraud.

¹ Collectively, Robert Allen Stanford’s (“Allen Stanford”) businesses will be referred to herein as the “Stanford Entities.” Allen Stanford and the Stanford Entities will be collectively referred to as “Stanford.”

² The Supreme Court is currently examining whether the Securities Litigation Uniform Standards Act (“SLUSA”) bars tort-based claims by investors in Stanford-related matters. See *Roland v. Green*, 675 F.3d 503 (5th Cir. 2012), cert. granted sub nom. *Chadbourne & Parke LLP v. Troice*, No. 12-79, *Willis of Colorado Inc. v. Troice*, No. 12-86, and *Proskauer Rose LLP v. Troice*, No. 12-88, 133 S. Ct. 977 (2013).

The IC fully describes Stanford's own elaborate scheme, such as fabricating stock portfolios and financial statements or bribing regulators (IC ¶¶ 27-43), thereby duping thousands of investors and the Securities and Exchange Commission ("SEC") – which had a right of access to Stanford's books and records. But the IC never pleads what superior knowledge of the scheme TD actually obtained or what it did to conspire with and/or assist the massive fraud.

As is demonstrated more fully below, the OSIC's fraudulent transfer claims under the Texas Uniform Fraudulent Transfer Act ("TUFTA") are barred by the statute of limitations, and even if they are not, the transactions at issue are not covered by TUFTA. As to the asserted tort claims, the OSIC lacks standing to bring them, fails to allege claims that are even cognizable under Texas law, and ultimately fails to provide the necessarily detailed allegations required in fraud-related actions. The IC must be dismissed.

PROCEDURAL HISTORY

This case arises out of the Ponzi scheme perpetrated by Allen Stanford through his Stanford Entities. A putative class of plaintiffs—represented by the same counsel now representing the OSIC here—initiated this litigation in a Texas court on August 23, 2009, subsequently amended on October 9, 2009 ("First Amended Petition" or "FAP"). The action was removed to the U.S. District Court for the Southern District of Texas on November 13, 2009 (ECF 1), and then transferred to this Court on December 15, 2009 (ECF 7). The suit asserts three TUFTA claims and one tort claim. TD moved to dismiss the FAP on May 26, 2010. (ECF 31) After multiple extensions of time, jurisdictional discovery, and motions regarding a stay, the plaintiffs finally opposed on December 5, 2011. (ECF 94) TD replied on December 22, 2011. (ECF 100)

Significantly, on the same day the class plaintiffs filed their opposition to TD's motion to dismiss, the OSIC—represented by the same class counsel—moved to intervene “for the purpose of joining in the prosecution of the fraudulent transfer claims against the Bank Defendants . . .” (Mot. to Int., ¶ 9, ECF 96) The OSIC attached to that motion a “Proposed Intervenor Complaint” *alleging only fraudulent transfer claims*. (App. to Mot. to Int., ECF 96-1.) TD opposed the Motion. (ECF 103) On December 6, 2012, this Court granted OSIC's motion to join the plaintiffs' pursuit of fraudulent transfer theories, noting, “OSIC, like the Class Plaintiffs, seeks recovery based on *fraudulent transfer theories* arising out of the same operative facts.”

(Order, ECF 129) (emphasis added)

However, on February 15, 2013, when OSIC actually filed its IC, it alleged not only the previously identified fraudulent transfer theories but also, for the first time, several tort claims as well. This motion seeks to dismiss the IC in its entirety.

FACTS ALLEGED IN INTERVENOR COMPLAINT³

I. THE STANFORD PONZI SCHEME

Allen Stanford, with the assistance of James Davis and Laura Pendergest-Holt, operated a Ponzi scheme through Stanford International Bank, Ltd. (“SIBL”) and the various other Stanford Entities, all of which were ultimately wholly-owned by Allen Stanford. (IC ¶¶ 26-28, 31-33) Stanford used money deposited by purchasers of SIBL CDs to (i) support Allen Stanford's lavish lifestyle; (ii) issue bogus, unsecured personal “loans” to Allen Stanford; (iii) capitalize other entities wholly owned by Allen Stanford; and (iv) fund investments in speculative, illiquid, and high-risk assets. (IC ¶ 29) Stanford misrepresented or failed to disclose this usage to

³ Facts alleged in the IC that are specifically cited in this Statement of Facts are assumed true, unless otherwise noted, only for purposes of this Motion to Dismiss.

investors. (IC ¶¶ 30-38) Allen Stanford, Davis, Pendergest-Holt, Gilberto Lopez, and Mark Kuhrt were all criminally convicted for their misconduct. (IC ¶ 42)

II. FACTUAL ALLEGATIONS AGAINST TD

A. The Transfers

TD is a banking corporation incorporated in Canada (IC ¶ 17), and was a correspondent bank for SIBL subject to Canadian law and regulation (IC ¶ 55). SIBL had an account at TD, no. xxxx-xx-xxx1670 (“TD 1670”) for its “CD activity,” with proceeds from CD sales—funds paid directly into that account by investors—constituting the “overwhelming majority” of the deposited funds. (IC ¶ 48) The Complaint specifies how Stanford used this account:

- From January 2008 to February 17, 2009, “approximately \$1.7 billion in SIBL CD sale proceeds were deposited into the TD 1670 account.” (IC ¶ 50) (emphasis added)
- In 2008, approximately \$474 million was transferred *from* the TD 1670 account *to a Bank of Houston account*, which in turn distributed roughly \$450 million among various Stanford Entities. (See IC ¶ 50) (emphasis added)
- Stanford allegedly paid loans, bonuses and commissions to Stanford employees in part from money he transferred *from* the TD 1670 account *to other bank accounts* and ultimately to the *employees*. (See IC ¶ 51) (emphasis added)
- In 2008, \$77 million was transferred *from* TD 1670 *to* the SFGGM’s operating account, which made a capital contribution to Stanford Group Holding, which then went to an SGC account. (See IC ¶ 52) (emphasis added)

These are the only “specific” allegations about TD in the IC. Aside from the allegation that *investors* deposited money into SIBL’s account at TD, these allegations show that Stanford transferred money *from* TD *to* accounts *somewhere else*. There are no allegations that TD took possession or control of those funds for its own use in any of its own accounts, or that it had knowledge of the purpose of any particular transfer out of the Stanford account.

B. The Tort Claims

OSIC baldly asserts that TD knew of Stanford's fraud and materially assisted it. (*See, e.g.*, IC ¶¶ 46, 54, 56 and 69) OSIC does not, however, detail any specific facts demonstrating TD's actual knowledge of the fraud. Instead, OSIC cites a few examples of what it calls "red flags" that were allegedly "willfully ignored" by all the Bank Defendants, some of which occurred 10 years before the filing of the action:

- Since the Banks issued their own CDs and likely monitored their competition, they knew or should have known the SIBL CD yield was unrealistically high and unsustainable. (IC ¶ 65)
- Since the Banks are sophisticated financial institutions, they knew or should have known that SIBL's consistent high returns based on a stated diversified, conservative and stable portfolio was mathematically implausible. (IC ¶ 66)
- In April 1999, the Treasury Department issued FinCEN Advisory No. 11, warning recipient banks and financial institutions to scrutinize all transactions routed in or out of Antigua for evidence of money laundering. (IC ¶ 67)⁴
- In 2000, OECD included Antigua on a list of tax shelter countries. (IC ¶ 68)⁵

As a correspondent bank, TD was allegedly required to conduct due diligence on Stanford pursuant to (unspecified) Canadian money laundering regulations, but the IC says nothing more about such diligence. (IC ¶ 55) OSIC alleges that TD had a correspondent

⁴ OSIC fails to acknowledge that FinCEN *withdrew* this advisory in 2001, as "enhanced scrutiny with respect to transactions involving Antigua" was no longer necessary. *See* FinCEN Advisory Issue 11A (Aug. 2001). While the Class Complaint acknowledges this withdrawal (*see* FAP, ¶ 103), OSIC omits it from the IC. This Court may consider "matters of public record" at the motion to dismiss stage. *See Green v. JPMorgan Chase Bank, N.A.*, No. 3:11-cv-1498, 2013 U.S. Dist. LEXIS 51936, at *38 (N.D. Tex. Apr. 8, 2013) (Godbey, J.). Moreover, courts may consider documents in reviewing a motion to dismiss "if they are referred to in the plaintiff's complaint and are central to her claim." *Collins v. Morgan Stanley Dean Witter*, 224 F.3d 496, 498-99 (5th Cir. 2000) (internal quotation omitted). Because the FinCEN Advisory and the OECD tax haven list discussed below are two of the only concrete examples of alleged "red flags" cited in the IC, they are central to OSIC's complaint.

⁵ OSIC again neglects to mention that Antigua *was removed* from this list in 2002. *See* OECD, "List of Uncooperative Tax Havens", <http://www.oecd.org/countries/monaco/listofunco-operativetaxhavens.htm>. This Court may consider "matters of public record," as well as documents referenced in the complaint. *See, supra*, note 4.

banking relationship with a *different* Antiguan bank in 1997, which was subsequently investigated by a U.S. Senate Subcommittee in 2001. (IC ¶ 56)

Nowhere does OSIC identify any TD-related individual who committed any overt act, what fraudulent action that person undertook, or when it occurred.

ARGUMENT

I. LEGAL STANDARD FOR MOTIONS TO DISMISS

In reviewing motions to dismiss, courts apply a two-step approach for determining whether plaintiffs have asserted legally sufficient claims. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *Janvey v. Alguire*, 846 F. Supp. 2d 662, 670 (N.D. Tex. 2011) (Godbey, J.). First, courts need not accept legal conclusions: “Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Iqbal*, 129 S. Ct. at 1949. Such pleadings are therefore not entitled to an assumption of truth. *See id.* at 1950. Second, only plausible claims survive. “A claim has facial plausibility when the plaintiff pleads factual content that allows the Court to draw a reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* at 1949; *see Janvey*, 846 F. Supp. 2d at 670. In that regard, courts have held that allegations made “upon information and belief” are insufficient. *See Irons v. City of Dallas*, No. 3:11-cv-1894, 2012 U.S. Dist. LEXIS 77036, * 12 (N.D. Tex. Apr. 4, 2012).

Further, when alleging fraud-based claims, plaintiffs must state the circumstances constituting fraud with particularity. FED. R. CIV. P. 9(b). “[A] plaintiff must allege the time, place and contents of the false representations, as well as the identity of the person making the representation and what that person obtained thereby.” *Biliouris v. Sundance Res., Inc.*, 559 F. Supp. 2d 733, 736 (N.D. Tex. 2008) (Godbey, J.) (internal quotation and punctuation omitted); *see also Carroll v. Fort James Corp.*, 470 F.3d 1171, 1174 (5th Cir. 2006) (holding that plaintiffs must allege facts to establish the who, what, when, where and how of the fraud). This standard

prohibits plaintiffs from relying on group pleading: “It is well established that general allegations, which do not state with particularity what representations *each defendant* made, do not meet [the particularity] requirements of Rule 9(b).” *Biliouris*, 559 F. Supp. 2d at 736 (internal quotation omitted). Thus, plaintiffs must apprise each defendant of conduct alleged against it with specificity and particularity.

As detailed herein, the OSIC’s claims constitute nothing more than “threadbare recitals” of the elements of causes of action. Its implausible, conclusory allegations are therefore not entitled to the assumption of truth, and their fraud-based claims certainly fail to meet Rule 9(b)’s stringent requirements. Accordingly, this Court must dismiss all claims with prejudice.

II. OSIC’S FRAUDULENT TRANSFER CLAIMS FAIL AS A MATTER OF LAW BECAUSE THEY ARE UNTIMELY AND TD IS NOT A TRANSFEREE UNDER TUFTA

In Count I, the OSIC attempts to bring claims under TUFTA, claiming the Receivership Estates are entitled to disgorge funds transferred from the Stanford Entities to TD, including, “but are not limited to, all banking and investment management fees paid to Defendants by the Stanford Entities.” (IC ¶ 76) In Count II, the OSIC asserts that the Banks aided, abetted or participated in fraudulent transfers from SIBL accounts to Stanford and other Stanford Entities. Both claims fail as a matter of law because (1) they are barred by the statute of limitations; (2) TD is not a “transferee” under TUFTA; and (3) Texas may not recognize a cause of action for aiding and abetting fraudulent transfers, but even if it does, OSIC has failed to plead sufficient facts to support such a claim.

A. OSIC's Fraudulent Transfer Claims Are Barred by the Statute of Limitations⁶

As a threshold matter, TUFTA's statute of repose requires dismissal of OSIC's fraudulent transfer claims regarding any transfers made before December 5, 2007, or four years before the OSIC moved to intervene on December 5, 2011. *See* TEX. BUS. & COMM. CODE § 24.010 (requiring claims to be brought within four years after the transfer was made or, if later, within one year after the transfer was or reasonably could have been discovered).⁷ While the OSIC essentially concedes that this statute has run on those transfers, it nonetheless asserts "the discovery rule and the doctrine of equitable tolling" should apply, claiming without more that it "did not discover until more recently—and could not have discovered with the exercise of reasonable diligence—the details of Defendants' participation in Stanford's fraud and the nature of the fraudulent transfers." (IC ¶ 71) Of course, the IC does not "detail" the "facts" about TD's "participation" that it supposedly learned, or when those facts were learned.

TUFTA's own built-in "discovery rule," however, requires filing a claim "within one year after the transfer or obligation was or could reasonably have been discovered by the claimant." TEX. BUS. & COMM. CODE § 24.010(a)(1). This Court, in an earlier Stanford ruling, found that the fraudulent transfers were "inherently undiscoverable" at the time the payments were made, and allowed the Receiver to pursue a claim "discovered" more than one year later. *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 793 F. Supp. 2d 825, 834-37 (N.D. Tex 2011).

⁶ A statute of limitations defense can be determined as a matter of law: "if reasonable minds could not differ about the conclusion to be drawn from the facts in the record, then the start of the limitations period may be determined as a matter of law." *See Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 196 (5th Cir. 2013) (internal quotation omitted).

⁷ TD joins arguments made in Trustmark Bank's motion to dismiss regarding the four-year statute of repose, and for the sake of economy, will not repeat them here.

On appeal, the Fifth Circuit held that TUFTA requires a claim to be filed within one year after the transfer's *fraudulent nature* is discovered or reasonably could have been discovered. *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 195 (5th Cir. 2013). In the Stanford scheme, the Court specifically held that James Davis's guilty plea, on August 27, 2009, wherein he publicly acknowledged a Ponzi scheme, is the proper Stanford discovery date. *Id.* at 197-98. Accordingly, the Court of Appeals held that the Receiver timely sued the political committees for the return of Stanford contributions because he "filed this suit on February 19, 2010, less than one year after Davis's guilty plea." *Id.* at 197. The actions here arise far later than did the political committee claims, and the Fifth Circuit has now fixed a clear discovery date that OSIC surely has missed.

The OSIC was formed on August 10, 2010. (IC ¶ 13) Because Davis pleaded guilty long before then, OSIC knew or reasonably should have known of the Stanford scheme's "fraudulent nature" *since the Committee's inception*. Indeed, OSIC's own IC properly cites Davis's plea in August 2009 as confirmation that Stanford ran a Ponzi scheme. (See IC ¶ 31) The OSIC thus knew of the "fraudulent nature" of the transfers at its inception, and was at least required to sue TD within one year from its establishment, or by August 10, 2011. Yet OSIC failed even to move for intervention until December 5, 2011.

The OSIC cannot now credibly complain that it did not know Stanford's scheme was fraudulent in nature. First, the OSIC purports to bring these fraudulent transfer claims on behalf of the Receivership Estates. (IC ¶ 15) But the Receiver himself knew Stanford's scheme was fraudulent at least by the date of Davis's plea, and the Receiver himself brought timely claims. *See, e.g., Janvey*, 712 F.3d at 195 (discussing the Receiver's timely filing within one year of Davis's plea). Moreover, because the Receiver and OSIC are required by court order to work

together to identify claims and actively share information, OSIC had an additional obligation to obtain that information. *See* Order establishing OSIC, *SEC v. Stanford Int'l Bank Ltd.*, No. 3:09-cv-298 [“*SEC Action*”], (N.D. Tex. Aug. 10, 2010), ECF 1149, at ¶¶ 5, 7-8 (contemplating an information sharing protocol and requiring regular consultation on litigation).

It is basic common law that an assignee takes the assignment subject to all the rights of, and defenses to, the assignor.⁸ This rule applies equally to statute of limitations defenses. As the Fifth Circuit has held: “the common law speaks in a loud and consistent voice: *An assignee stands in the shoes of his assignor.*” *FDIC v. Bledsoe*, 989 F.2d 805, 810 (5th Cir. 1993) (emphasis in the original). The *Bledsoe* court cited with approval a District of Columbia Circuit Court decision to the effect that “the statute of limitations continues to run against the assignee as it had against the assignor before.” *Id.* (quoting *Fox-Greenwald Sheet Metal Co. v. Markowitz Bros., Inc.*, 452 F.2d 1346, 1357 n.69 (D.C. Cir. 1971)). To the extent that OSIC relies on this assignment, it is time-barred.

Second, to the extent OSIC asserts “its own” claim, it likewise is barred. The OSIC is represented by the *same counsel who brought the same fraudulent transfer claims four years ago*. That counsel is also *a member of OSIC*. The amended class complaint was replete with details about the fraudulent nature of the Stanford Ponzi scheme, (*see* FAP ¶¶ 31-79), thus confirming that OSIC’s counsel had sufficient information of the scheme’s fraudulent nature to satisfy Rule 11 and to file an original and amended complaint for fraudulent transfers in August and October 2009. In *Zenner v. Lone Star Striping & Paving, LLC*, 371 S.W.3d 311, 316 (Tex. App. 2012), the Court held that the discovery rule requires plaintiffs to exercise reasonable

⁸ An assignee stands in the shoes of an assignor, and acquires the same rights as the assignor, but remains subject to the same defenses. *See* 6 AM. JUR. 2D *Assignments* §134; *see also* *Misic v. The Building Serv. Emp. Health and Welfare Trust*, 789 F.2d 1374, 1379 n.6 (9th Cir. 1986) (“Of course, the trust will be able to assert against appellant whatever defenses it possessed against the assignors.”).

diligence once apprised of facts that would incite a reasonably diligent person to seek information about his injury. OSIC—through its exact same counsel and sitting Committee member—thus had *actual knowledge* of the transfers’ fraudulent nature, without any need to impute it from the Receiver, from at least the date of OSIC’s creation, and surely from Davis’s guilty plea. OSIC had a duty to exercise reasonable diligence to assert the claim, under both Texas law and orders of this Court, at least from the inception of the Committee.

The timeline here is clear. The “discovery” date is at least Davis’s plea on August 27, 2009. Even allowing the OSIC, in a best case scenario, one year from its official formation on August 10, 2010, its failure even to request intervention until December 5, 2011 falls well beyond the one-year period by any measure, and the fraudulent transfer claims are barred.

B. OSIC’s Fraudulent Transfer Claims Also Fail as a Matter of Law Because TUFTA Does Not Apply to TD

The OSIC is not entitled to recover the transfers described in the IC from TD because (1) the IC does not allege transfers from the *debtor* to TD; and (2) TD was not a “transferee” of the funds or fees described in the IC.

1. *The Alleged “Fraudulent Transfers” Were Not Made By The Debtor to TD*

The alleged “fraudulent transfers” identified in the Complaint were not made *from* the debtor—Stanford—to TD. As such, TUFTA does not apply. *See* TEX. BUS. & COM. CODE § 24.005(a)(1)-(2); § 24.006(a). TUFTA is not a general asset recovery statute; it is limited to particular types of asset transfers, none of which occurred here.

Under TUFTA, “a transfer ‘is fraudulent as to a creditor . . . if *the debtor* made the transfer or incurred the obligation . . . with actual intent to hinder, delay, or defraud any creditor of the debtor.’” *See Janvey*, 846 F. Supp. 2d at 671 (quoting TEX. BUS. & COM. CODE §

24.005(a)(1)) (emphasis added). OSIC's IC, however, alleges only transfers made *by investors* to Stanford accounts at TD, or transfers made *from* TD's Stanford account to others:

- From January 2008 to February 17, 2009, "approximately \$1.7 billion in SIBL CD sale proceeds were deposited into the TD 1670 account." (IC ¶ 50)
 - In 2008, approximately \$474 million was transferred from the TD 1670 account to a Bank of Houston account, which in turn distributed roughly \$450 million among various Stanford Entities. (See IC ¶ 50)
 - Stanford allegedly paid loans, bonuses and commissions to Stanford employees in part from money he transferred from the TD 1670 account to other bank accounts and ultimately to the employees. (See IC ¶ 51)
-
- In 2008, \$77 million was transferred from TD 1670 to the SFGGM's operating account, which made a capital contribution to Stanford Group Holding, which then went to an SGC account. (See IC ¶ 52)

All of these allegations assert that investors deposited money into SIBL's account at TD, or that Stanford transferred money *from* the SIBL account at TD *to* an account *somewhere other than TD*. But there are *no* allegations that transfers were made from the debtor (Stanford) to TD's own accounts. The statute is, on its face, simply inapplicable.⁹

2. *TD Did Not Have Dominion or Control of the Funds Conveyed*

Even if the allegedly "fraudulent transfers" themselves somehow are timely and within the scope of TUFTA, TD is not a "transferee" under TUFTA. Long standing case law makes clear that mere "financial intermediaries" are not "transferees" and therefore are not liable to creditors.

In determining whether a defendant is a "transferee," courts apply the "dominion or control test" set out in *Bonded Financial Services v. European American Bank*, 838 F.2d 890, 892 (7th Cir. 1988). The Seventh Circuit held that "the minimum requirement of status as a

⁹ TD also joins in the arguments made by the other foreign Bank Defendants (HSBC Bank plc and Société Générale Private Banking (Suisse) S.A.) that TUFTA does not provide a cause of action to avoid wholly foreign transactions. Thus, any payments from investors outside the U.S. to Canada, or transfers from Canada to non-U.S. accounts cannot be avoided.

‘transferee’ is dominion over the money or other asset, the right to put the money to one’s own purposes,” *id.* at 893, explaining that “[t]o treat ‘transferee’ as ‘anyone who *touches* the money’” would lead to “absurd results.” *Id.* at 894 (emphasis added). This is particularly true for correspondent banks:

Hundreds of thousands of wire transfers occur every day. The sender of money on a wire transfer tells its bank to send instructions to ... a correspondent bank to make money or credit available through still another bank. The ... receiving bank could be called the “initial transferee” of the funds if we disregarded the function of fraudulent conveyance law. Similarly, an armored car company might be called the “initial transferee” if the [debtor] gave it valuables or specie to carry.

Id. at 893. Thus, the Court concluded that a “financial intermediary,” such as “a correspondent bank,” is a mere conduit, and not a “transferee” from whom creditors may recover. *Id.*

Correspondent banks are required to follow the instructions that come with wire transfers, and are therefore “no different from a courier.” *Id.*

The Fifth Circuit has explicitly adopted this “dominion or control” test. In *Matter of Coutee*, a law firm’s clients endorsed a check they received in satisfaction of a judgment to the law firm. *See* 984 F.2d 138, 140 (5th Cir. 1993). The firm deposited the check into its trust account, claimed its legal fees out of the funds, and repaid as instructed a litigation loan obtained for the clients. When a bankruptcy trustee later tried to avoid the loan repayment, the Fifth Circuit held that the trustee could not seek recompense from the firm because it was not a “transferee.” *See id.*

Applying the “dominion or control test,” the Fifth Circuit held that an “intermediary party” does not exercise dominion or control, and is not the “initial transferee because it held the funds only for the purpose of fulfilling an instruction to make the funds available to someone else.” *Id.* Such an “intermediary” “is often referred to as a mere conduit or agent,” and thus it

was not a “transferee.” *Id.* at 140 n.3. The law firm had “no legal right to put the funds to its own use, and thus lacked the requisite dominion required to be the initial transferee.” *Id.* at 140.

Judge Lindsay of this Court applied the dominion or control test in *GE Capital Commercial, Inc. v. Wright & Wright, Inc.*, No. 3:09-cv-572, 2009 U.S. Dist. LEXIS 121472 (N.D. Tex. Dec. 31, 2009). There, drawing on *Coutee* and *Bonded Financial Services*, the Court held that “deposits in a bank account cannot categorize [the bank] as a ‘transferee’ under TUFTA, because [the bank] acted as nothing more than a financial intermediary and could exercise no legal dominion or control over the alleged fraudulently obtained funds.” *Id.* at *26.¹⁰

Texas state courts have similarly adopted the dominion or control test. In *Newsome v. Charter Bank Colonial*, the Texas Court of Appeals held that the bank defendant was not a “transferee” under TUFTA because “the [b]ank’s duty was simply to pay funds as directed by its depositors and in accordance with applicable law and prudent banking standards,” and thus “the bank was merely a ‘financial conduit or intermediary’” that did not exercise “dominion or control” over the funds in client accounts. *See* 940 S.W.2d 157, 165 (Tex. App. 1996), *writ denied*. Although the plaintiffs in *Newsome* specifically argued that the bank knowingly processed “imprudent transactions,” the court found that “the [b]ank did not own these funds or otherwise benefit from these transactions, but was simply complying with its depositors’ instructions.” *Id.* “Therefore, any knowledge the [b]ank might have had at the time of the

¹⁰ Several federal courts in Texas have recently reiterated Texas’s adoption of the dominion or control test. *See U.S. Bank N.A. v. Verizon Commc’ns. Inc.*, 892 F. Supp. 2d 805, 820-21 (N.D. Tex. 2012) (quoting *Bonded Fin. Servs., Inc.*, 838 F.2d at 895) (“In this case, it is clear that the plaintiff cannot recover from Verizon on the interest payments. . . . Verizon was not ‘the entity for whose benefit the payments were made.’”); *Andres Holding Corp. v. Villaje Del Rio, Ltd.*, No. SA-09-CV-127, 2011 U.S. Dist. LEXIS 23109, *37-38 (W.D. Tex. Mar. 8, 2011) (internal quotation omitted) (holding that a transferee “must have unfettered control over the funds allegedly transferred to it” and that a recipient of funds is not a transferee if it has “no legal right to put the funds to its own use.”); *Moser v. Najafi (In re Goushey)*, Adv. Proc. No. 09-4208, 2011 Bankr. LEXIS 2408, *6-7 (E.D. Tex., Bankr. June 17, 2011) (finding that a person who delivered a check from the debtor to the defendant could not be characterized as the initial transferee because “he was, at most, a messenger” who had no right to the proceeds).

various transactions ... would not have bestowed the [b]ank with dominion or control over such funds.” *Id.*

The IC on its face acknowledges that TD acted as a correspondent bank (IC ¶ 55), and the transfers discussed reflect correspondent banking activities (*see* IC ¶¶ 50-52). Thus, the “dominion or control” test clearly applies and requires dismissal of the claims. Further, the allegation that TD earned fees for its role as a correspondent bank does not transform TD from a financial intermediary to a “transferee,” just as fees paid to an armored car company or other “couriers” do not change their status. ~~The Fifth Circuit affirmed dismissal of fraudulent transfer~~ claims in *Matter of Coutee* even though the law firm deducted its fees from client funds held in its trust account. *See* 984 F.2d at 141. The Court of Appeals actually found that the need for “negotiations regarding the firm’s legal fees . . . indicate that the firm was not free at the time simply to keep the money” deposited in its account, *see id.*, and it did not order the return of any such fees.

To separate the fees from the transactions they accompany is commercially unreasonable and inconsistent with the very principles outlined in *Bonded Financial Services*—particularly for correspondent banks who daily process thousands of wire transfers. The Seventh Circuit adopted the dominion or control test for financial intermediaries in large part because it correctly recognized that the costs of imposing monitoring obligations upon financial intermediaries “would be staggering” due to the high volume of transactions (particularly wire transactions) that those institutions process daily. *See Bonded Fin. Servs., Inc.*, 838 F.2d at 893. This reasoning applies equally to the transaction fees that accompany the transfers. If the underlying transaction is not a “transfer,” then fees paid for it are likewise not a “transfer.”

* * * * *

With regard to OSIC's fraudulent conveyance claims then, they must be dismissed because they are time-barred. And, if not time barred, the statute does not apply because the funds were not transferred by the debtor (Stanford), and TD in any event was not the recipient of such funds because it never owned them—it was simply a conduit to the ultimate transferee.

C. Texas Does Not Recognize a Cause of Action for Aiding, Abetting or Participation in Fraudulent Transfers

In Count II, the OSIC claims TD aided, abetted or participated in fraudulent transfers, namely, money transferred to *Stanford* and other Stanford Entities from SIBL accounts maintained by Defendants. (IC ¶ 86-89) But it is unclear whether Texas even recognizes this cause of action. Fraudulent transfer claims are statutory, and TUFTA permits suit only to recover assets *from the transferee* who received fraudulent payments from a debtor. TEX. BUS. & COM. CODE § 24.009(b)(1)-(2). The legislature could have permitted third-party facilitators to be sued, but it did not do so. To the contrary, courts have exempted simple conduits like TD from the statute's coverage. *See, supra*, Arg. § II.B at pp. 12-15. Thus, TUFTA does not provide for actions against alleged aiders and abettors.

In *Mack v. Newton*, the Fifth Circuit held that Texas's fraudulent conveyance statute "does not provide for recovery other than recovery of the property transferred or its value from one who is, directly or indirectly, a transferee or recipient thereof." 737 F.2d 1343, 1361 (5th Cir. 1984); *see also In re Mortg. Am. Corp.*, 714 F.2d 1266, 1272 (5th Cir. 1983) (noting that the remedy "relates entirely to the debtor's fraudulently transferred property and entails no personal liability on the part of those responsible for the transfer."). In so holding, the Fifth Circuit recognized the statute had nothing to do with anyone's fraudulent intent: "[The statute] does not purport to vary its operation on the basis of participation in wrongdoing or the lack thereof."

Mack, 737 F.2d at 1361. Rather, TUFTA is a statutory vehicle to permit creditors to “void” certain transfers, even if made to innocent transferees. This court has followed *Mack*, holding “that the pertinent statutes do not create personal liability on the part of a co-conspirator for fraudulent conveyances to an extent or in an amount beyond property which a co-conspirator actually receives or in which he acquires an interest.” *FDIC v. White*, No. 3:96-cv-0560, 1998 U.S. Dist. LEXIS 3020, *6-7 (N.D. Tex. Mar. 5, 1998).

Some courts, without specifically analyzing whether a cause of action for aiding and abetting a fraudulent transfer exists, have permitted derivative liability claims with a fraudulent transfer as the predicate act. *See, e.g., Matter of Educators Grp. Health Trust*, 25 F.3d 1281, 1285 (5th Cir. 1994) (listing conspiracy to commit fraudulent transfers among claims that belong to a bankruptcy estate, but providing no analysis of the claim); *Chu v. Hong*, 249 S.W.3d 441, 444 (Tex. 2008); *Biliouris v. Sundance Res., Inc.*, 559 F. Supp. 2d 733, 740 (N.D. Tex. 2008) (Godbey, J.). But, to the extent this is a valid claim, then it must also include the necessary elements of a concert of action claim, including actual knowledge and intent to cause harm. *See Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996) (declining to adopt a cause of action for aiding-and-abetting fraud, but noting that the RESTATEMENT (SECOND) OF TORTS § 876(b) requires knowledge of the wrongful act and the intent to assist it); *see, infra*, Arg. § IV.C at pp. 29-33 (discussing civil conspiracy requirements for actual knowledge and intent to cause harm).

Notably, in *Biliouris*, where this Court found that fraudulent transfer violations may be a predicate act for a conspiracy claim, the claims for fraudulent transfer and conspiracy were directly against the corporate *debtor* and its responsible *officers*, who allegedly caused the transfers to be made. *See* 559 F. Supp. 2d at 735. Here the claim (without supporting allegations) is against a third party in a different country providing routing banking services.

Accordingly, even if fraudulent transfers made by Stanford to people or entities other than TD can suffice as predicate acts for derivative liability, the OSIC must still plead that TD had actual knowledge that Stanford was running a Ponzi scheme (or that he made the transfers with the intent to defraud his creditors). As discussed *infra*, Arg. § IV.C at pp. 29-33, the OSIC has failed to plead any sufficient facts demonstrating actual knowledge. It is not enough to allege that TD aided simply because it routinely processed transfers; rather, the OSIC must allege that TD did so with actual knowledge of the fraud and with the specific intent to injure Stanford's investors. *See Chu*, 249 S.W.3d at 446 (“Chu could only be liable for conspiracy if he agreed to the *injury* to be accomplished; agreeing to the *conduct* ultimately resulting in injury is not enough) (emphasis in original); *see also Triplex Commc'ns, Inc. v. Riley*, 900 S.W.2d 716, 719 (Tex. 1995) (rejecting plaintiff's argument that the defendant only needed to “intend to engage in the conduct that resulted in the injury” because “[c]ivil conspiracy requires specific intent to cause harm.”). Thus, because the OSIC has failed to plead actual knowledge or intent to cause harm, this claim—if it even exists—must be dismissed.¹¹

III. OSIC LACKS STANDING TO PURSUE TORT CLAIMS

In Counts III through V, the OSIC seeks to assert three tort claims against TD. While the OSIC purports to bring this action “on behalf of the Committee, the SIBL CD investors, and the Receivership Estates” (IC ¶ 15), in actuality it lacks standing to pursue these tort claims on behalf of any of those entities.

¹¹ This claim is also time barred. If this is a cause of action, it would be subject to—at latest—the same statute of repose as the underlying fraudulent transfers: four years, or, if later, one year after reasonable discovery. *See* TEX. BUS. & COMM. CODE § 24.010. *Cf. Thomas v. Barton Lodge II, Ltd.*, 174 F.3d 636, 647 (5th Cir. 1999) (holding the statute of limitations for a derivative claim is the same as the underlying claim). Because OSIC failed to preserve this claim when it moved to intervene, the four years dates back from the IC's filing on February 15, 2013. And for the reasons set forth *supra* at pp. 8-11, the OSIC cannot benefit from TUFTA's discovery rule. Accordingly, any fraudulent transfers arising before February 15, 2009 cannot serve as a basis for derivative liability, so OSIC's derivative claim at least fails as to all transfers except those occurring on the final two days of the Stanford scheme.

A. To the Extent OSIC Brings Claims on Behalf of “the Committee,” “the SIBL Investors” or the “Stanford Victims,” Its Tort-Based Claims Are Precluded by SLUSA

The Supreme Court is currently examining whether SLUSA bars tort-based claims by investors in Stanford-related matters. *See Roland v. Green*, 675 F.3d 503 (5th Cir. 2012), *cert. granted sub nom. Chadbourne & Parke LLP v. Troice*, No. 12-79, *Willis of Colorado Inc. v. Troice*, No. 12-86, and *Proskauer Rose LLP v. Troice*, No. 12-88, 133 S. Ct. 977 (2013). If SLUSA precludes an investor class action, then OSIC is also precluded from pursuing such claims to the extent it brings the claims on behalf of investors or itself.

SLUSA precludes a “covered class action” based on state statutory or common law that alleges misrepresentations in connection with the purchase or sale of securities. *See* 15 U.S.C. § 78bb(f)(1). In turn, SLUSA defines a “covered class action” as a suit in which “damages are sought on behalf of more than 50 persons or prospective class members and questions of law or fact common to those persons or members of the prospective class . . . predominate over any questions affecting only individual persons or members.” 15 U.S.C. § 77p(f)(2)(A).

Although SLUSA generally treats an entity as one person for purposes of determining the number of class members, it expressly does not do so where an entity is “established for the purpose of participating in the action.” 15 U.S.C. § 77p(f)(2)(C). Thus, SLUSA’s single-entity exception does not apply to entities such as OSIC that are formed for the primary purpose of engaging in litigation. *See LaSala v. UBS, AG*, 510 F. Supp. 2d 213, 236-37 (S.D.N.Y. 2007). To determine an entity’s primary purpose, courts look to its founding documents. *See id.*

The OSIC’s founding document confirms it was formed primarily for litigation:

- “Whereas, it is the intent of the parties to this Stipulation that the Receiver and representatives of the Movants establish reasonable cooperation and coordination of their efforts *to identify and prosecute potential claims against third-parties* that may inure to the benefit of the Receivership Estate . . .” *See* Order, *SEC Action*, ECF 1149, at p. 2. (emphasis added)

- “The Receiver and the Committee will cooperate in the identification and prosecution of actions and proceedings for the benefit of the Receivership Estate and the Stanford Investors, and endeavor to consensually determine which actions shall be brought by the Receiver, and which shall be brought on a class and/or contingency fee basis . . . by the Committee . . .” *Id.*, ¶ 8.

Indeed, this primary purpose is patent from the IC itself: “The Court has formed and recognized the [OSIC], which is working with the Receiver to investigate and prosecute certain potential claims and causes of action, including the claims asserted in this action.” (IC ¶ 1)

Nor can the OSIC avoid this outcome by bringing the action on behalf of “the Committee” directly. In another Stanford-related case, this Court found the Committee itself had standing only as “an unincorporated association” to pursue fraudulent transfer claims because it served as “representative of an association of Stanford investors” who themselves had standing to pursue such claims under TUFTA. *See Janvey v. IMG Worldwide, Inc.*, No. 3:11-v-117, Slip Op. at *3-6 (N.D. Tex. Sept. 24, 2012) [ECF 33]. Significantly, one of the standing criteria listed in the Court’s *IMG* decision is that neither the association’s claim nor the requested relief “requires the participation of individual members . . .” *Id.* This is typically true in cases seeking a “declaration, injunction or some other prospective relief,” *Warth v. Seldin*, 422 U.S. 490, 515 (1975), as in the fraudulent transfer claim at issue in *IMG*. Here, however, the OSIC is “seeking relief in damages for its members,” *id.*, and so “each member of [the association] who claims injury . . . must be a party to the suit, and [the association] has no standing to claim damages . . .” *Id.* at 516. *Hunt v. Wash. State Apple Adver. Comm’n*, cited by this Court in *IMG*, specifically adopts the distinction between prospective relief and monetary damages, *see* 432 U.S. 333, 343 (1977), but concludes that the remedies in that case were equitable, not monetary. Here the remedies sought are unequivocally monetary, and will require personal participation by investors

to establish the amounts due to each individual as a result. Consequently OSIC lacks associational standing.

Moreover, the OSIC's individual members likely are barred by SLUSA from bringing these claims as a class, so their "representative" is likewise precluded.¹² In short, there is no difference between the OSIC bringing the claims "on behalf of investors," and the OSIC bringing the claims on behalf of "the Committee" as a representative of those investors. If the investors cannot pursue these claims, neither can the OSIC.

Thus, if the Supreme Court agrees with this Court that SLUSA precludes the tort claims asserted by investors in Stanford-related cases, then this Court must dismiss claims brought by the OSIC on behalf of those investors or itself.

B. OSIC Lacks Standing to Bring Tort Claims on Behalf of the Receivership Estates Because the Estates Were Not Injured by the Conduct Alleged

The Receiver *lacks standing* to pursue the tort claims asserted in this action because the Receivership Entities were not injured by the conduct described in the Complaint. And because the Receiver himself lacks standing to pursue these claims, he cannot assign them to OSIC.

A party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. To have standing to pursue a claim, plaintiffs must demonstrate that (1) they suffered an "injury in fact—an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent"; (2) there is a "causal connection between the injury and the conduct complained of";

¹² In addition, to the extent OSIC purports to bring these claims on behalf of a class of investors, the IC is facially deficient in that it lacks class allegations of any kind. See WRIGHT, MILLER & MARCUS, FEDERAL PRACTICE & PROCEDURE § 1914 ("Intervention may be allowed for an entire class *if the proper class-action allegations are pleaded.*") (emphasis added); see generally FED. R. CIV. P. 23 (requiring numerosity, commonality, typicality and adequacy for class actions.) Notably, in approving the Receiver and OSIC's Agreement regarding prosecution of the "FT Claims," this Court specifically cautioned, "the Agreement will not alter the applicability of Rule 23 to any 'FT Claim' (as the Agreement defines that term) prosecuted on a class basis." Order, *SEC Action*, ECF 1267.

and (3) the injury is likely to be redressed by a favorable decision.” *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992).

OSIC cannot purport to bring tort claims supposedly belonging to the Receiver *on behalf of investors* because, as the Fifth Circuit has already held in a Stanford-related case, “a federal equity receiver has standing to assert only the claims of the entities in receivership, and not the claims of the entities’ investor-creditors...” *Janvey*, 712 F.3d at 190. The Court expressly said that this Court’s order appointing Janvey as Receiver “does not authorize the Receiver to represent the creditors of the [Stanford] corporations in receivership in asserting claims against third persons.” *Id.* at 192. Because the Receiver can only assert claims *of the Receivership Entities*, he—or OSIC on his behalf—can seek only to recover damages for injuries caused *directly to those entities*. So, in *Janvey*, the Fifth Circuit allowed the Stanford receiver to pursue *fraudulent transfer* claims on behalf of the receivership estates against the beneficiaries of those transfers, but not tort claims. *Id.*

By contrast, tort claims against third parties for allegedly aiding-and-abetting Ponzi schemes belong to the investors who paid out their funds in reliance on fraudulent statements. Chief Judge Fitzwater previously held that an equity receiver lacked standing to pursue tort claims because those claims properly belonged to investors. *See Reneker v. Offill*, No. 3:08-cv-1394, 2009 U.S. Dist. LEXIS 24567, *17-19 (N.D. Tex. Mar. 26, 2009). The Court first found that the receiver had standing to pursue fiduciary duty claims on the estate’s behalf because the law firm defendant owed a duty *directly to the corporations that became the estate*. *See id.* at *17 (“In other words, because both the duty of care and the duty of a fiduciary were owed to the AmeriFirst Clients rather than to investors, if Godwin Pappas breached either duty, it wronged the AmeriFirst Clients, not the investors.”). But the Court went on to find that the receiver

lacked standing to pursue other tort claims that effectively sought “the difference between the amount owed to the investors by the [corporations in receivership] and the amount of any investor recovery from the assets of the Receivership Estates” because “[t]he Receivership Estate’s financial inability to satisfy liabilities owed to investors as a result of securities-laws violations harms the investors, not the [corporations].” *Id.* at *17-18.¹³

Here, aside from the untimely and improper fraudulent transfer claims discussed above, OSIC itself describes the three tort-based causes of action as harming *investors*. In Count III, the OSIC states: “By their conduct described herein, Defendants aided, abetted, and/or participated with Stanford and his co-conspirators in a fraudulent scheme *against the investors* who purchased CDs issued by SIBL and therefore against the Receivership Estates and the SIBL CD investors represented by the Committee.” (IC ¶ 91) (emphasis added) This circular claim fails to describe any concrete harm the *Receivership Estates* suffered from its own misrepresentations that caused *investors* to deposit money in the first place.

Similarly, in Count IV, the OSIC asserts that the Defendants aided and abetted the Stanford Entities’ conversion of “*the funds deposited with SIBL by CD investors.*” (IC ¶ 94) (emphasis added) And in Count V, the OSIC asserts “Defendants are responsible for the wrongdoing committed by Stanford, Davis, and others who conspired with Stanford. In particular, Defendants conspired with and are responsible *for Stanford’s theft of billions of dollars in CD customer funds.*” (IC ¶ 98) (emphasis added) Thus, on its face, the IC alleges harm only to investors.

¹³ The Second Circuit just recently dismissed a SIPA trustee’s claims that various banks aided-and-abetted Bernard Madoff’s Ponzi scheme (by allegedly ignoring red flags to collect “steep fees”) in part because the trustee lacked standing to pursue claims that properly belonged to Madoff’s investors. *See Picard v. JPMorgan Chase & Co. (In re Bernard L. Madoff Investment Securities LLC)*, No. 11-5044, 2013 U.S. App. LEXIS 12551, *4, 28, 61 (2d Cir. June 20, 2013). The Court confirmed that a “claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation.” *Id.* at *19 (quoting *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 120 (2d Cir. 1991)).

Notably, until filing the IC, OSIC and the Receiver had repeatedly recognized this legal limitation. At no point in this Receivership process has the Receiver assigned anything to OSIC except fraudulent transfer claims or third party claims based on direct duties to the Estate. From the earliest Agreement with OSIC the parties spoke only to fraudulent transfers, or “FTs”:

The Claims. Unless otherwise agreed, this proposal will apply to the litigation of all ‘fraudulent transfer’ and similar claims that may be brought under common law, statute (including, but not limited to TEX. BUS. & COMM. CODE § 24.005(a)), or otherwise (hereafter, the ‘FT Claims’) that may be asserted (i) by creditors individually or on a class basis, or (ii) by the Receiver on behalf of the Receivership Entities...

See Agreement, *SEC Action*, ECF 1208, App. A., ¶ 1. This Court approved the Agreement and ordered the Receiver and the OSIC to report quarterly on the status of the “FT Claims.” *See* Order, *SEC Action*, ECF 1267. A review of these quarterly litigation reports reveals that the vast majority of cases pursued by the Receiver are fraudulent transfer claims. *See* Fourth Joint Report of the Receiver, the Examiner and the OSIC Concerning Pending Litigation, *SEC Action*, ECF 1850. The few third-party liability cases brought by the Receiver and OSIC together are claims against law firms that potentially owed independent fiduciary duties directly to firm clients—the Stanford Entities—and thus to the Estate. *See id.* at 55-62.

Consistent with this approach, OSIC expressly moved to intervene in this case “*for the purpose of joining in the prosecution of the fraudulent transfer claims* against the Bank Defendants . . .” (Mot. to Int., ¶ 9, ECF 96) (emphasis added) In fact, OSIC all but promised this Court it would not introduce new causes of action: “the Committee is not expected to advance new or unexpected theories of recovery.” (*Id.* at ¶ 20) To that end, the OSIC’s Proposed Intervenor Complaint, which it attached to its Motion to Intervene, contained only fraudulent transfer claims. (*See* App. to Mot. to Int., ECF 96-1) This was the basis upon which the Court

granted intervention: “OSIC, like the Class Plaintiffs, seeks recovery . . . *based on fraudulent transfer theories* arising out of the same operative facts.” (Order, ECF 129) (emphasis added)

It was *only after* this Court granted its motion that OSIC filed the Intervenor Complaint now at issue, alleging these tort-based theories against third parties. And even the new IC concedes the original arrangement: “[T]he Committee and the Receiver entered into a separate agreement and protocol, which designated the Committee as the party primarily responsible *for prosecuting fraudulent transfer claims* against most third parties.” (IC ¶ 14) (emphasis added)

OSIC tries to avoid this fundamental standing problem by claiming to seek recovery only on behalf of SIBL itself for “damages . . . for aiding and abetting the *alleged diversion of billions of dollars from SIBL* by Stanford and entities he controlled.” (IC ¶ 2) (emphasis added) Thus, OSIC attempts to claim SIBL as the “victim” of Allen Stanford and his other entities. But they are in fact all one and the same—they are all “Stanford.” This Court has already pierced that corporate veil and agreed—*with the Receiver*—in related proceedings “that Stanford operated the entire network of Stanford Entities as an integrated unit in order to perpetrate a massive worldwide fraud.” *See* Order, *In re Stanford Int’l Bank, Ltd.*, No. 3:09-cv-721 (N.D. Tex. July 30, 2012), ECF 176, at *26-36; *see also Janvey v. Alguire*, No. 3:09-cv-724, 2013 U.S. Dist. LEXIS 82568, at *45-46 (N.D. Tex. Jan. 22, 2013) (Godbey, J.) (reaffirming prior finding that the Stanford Entities operated as a single entity). In so holding, this Court emphasized that *each entity* contributed to the fraud:

Each Stanford Entity either participated in the scheme, derived benefit from the scheme, or lent the appearance of legitimacy to the entirety of Stanford’s fraudulent enterprise. To ignore these findings would elevate form over substance – thereby legitimizing the corporate structure that Stanford utilized to perpetrate his fraud and running afoul of Fifth Circuit precedent cautioning courts to look beyond the surface.” [Order, No. 3:09-cv-0721, ECF 176, at *36.]

And of course, the only “harm” SIBL has suffered is the “loss” of the funds that it took from investors, and which it now must repay to them. No matter how one parses this issue, the alleged “harm” falls squarely upon investors, and not upon the Estate.

Accordingly, OSIC’s self-serving “distinction” between SIBL and the other Stanford Entities is mere form over substance that contradicts the law of this case and must be disregarded. OSIC cannot simply divide the estate into pieces and sue on behalf of the piece it likes best. The purported “victim” here was not “harmed,” because it was part of the Ponzi scheme that wrongfully took investors’ money in the first place and so it never had legitimate ownership of the funds such that there was any “loss.” Because OSIC lacks proper standing, all of OSIC’s tort claims must be dismissed.

IV. EVEN IF OSIC HAS STANDING TO PURSUE THE TORT CLAIMS, THOSE CLAIMS MUST BE DISMISSED BECAUSE THEY ARE INVALID AND FAIL TO ALLEGE FACTS WITH SUFFICIENT PARTICULARITY

A. Texas does not recognize a cause of action for aiding, abetting or participation in a fraudulent scheme

In Count III, the OSIC alleges that TD aided, abetted and/or participated with Stanford in a fraudulent scheme against CD investors. (IC ¶¶ 90-91) This claim fails because Texas has never recognized a cause of action for aiding and abetting fraud. *See Ernst & Young, LLP v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 n.7 (Tex. 2001); *O’Kane v. Coleman*, NO. 14-06-00657-CV, 2008 Tex. App. LEXIS 4908, *5 (Tex. App. – Houston 2008). Indeed, this Court previously dismissed an aiding and abetting fraud claim because “Texas does not recognize such a cause of action.” *Highland Crusader Offshore Partners, L.P. v. Lifecare Holdings, Inc.*, No.

3:08-cv-102, 2008 U.S. Dist. LEXIS 66229, *43 (N.D. Tex. Aug. 27, 2008). The Court must likewise dismiss this count with prejudice.¹⁴

B. OSIC's Aiding, Abetting or Participation in Conversion Claim Fails on Multiple Grounds

In Count IV, the OSIC claims that TD aided, abetted or participated in the conversion of CD investors' funds. (IC ¶¶ 93-94) This claim must also be dismissed.

First, it is not clear that an aiding and abetting conversion claim is even actionable in Texas. Very few cases mention it, and those few fail to identify its elements. *See, e.g., Dixon v.*

Texas, 808 S.W. 2d 721, 722-24 (Tex. App. 1991) (holding that an oil company president "committed the tort of conversion by instigating, aiding, or abetting" his company's conversion, but explaining he was liable as an officer for his company's torts committed through him); *Hooser v. G.M. Carlton Bros. & Co.*, 288 S.W. 1095, 1097 (Tex. App. 1926) (explaining that a person can be "guilty" of conversion if he cooperated with another in the conversion and recognized, approved and adopted those acts). In both of those cases, the facts demonstrated the defendant "knew" and "approved" of the act, thus indicating that the claim, if it exists, requires actual knowledge and intent, as is the case with all concert of action theories. But in a state that does not recognize aiding and abetting a fraud, it is not at all clear that it would nonetheless recognize that cause of action in conversion cases.

Second, before OSIC can sue TD for aiding and abetting a conversion, it must first plead that an actionable conversion occurred. This it cannot do because the statute of limitations has expired. Conversion of personal property claims must be brought "not later than two years after

¹⁴ Even assuming Texas recognized aiding and abetting fraud, the OSIC has not sufficiently pleaded such a claim. In *Juhl v. Airington*, although the Texas Supreme Court *declined* to adopt Restatement (Second) of Torts § 876(b), which imposes liability for substantially assisting a wrongdoer in a tortious act, it noted that §876(b) requires a defendant to have an unlawful intent ("i.e., knowledge that the other party is breaching a duty and the intent to assist that party's action") and to substantially assist the wrongdoer. *See* 936 S.W.2d 640, 644 (Tex. 1996). Thus, the OSIC would have to allege and prove that TD knew of Stanford's fraud and intended to assist it. As discussed below, the OSIC has pleaded neither knowledge nor intent adequately. *See, infra*, Arg. § IV.C at pp. 29-33.

the day the cause of action accrues.” TEX. CIV. PRAC. & REM. CODE § 16.003. The “property” was supposedly “converted” in 2008 and 2009, the OSIC was formed in August 2010, but it *did not assert* this claim until February 2013. Notably, when OSIC moved to intervene in December 2011, it failed to preserve this claim by including it within its Motion or Proposed Intervenor Complaint which, as noted above, asserted only fraudulent transfer claims. And it “knew” of the “fraudulent nature” of the alleged conversion by at least August 27, 2009, the date of Davis’s plea, yet failed to act timely.¹⁵

Third, Texas—like virtually every state—permits conversion actions only for the conversion of specific chattel, such as old coins or gold bullion, and not where indebtedness can be discharged by payment of money. *See Mitchell Energy Co. v. Samson Res., Co.*, 80 F.3d 976, 984 (5th Cir. 1996); *see also Felcheck v. JP Morgan Chase Bank*, No. H-12-2847, 2013 U.S. Dist. LEXIS 66805, *11 (S.D. Tex. May 10, 2013) (“The conversion claim fails for the additional reason that money that is not specific chattel is not personal property that can be converted.”). No conversion of specific chattel is alleged in the IC, so no conversion action is available at all.

Fourth, even if the OSIC timely could allege that the Stanford Entities converted non-fungible property belonging to SIBL, and even if Texas recognizes a cause of action for aiding-and-abetting conversion, the OSIC’s claim does not plead any facts with sufficient particularity to demonstrate TD’s actual knowledge of Stanford’s scheme or its acts in aid of that scheme. *See Juhl*, 936 S.W.2d at 643-44 (internal quotation marks omitted) (declining to hold that Texas recognizes a concert of action theory, but noting that RESTATEMENT (SECOND) OF TORTS § 876(b) “requires that the defendant have an unlawful intent, i.e., knowledge that the other party

¹⁵ Similarly, the OSIC’s derivative claim for aiding-and-abetting conversion itself is untimely since such actions are subject to the same two-year statute of limitations as the underlying tort. *See, supra*, p. 18, note 11.

is breaching a duty and the intent to assist that party's action."'). *See, infra*, Arg. § IV.C at pp. 29-33.

C. OSIC's Civil Conspiracy Claim Must Be Dismissed Because OSIC Failed to Allege It with the Required Particularity

Finally, in Count V, the OSIC has not pled with sufficient particularity that TD conspired to commit fraud.¹⁶ A civil conspiracy is a combination by two or more persons to accomplish an unlawful purpose, or to accomplish a lawful purpose by unlawful means. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983). The elements of conspiracy are: (1) two or more persons; (2) an object to be accomplished; (3) a meeting of the minds on the object or course of action; (4) one or more unlawful, overt acts; and (5) damages as the proximate result. *Id.*¹⁷ Plaintiffs alleging fraud-based claims must state the circumstances constituting fraud with particularity. FED. R. CIV. P. 9(b); *see Biliouris*, 559 F. Supp. 2d at 736. This standard applies equally to claims of fraud and conspiracy to defraud. *See Newby v. Enron Corp. (In re Enron Corp. Sec., Derivative & "ERISA" Litig.)*, 540 F. Supp. 2d 759, 774 (S.D. Tex. 2007).

¹⁶OSIC's civil conspiracy claim is barred by Texas's two-year statute of limitations. *See* TEX. CIV. PRAC. & REM. CODE § 16.003; *see Cook-Bell v. Mortg. Elec. Registration Sys., Inc.*, 868 F. Supp. 2d 585, 590 (N.D. Tex. 2012). As discussed, the Fifth Circuit has set August 27, 2009—the date of James Davis's guilty plea—as the discovery date in Stanford actions. *See, supra*, Arg. § II.A at p.8. Accordingly, any conspiracy or aiding-and-abetting conversion claims must have been brought by August 27, 2011. Even if OSIC argues it should receive two years since the date of its creation (August 10, 2010), it was required to bring these claims by August of 2012. OSIC, however, failed to bring these claims until it filed the IC in February, 2013. Notably, its Proposed Intervenor Complaint *did not* contain the tort claims. *See, supra*, Proc. Hist. at p. 3. Thus, this claim is untimely, and must be dismissed.

¹⁷ Several Texas cases have arguably suggested an additional element: that the wrongful act underlying the conspiracy claim must itself be actionable against all of the individual conspirators. *See, e.g., Staples v. Merck & Co.*, 270 F. Supp. 2d 833, 845-46 (N.D. Tex. 2003) (emphasis in original) ("Plaintiffs must establish that the [Defendants] are liable for *both* the conspiracy and the underlying challenged act."); *Leigh v. Danek Med., Inc.*, 28 F. Supp. 2d 401, 405 & n.1 (N.D. Tex. 1998) (emphasis added) (the alleged wrongful act, that is the underlying fraud, must be actionable against *the individual conspirators*"); *Ernst & Young LLP v. Pac. Mut. Life Ins. Co.*, 51 S.W.3d 573, 583 (Tex. 2001) (emphasis added) ("Because [plaintiff's] conspiracy and 'aiding and abetting' claims are premised on [defendant's] alleged fraud, our conclusion on the fraud issue *necessarily disposes* of these other claims."). To the extent that this is a requirement, the OSIC here clearly fails to plead that TD itself committed fraud.

1. ***OSIC has not alleged with particularity that TD actually knew of Stanford's scheme***

Actual knowledge is a prerequisite for a meeting of the minds: “one without knowledge of the object and purpose of a conspiracy cannot be a co-conspirator; he cannot agree, either expressly or tacitly, to the commission of a wrong which he knows not of.” *Schlumberger Well Surveying Corp. v. Nortex Oil and Gas Corp.*, 435 S.W.2d 854, 857 (Tex. 1968). Thus, constructive knowledge or any lesser knowledge will not suffice. In *Schlumberger*, although the facts showed that the defendant could have discovered the conspiracy *by the slightest degree of diligence*, the court concluded that the plaintiffs’ conspiracy claim foundered because actual knowledge was required. *See id.*; *see also Goldstein v. Mortenson*, 113 S.W.3d 769, 779 (Tex. App. – Austin 2003) (“[P]roof that an individual had some collateral involvement in a transaction, and had good reason to believe that there existed a conspiracy among other parties to it, is insufficient of itself to establish that the defendant was a conspirator.”).

The IC utterly fails to plead any facts—and certainly pleads none with particularity—demonstrating TD’s actual knowledge of Stanford’s scheme. Instead, the OSIC says TD *should have known* of the fraud based on its financial expertise, its banking relationship with Stanford, and alleged “red flags and other indicia of fraud, only some of which” the OSIC chose to “itemize[.]” (IC ¶ 46) For instance, the OSIC suggests TD knew or should have known SIBL’s CD yields were “unrealistically high and unsustainable” and that its consistent high returns based on a stated diversified, conservative and stable investment portfolio were mathematically implausible. (IC ¶¶ 65-66) But this does not plead actual knowledge of a conspiracy. Nor does it even suggest TD knew anything not also known to investors—or to regulators, such as the SEC.

The OSIC claims that the banks somehow should have known about Stanford's fraud based on a 1999 Treasury Department FinCEN advisory regarding regulatory problems in Antigua and a 2000 OECD list of tax-shelter countries that included Antigua, neither of which mention Stanford. (See IC ¶¶ 67-68) Not surprisingly, however, the OSIC neglects to mention that FinCEN *withdrew* the advisory in 2001,¹⁸ and that the OECD *removed* Antigua from the tax shelter list in 2002,¹⁹ years before the collapse of the Stanford Ponzi scheme and this case. Thus, even if these international advisory statements could somehow support an inference that TD had actual knowledge of fraud because Antigua had lax regulatory standards, an opposite inference of equal or greater weight must be given to the withdrawal of those warnings, which provide comfort that regulators were now satisfied with Antigua's regulatory regime. In any event, none of this has absolutely anything to do with Stanford's fraud, or with TD's supposed "knowledge" of it.

The OSIC further asserts that TD had a duty to conduct "due diligence" under some unspecified Canadian regulations. (See IC ¶ 55) Yet the OSIC does not explain what type of due diligence that law requires, whether TD complied with that law, or what the results of any such due diligence were. There is no claim that in the course of its due diligence, for example, TD learned of Stanford's phony financial statements or its bribes to Antiguan regulators. In such a void, an equal inference can be drawn that TD was lied to by Stanford during any such diligence, just as Stanford lied to investors and regulators, by using phony stock portfolios and financial statements.

The OSIC also cites a U.S. Senate Subcommittee Report from 2001, to the effect that TD had been a correspondent bank for *a different* Antiguan bank, in 1996 and 1997, that later fell

¹⁸ See, *supra*, p. 5 at note 4.

¹⁹ See, *supra*, p. 5 at note 5.

into liquidation following allegations of money laundering. (IC ¶ 56) Again this has absolutely nothing to do with Stanford; it did not even occur during the time frame relevant to the IC and no charges or claims were ever filed against TD. The best the OSIC can muster about Stanford in this regard is to blindly assert that TD “gathered sufficient information concerning SFG to understand Stanford’s business and, as a result, knew, or should have known, that Stanford, like [the other bank], was conducting an illegal and fraudulent scheme.” (IC ¶ 56) But without pleading what “sufficient information” TD gathered, OSIC’s conclusory allegation about TD’s knowledge is not entitled to an assumption of truth. *Iqbal*, 129 S. Ct. 1949.

None of these allegations constitute “facts” demonstrating a meeting of the minds and actual knowledge. At best, the OSIC has identified what it calls “red flags” or “indicia of fraud.” (IC ¶ 46) But courts have repeatedly held that so-called “red flags” do not constitute actual knowledge. For example, in *Lerner v. Fleet Bank, N.A.*, in response to the claim that persistent overdrafts constituted evidence the bank knew about a Ponzi schemer’s fraud, the Second Circuit explained that “these ‘red flags,’ as alleged were insufficient to establish a claim for aiding and abetting fraud because, although they may have put the banks on notice that some impropriety may have been taking place, they do not create a strong inference of actual knowledge of Schick’s outright theft of client funds.” 459 F.3d 273, 294 (2d Cir. 2006). Other courts unanimously concur. *See, e.g., In re Agape Litig.*, 681 F. Supp. 2d 352, 362-63 (E.D.N.Y. 2010) (holding that facts leading to generalized suspicions do not suffice to prove actual knowledge); *Silverman Partners, L.P., v. First Bank*, 687 F. Supp. 2d 269, 286 (E.D.N.Y. 2010) (holding that “even if a reasonable banker would have viewed the actions by [the wrongdoer customer] as raising ‘red flags,’” that did not suffice to raise a strong inference of actual knowledge).

So it is here: the OSIC's alleged "red flags" simply do not raise any reasonable inference that TD had actual knowledge of the Ponzi scheme, and thus there could have been no meeting of the minds. In the absence of *any* allegations of actual knowledge, this claim fails and must also be dismissed.

2. ***OSIC has not alleged with particularity that TD agreed to a preconceived plan and intended to cause harm***

The IC likewise fails to allege that TD and Stanford agreed to a preconceived plan with the specific intent to cause harm, let alone describing what such a plan might be. *See Goldstein*, 113 S.W.3d at 779; *Schlumberger*, 435 S.W.2d at 856; *see also Triplex Commc'ns, Inc.*, 900 S.W.2d at 719 (rejecting plaintiff's argument that the defendant only needed to "intend to engage in the conduct that resulted in the injury" because "[c]ivil conspiracy requires specific intent to cause harm.>").

Here, there is no mention of any "preconceived plan" between Stanford and the banks. The closest the OSIC comes is to assert—without supporting facts—that "Defendants' actions were taken to protect the scheme and to avoid regulatory intervention." (IC ¶ 98) This conclusory assertion as to *all* the defendants is insufficient. The Complaint contains no facts demonstrating TD's knowing agreement to any plan, with Stanford or with the four other banks. If TD did not know of the plan, it could not have specifically intended to injure anyone: "[O]f course, one without knowledge of a conspiratorial plan or scheme to injure another by the commission of a particular wrong cannot share the intent to injure such other." *Schlumberger*, 435 S.W.2d at 857. Thus, the OSIC's failure to sufficiently allege either that TD planned or intended to cause harm provides still further grounds for dismissing their conspiracy claims.

CONCLUSION

A legal complaint must offer more than “threadbare recitals of the elements of a cause of action, supported by mere conclusory statements.” *Iqbal*, 129 S. Ct. at 1949. Yet that is exactly what the OSIC does here. It pleads no facts to support its implausible claims for relief. Moreover, it lacks standing to pursue most of the claims, and many of the causes of action are time-barred, do not exist or do not apply to TD. For these and the many reasons set forth above, The Toronto-Dominion Bank respectfully requests that this Court enter an Order dismissing the Intervenor Complaint with prejudice.²⁰

Dated: July 10, 2013
Dallas, Texas

Respectfully submitted,

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²⁰ TD further incorporates by reference the arguments and authorities made by each of the other defendant banks in this action in their respective motions to dismiss.

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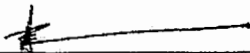
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CERTIFICATE OF SERVICE

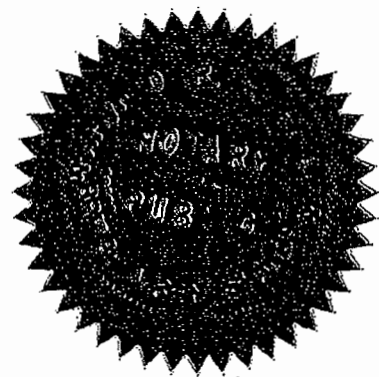
I hereby certify that on this 10th day of July, 2013, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Robert Plotkin
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This is **Exhibit "S"** referred to in the
affidavit of Marcus A. Wide
sworn before me, this 28 day of November, 2014.



A Commissioner, notary, etc.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

PEGGY ROIF ROTSTAIN, *et al.*,
on behalf of themselves and all others similarly situated,

Plaintiffs,

and

THE OFFICIAL STANFORD INVESTORS COMMITTEE,

Intervenor,

v.

TRUSTMARK NATIONAL BANK, *et al.*

Defendants.

Case No.: 3:09-CV-2384

**THE TORONTO-DOMINION BANK'S REPLY IN SUPPORT OF ITS
MOTION TO DISMISS THE INTERVENOR COMPLAINT**

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The Toronto-Dominion Bank (“TD”) respectfully submits this reply in support of its Motion to Dismiss (“TD Motion” or “TD Mot.”) the Intervenor Complaint filed by the Official Stanford Investors Committee (“OSIC”).

PRELIMINARY STATEMENT

OSIC’s Intervenor Complaint (“IC”) sought to plead five causes of action against TD, all of which TD has moved to dismiss. These claims fall into two categories: two counts of statutory fraudulent transfers, and three derivative common law tort claims.

~~As to the fraudulent transfer claims in Count I, OSIC concedes that TD was simply a~~
conduit and *not* a transferee under TUFTA, so that the funds passing through TD accounts cannot be avoided or recovered. Response at 43.¹ OSIC now asserts that it seeks to avoid only the “fees” associated with those conduit transactions. The conduit law, however, unmistakably includes the fees for those transactions as an integral part of the exempt transaction, and so the TUFTA claims must be dismissed in their entirety. In Count II, OSIC pleads derivative aiding and abetting fraudulent transfers, but OSIC fails to establish that such an action is even available under the TUFTA statute or in Texas common law, especially as to an exempt conduit bank. Even if such a derivative action is available, it is barred by the TUFTA statute of limitations and discovery rule, and is insufficiently pleaded.

With regard to its tort claims, OSIC likewise has significant shortcomings. When OSIC moved to intervene it did not include any tort claim in its motion or proposed complaint, and so failed to obtain court approval for filing those claims, or to preserve the statute of limitations as to them. And, although it is OSIC’s burden to establish its standing to bring the tort claims, OSIC fails to plead any particulars of its alleged assignment from the Receiver, and fails to show

¹ Citations to “Response at ___” refer to Plaintiff-Intervenor The Official Stanford Investors Committee’s Response and Brief in Opposition to Defendants’ Motions to Dismiss the Intervenor Complaints [ECF 166].

that its tort claims are assignable or timely. In addition, OSIC never addresses TD's argument that unincorporated associations lack standing to seek monetary damages for its "members."

Finally, even if OSIC somehow overcomes its standing and timeliness issues, the actual tort claim allegations fail to satisfy contemporary pleading standards regarding plausibility and particularity. The IC relies on improper group pleading, remote and inapplicable "red flags," and fails to allege the who, what, where and when required by law to put TD on notice. Although the IC must plead actual knowledge, a meeting of the minds and overt acts in furtherance of conspiracy or abetting, it nowhere does so. For all these reasons, the IC must be dismissed.

I. OSIC LACKS STANDING TO PURSUE THE TORT CLAIMS

Although OSIC pleads that it brings the tort actions "on behalf of the Committee, the SIBL CD investors, and the Receivership Estates" (IC ¶ 15), at no point does OSIC ever allege which of these groups or entities has standing to bring which claims. The party invoking jurisdiction bears the burden of establishing its standing, *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992), but OSIC's Response only further obscures its position.

Standing "requires the litigant to prove that he has suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661 (2013). This is a threshold jurisdictional issue: "for a federal court to have authority under the Constitution to settle a dispute, the party before it must seek a remedy for a personal and tangible harm." *Id.*

Because OSIC did not itself invest money with Stanford—indeed it did not even exist at the time—it lacks direct standing to bring any tort claims because it clearly suffered no personal or particularized harm. *See Lujan*, 504 U.S. at 561 n.1. And, as TD demonstrated in its Motion at 18-21, OSIC lacks standing to bring the tort claims on behalf of anyone else.

A. **OSIC Cannot Pursue The Tort Claims On Behalf Of The Receiver.**

Central to OSIC's contentions is the notion that the Receiver has assigned to OSIC tort actions owned by the Receiver that permit OSIC to sue under common law and despite SLUSA restrictions. Response at 81-82. Where an assignment is the basis for its standing, a plaintiff has the burden to establish a valid assignment. This is a jurisdictional requirement, not a pleading requirement. OSIC did not attach a *copy* of the assignment to its IC. It did not allege *what claims* are assigned to it, the *date* of that assignment, the *terms and conditions* of that assignment, if any, and whether the assigned claim was *assignable*. As Texas law requires, "to recover upon an assigned cause of action, one must allege and prove that there was a cause of action, that it was a cause of action that could be assigned, and that it had been assigned to him." *Esco Elevators, Inc. v. Brown Rental Equip. Co.*, 670 S.W.2d 761, 764 (Tex. App.—Ft. Worth 1984); *see R&R White Family L.P. v. Jones*, 182 S.W.3d 454, 459 (Tex. App.—Texarkana 2006); *Ceramic Tile Int'l v. Balusek*, 137 S.W.3d 722, 724 (Tex. App.—San Antonio 2004). Such information is crucial to this Court's decision regarding jurisdiction, and its omission is telling.

The Receiver's sole basis for authority to assign is for claims of *fraudulent transfer* and *fiduciary duty* violations owed to the Receivership entities. TD Mot. at 24-25. For that reason, OSIC moved to intervene here only "for the purpose of joining in the prosecution of the fraudulent transfer claims against the Bank Defendants," and that is the basis upon which the Court granted intervention. *See id.* (citing Mot. to Int., ¶ 9, ECF 96, and Order, ECF 129). OSIC gave no notice that tort actions were also being asserted, and it was not until OSIC later filed its IC that TD first learned of such claims. *See* FED. R. CIV. P. 24(c). The IC fails to plead any specifics of this assignment, stating simply that pursuant to earlier court orders, the Committee is authorized to bring the claims. IC ¶ 1. The IC then described an "agreement and protocol,"

which gave OSIC authority to prosecute *fraudulent transfer claims* against third parties, IC at ¶ 14. But nothing cited assigns *tort* claims of the Receiver to OSIC.²

Rather, as asserted in TD's Motion at 24, the prior orders and agreements do not include tort claims, and it is not clear that the Receiver has authority to assign tort claims.³ In the absence of any actual assignment documentation, it is impossible to know the basis for the Receiver's authority, what claims the Receiver actually assigned, or when the statute of limitations on such claims expires.

Even if the Receiver is authorized to assign tort claims, however, they must be tort claims he holds for the estate. TD argued that the injuries OSIC pleads in the IC are injuries to investors, not to receivership entities, and so are not assignable by the Receiver. *See* TD Mot. at 23. OSIC's only response is that "the Bank Defendants cannot possibly dispute well-settled law that receivers *have* standing to sue for injuries caused specifically to receivership entities." Response at 77. TD does not dispute that receivers can pursue injuries to *receivership entities*; rather, it argues that OSIC's allegations regarding the injuries purportedly assigned in this case belong to investors and not to the receivership entities.⁴

² This Court's February 25, 2010 Order empowered the Receiver to enter into the "Agreement" but the Order only makes reference to "FT" claims. *S.E.C. v. Stanford Int'l Bank, Ltd.*, No. 3:09-cv-298 (N.D. Tex. Feb. 25, 2010) [ECF 1267].

³ In its Response, OSIC only states that it "received an assignment from the Receiver to sue the Bank Defendants in tort," and cites only ¶ 8(d) of the Order establishing OSIC. *See* Response at 81. That provision is not an actual assignment, but only authorizes the issuance of certain types of assignments (*i.e.*, fraudulent transfer claims). It does not include torts.

⁴ None of the cases cited by OSIC found standing by a receiver for tort claims against a third party unless that party owed either a fiduciary duty to the receivership entity or was closely related to the receivership entity. *Moratzka v. Morris (In re Senior Cottages of Am., LLC)*, 482 F.3d 997, 1000 (8th Cir. 2007) involved negligence and aiding and abetting breach of fiduciary duty claims against the estate's *law firm*. *Obermaier v. Arnett*, No. 2:02-cv-111FTM29DNF, 2002 WL 31654535, *4 (M.D. Fla. Nov. 20, 2002) involved fraudulent transfer and unjust enrichment claims against net winners. In *Commodity Futures Trading Comm'n v. Chilcott Portfolio Mgmt., Inc.*, 713 F.2d 1477, 1482-83 (10th Cir. 1983), while the court found the receiver had "capacity" to sue on behalf of the receivership entity, the court expressly *declined* to "reach or decide the standing question." And *Knauer v. Jonathan Roberts Fin. Grp., Inc.*, 348 F.3d 230, 235 (7th Cir. 2003) is distinguishable on multiple grounds, as the Ponzi schemers in that case were *representatives of the defendants* sued by the receiver. Moreover, the court noted that

The Fifth Circuit made clear in related Stanford cases that the Stanford Receiver is *not authorized* to assert claims against third parties on behalf of investors. See *Janvey v. Democratic Senatorial Campaign Comm.*, 712 F.3d 185, 192 (5th Cir. 2013). He may sue only for injuries directly to receivership entities. Yet here OSIC's aiding-and-abetting claim alleges that the Banks aided "a fraudulent scheme *against the investors.*" Its conversion claim asserts that the Banks helped convert "funds deposited with SIBL by CD *investors.*" The conspiracy claim states that the Banks "conspired with and are responsible for Stanford's theft of billions of dollars in CD *customer funds.*" See TD Mot. at 23 (citing IC ¶¶ 91, 94, 98, emphasis added). In each case, the injury asserted is to the investors whose money Stanford stole. These third-party actions against non-fiduciary banks cannot be assigned to OSIC because the Receiver lacks authority to assign them.

In an attempt to manufacture injuries to the receivership entities, OSIC invents a distinction between SIBL and other Stanford entities by claiming that Stanford's internal transfer from SIBL to one of his other entities "harmed" SIBL. But this false distinction was already rejected by this Court, when it pierced the Stanford corporate veil—at the Receiver's urging—in multiple cases. See TD Mot. at 25. While OSIC tries to limit this Court's veil piercing only to "the Chapter 15 case," Response at 78, OSIC ignores that this Court later *reaffirmed* the finding. See *Janvey v. Alguire*, No. 3:09-cv-724, 2013 U.S. Dist. LEXIS 82568, at *45-46 (N.D. Tex. Jan. 22, 2013). This Court made it crystal clear that it would pierce the veil "[r]egardless of the standard employ[ed]." *Id.* That Stanford and *every one* of his entities, including SIBL, are one

"[a]s long as an entity is legally distinct from the person who diverted funds from the entity, a receiver for the entity has standing to recover the removed funds." *Id.* at 235. As discussed *infra*, because this Court has pierced the veil and held that all Stanford Entities were Stanford, the law of the case is that the Stanford Entities were *not* legally distinct from Stanford. In any event, in *Knauer*, the Seventh Circuit affirmed dismissal of the tort claims in the very same opinion on *in pari delicto* grounds. See *id.* at 237-38.

and the same entity is the accepted law of this case, and OSIC cannot claim harm to the Stanford entities based on *internal* transfers of money within Stanford's unitary fake empire.

So, in classic convenient misleading style, OSIC asserts that sometimes it is acceptable to pierce the veil, but other times it is not – without any analysis or explanation. In this case, the unified Stanford entities and their creator have been held to be one and the same, so moving funds from one entity to another is equivalent to moving funds from the right pocket to the left pocket. But *Stanford* took money from *investors'* pockets, and only the investors can pursue those claims, which they already are doing in the underlying class action. The Receiver, if he has any authority to assign tort claims, surely cannot assign claims he does not have.

B. Associational Standing Does Not Extend To Monetary Damage Claims.

In its Motion, TD argued that to the extent OSIC claims to pursue the tort claims as a “representative” of investors, those claims may be precluded by the Securities Litigation Uniform Standards Act (“SLUSA”), and the Supreme Court will soon determine the answer to this question. TD Mot. at 19. To the extent OSIC asserts tort claims as an “unincorporated association,” it lacks standing to pursue claims for money damages. TD Mot. at 19-21.

OSIC's Opposition suggests that the SLUSA exception permitting Receivers to bring suit allows OSIC to proceed. However, as noted above, the Receiver lacks the authority or the standing to assign the tort claims. And this exception for the Receiver himself does not extend to entities such as OSIC that were “established for the purpose of participating in the action.” See 15 U.S.C. § 77p(f)(2)(C). OSIC reads “in the action” as requiring that the entity be formed *specifically* to litigate the very action in which its standing is questioned. See Response at 81-82. OSIC cannot dispute that it *was* created for the purpose of litigating claims, but argues it *was not* created specifically to participate in the *Rotstain* action, and so satisfies the exception.

This has been expressly rejected: “The Trustee’s argument that the Trust is a unitary entity because it was created not to pursue any particular action, but ‘all such actions as necessary to recover on behalf of beneficiaries,’ makes no sense conceptually or legally.” *Cape Ann Investors LLC v. Lepone*, 296 F. Supp. 2d 4, 10 (D. Mass. 2003). See also *Smith v. Arthur Anderson, LLP*, 421 F.3d 989, 1007 (9th Cir. 2005). Moreover, courts have rejected an entity’s attempt to hide behind the single-entity exception even if the entity was created for *multiple* purposes. So long as litigation was the entity’s *primary* purpose, that “satisfied the statutory language ‘for the purpose of participating in the action.’” *LaSala v. UBS, AG*, 510 F. Supp. 2d 213, 236-37 (S.D.N.Y. 2007). OSIC’s founding documents establish that it was created to litigate this and other claims, see TD Mot. at 19-20, and so the SLUSA exception does not apply to it.

As to OSIC’s effort to pursue the tort claims as an “unincorporated association,” it cannot do so because it seeks monetary damages for individual investors. See TD Mot. at 20-21. OSIC ignores this point and only mentions in a footnote that this Court has already approved standing for OSIC. See Response at 81 n.36 (citing *Janvey v. IMG Worldwide, Inc.*, No. 3:11-cv-117 (N.D. Tex. Sept. 24, 2012) [ECF 33].) But, as TD’s Motion noted, this Court’s finding in *IMG Worldwide* related to *fraudulent transfer* claims where individual monetary damages were not at issue, and so does not control the tort claims here. TD Mot. at 20-21.

In *Hunt v. Wash. State Apple Adver. Comm’n*, 432 U.S. 333, 343 (1977)—the case this Court relied upon in *IMG Worldwide*—the Supreme Court expressly held that an association has standing to bring suit on behalf of its members only when the claim asserted or the relief requested does not require participation of individual members in the lawsuit. While the fraudulent transfer claim in *IMG Worldwide* did not require any such individual input, here OSIC

clearly seeks monetary damages for individuals, whose participation thus is essential. Because these tort claims seek “relief in damages for alleged injuries to its members,” *Warth v. Seldin*, 422 U.S. 490, 515 (1975), OSIC lacks associational standing to pursue the tort claims.

* * * * *

In sum, OSIC has failed to satisfy its jurisdictional standing burden because it has not demonstrated a proper assignment from the Receiver, is barred by SLUSA from representing investors or itself, and as an unincorporated association it lacks standing to seek monetary damages for its “members.”

II. THE MAJORITY OF OSIC’S CLAIMS ARE BARRED BY THE STATUTES OF LIMITATIONS

OSIC attempts to evade applicable statutes of limitations by arguing its claims are saved by an amalgam of exception theories: (1) relation back, (2) the discovery rule and (3) *American Pipe*. It is wrong on all counts.

A. Relation Back Does Not Apply to Intervenor Actions.

Contrary to OSIC’s argument, Response at 68-71, an *intervenor’s* complaint does not “relate back” to the Plaintiffs’ original filed complaint to determine commencement for purposes of the statute of limitations. Fifth Circuit law recognizes the “almost unanimous agreement among the district courts addressing the question: the filing of *the motion for* intervention . . . determines the commencement of the action for the purposes of the statute of limitations.” *United States v. Randall & Blake*, 817 F.2d 1188, 1192 (5th Cir. 1987) (emphasis added); *see also* 7C WRIGHT, MILLER & KANE, FEDERAL PRACTICE & PROCEDURE: CIVIL 3D § 1914. It is the filing date of the intervention that controls, and so it does not matter when the original complaint was filed.

Consistent with this Fifth Circuit rule, the text of Federal Rule of Civil Procedure 24, which governs intervention, *does not provide for* relation back. While “the explicit provisions for relation-back of amendments under Rule 15(c) and of substitutions of real parties in interest under Rule 17(a), demonstrate that Congress knew how to create such a mechanism when it so chose,” *Ceribelli v. Elghanayan*, No. 91-civ-3337, 1994 U.S. Dist. LEXIS 13681, *4-5 (S.D.N.Y. Sept. 28, 1994), Rule 24 contains no such provision. OSIC’s entire argument is based on the inapplicable Rule 15(c) although OSIC’s *intervention* is not an “amended” or “supplemental” pleading covered by Rule 15. The Fifth Circuit permits intervenors to “relate back” under Rule 15 only when they “relate” to the intervenor’s own prior pleadings, but not to pleadings filed by another party. *Randall & Blake*, 817 F.2d at 1191-92.

If the Court finds that Rule 24 somehow does permit relating back, OSIC nevertheless did not seek authorization in its Motion to Intervene to file the tort claims as Rule 24(c) requires. OSIC completely ignores TD’s argument that its Motion to Intervene on December 5, 2011 *did not assert any tort claims*. TD Mot. at 3. The tort claims did not appear until the filing of the IC in February 2013, and thus were not included or approved in the Court’s prior Order allowing intervention. The later unauthorized tort claims do not “relate back” to anything.

Manifest prejudice occurs when a defendant, protected from suit by expired limitations, suddenly finds that protection revoked. “There is nothing in the purpose of [Rule 24] which would countenance a situation in which claims, otherwise time-barred, could be resuscitated simply by virtue of the existence of another timely filed lawsuit with common questions of law or fact. Such a result would serve only to frustrate the salutary purpose of the statute of limitations to set stale claims at rest.” *Ceribelli*, 1994 U.S. Dist. LEXIS 13681, at *5.

B. The Discovery Rule Does Not Save OSIC's Claims.

1. The tort claims were not presented in the intervention motions.

OSIC contends that the discovery rule saves its tort claims because OSIC allegedly filed its Motion to Intervene before the discovery rule had run. Response at 71-75. But in more sleight-of-hand pleading, the dates relied on in OSIC's response are misleading. As noted above, when OSIC filed to intervene on December 5, 2011, its Motion to Intervene (and the attached proposed complaint) *did not include* the tort actions. Rule 24(c) specifically requires that motion to "state the grounds for intervention," together with a "pleading that sets out the claims . . ."

See Pin v. Texaco, Inc., 793 F.2d 1448, 1450 (5th Cir. 1986). Instead, OSIC did not assert any tort claims until it filed much later a *different* IC than the one attached to its Motion, without any leave of court or explanation for its earlier failure to include tort claims. TD Mot. at 3.

TD believed in good faith that intervention raised *only* fraudulent transfer claims and not time-barred torts, and had no notice that additional tort claims, several of which had never been raised before, would still be filed. If OSIC had sufficient knowledge in December 2011 to intervene, and believed it had standing to do so, it never explains why it did not include any torts in its intervention pleadings, or otherwise seek to preserve them.

To the extent OSIC asserts tort assignments from the Receiver, OSIC never discloses which claims come from the Receiver via assignment, and which claims are its "own." OSIC does not contest that an assignee stands in the shoes of the assignor for statute of limitations purposes, *see* TD Mot. at 10. The Receiver was appointed more than two years before OSIC's creation, and the statute of limitations on his claims has certainly run. *See id.* This is yet another example of OSIC's "convenience" pleading, where it selects a convenient claim or a date or entity to promote a particular argument – an assignment – but ignores that same point where it inconveniently undermines a different OSIC argument – statutes of limitation.

Because the statutes have run on the Receiver's claims, and because OSIC failed to timely preserve claims on its own behalf – if any – these tort claims are time-barred.

2. The fraudulent transfer claims are not saved by TUFTA's "discovery" rule.

OSIC attempts further misdirection in arguing that its fraudulent transfer claims are within TUFTA's one-year discovery rule window. However, here OSIC misstates the applicable legal discovery standard when it asserts only that its claims were "certainly brought within one year of discovery." Response at 73 (emphasis in original). Rather, OSIC must know that TUFTA discovery runs either from one year after the transfers' fraudulent nature was discovered, *or when it reasonably could have been discovered*. See *Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d at 195. In this multi-district litigation, the Fifth Circuit has now fixed the reasonable discovery date for fraudulent transfers as August 27, 2009, based on James Davis's guilty plea. See *id.* at 197-98. OSIC argues without explanation that somehow that date does not control its fraudulent transfer claims here, when actually it is the law of the case on this point.

OSIC's assertion that it could not have reasonably discovered the "facts" underlying its claims against TD until the Stanford criminal trial is demonstrably implausible. The Davis plea publicly disclosed the entire Ponzi scheme in August 2009, even if it is not "the" date fixed by the Fifth Circuit. And OSIC fails to identify in any allegation "new" information it supposedly "discovered" about TD in the criminal trial, as TD was barely mentioned there. Instead, the few "specific" allegations about transfers involving TD in the IC are lifted, nearly verbatim, from an affidavit by Karyl Van Tassel that was publicly filed *by the Receiver* on July 28, 2009, a month before the Davis guilty plea. Compare IC ¶ 52, with Aff. of Karyl Van Tassel, *Janvey v. Alguire*, No: 3:09-cv-724, July 28, 2009 [ECF 18], at ¶ 54 ["Van Tassel Aff."]. That Affidavit itself was

based on documents provided to the Receiver by TD in 2009 and 2010, Van Tassel Aff., ¶ 6, which documents were also available to OSIC since at least OSIC's creation. OSIC's incomplete and ambiguous assertions about its so-called "discovery" of fraudulent transfers cannot possibly override the Fifth Circuit's specific application of the TUFTA discovery rule in *Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d at 195, or the other readily available public information.

Lastly, TD argued that OSIC had actual knowledge of the "fraudulent nature" of the transfers through its counsel in the present case, as well as its sitting committee members. *See* TD Mot. at 10-11. OSIC claims that the knowledge an agent obtains before entering into the agency relationship cannot be imputed to the principal. Response at 74. But the Texas Supreme Court long ago confirmed that "where the agent is the actor (sometimes designated sole actor), representing his principal in the transaction *to which his knowledge relates*, the principal will not be permitted to avail himself of the benefits of his agent's services without being charged with his knowledge." *Wellington Oil Co. of Delaware v. Maffi*, 136 Tex. 201, 207-08 (Tex. 1941) (emphasis added) ("A rule which would permit a principal to profit by a transaction of his agent without at the same time charging him with relevant knowledge possessed by his agent at the very time he carried on the negotiations would be, to our minds, indefensible."). Additionally, counsel here is more than a mere "agent." On the date of OSIC's creation, he became a principal of OSIC, so from at least that date, his principal knowledge must be imputed to OSIC, even if the rest of the Committee somehow was "unaware" of the 2009 filing of the *Rotstain* case, or the Davis guilty plea or the entire Stanford MDL proceedings.

For all these reasons, the inescapable conclusion is that OSIC could reasonably have discovered the allegedly fraudulent nature of the TUFTA transfers from at least OSIC's

inception. The Fifth Circuit decision and the pleadings here establish that while OSIC had this knowledge since August 2010, it waited to file its claims until December 2011, and exceeded TUFTA's one year discovery rule.

C. *American Pipe Is Inapplicable To The Tort Claims.*

In yet another futile effort, OSIC claims – conveniently – that this time it represents the Stanford investors and not the Receiver estate, so it “should benefit from the tolling of the class claims under *American Pipe*.” Response at 76. *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538, 554 (1974), stands for the proposition that “the filing of a class action tolls the running of a statute of limitations for ‘all asserted *members of the class*.’” *Hall v. Variable Annuity Life Ins. Co.*, 727 F.3d 372, 375 (5th Cir. 2013) (quoting *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345, 350 (1983)) (emphasis added). Thus, if the case is later dismissed, or a class not certified, those individuals may file new actions and receive certain benefits of tolling. *Id.* The purpose of this Rule is to avoid the need for putative class members to file multiple actions to protect their rights while class certification is pending, *Crown, Cork & Seal Co., Inc.*, 462 U.S. at 349. It is not intended to permit non-class members to intervene *prior* to any decision on class status.

Here, OSIC *is not a member of the class*. It did not exist during the Stanford fraud and it invested no funds in the Ponzi scheme. The Receiver likewise is not a class member, so he cannot assign class membership. OSIC is simply an unincorporated association that lacks standing to pursue monetary damage claims on behalf of investors, as demonstrated in TD's Motion at 20-21, but not refuted in OSIC's Response. To the extent that the *investors* OSIC purports to represent are already putative class members, they may be entitled to *American Pipe* protection if their case is later dismissed, but that is premature. Moreover, OSIC failed to allege

a Rule 23 class action in its IC, as it must do, *see* TD Mot. at 21 n.12, so OSIC's claim to represent any class is murky.

* * * * *

In sum, the Fifth Circuit fixed James Davis's guilty plea on August 27, 2009 as providing reasonable notice of the fraudulent nature of the Stanford related transactions and entities. OSIC provides no reasons why that decision does not control here. There were also years of public reports of Stanford's fraud as well as the fraud-based actions filed in this MDL. Because OSIC's charter took effect on August 10, 2010, it was that date, *at the very latest*, from which it had notice and from which any discovery-like extensions began to run. For ease of reference, TD has attached, as Exhibit 1, a chart demonstrating the applicable statutes of limitation as to each claim.

Accordingly, the Court should dismiss on statute of limitations grounds the conversion and civil conspiracy claims, and limit the fraudulent transfer claims – if any remain – to transfers occurring after December 5, 2007, or four years from the date of intervention.

III. OSIC HAS FAILED TO ESTABLISH ANY FRAUDULENT TRANSFERS

A. The Debtor Was Not A Transferor To TD.

TUFTA requires that a “debtor” – here the Stanford entities – make a “transfer” to a third party. TEX. BUS. & COMM. CODE § 24.005(a)(1)-(2); § 24.006(a). TD argued in its Motion at 11-12 that the debtor did *not* make any transfers to TD. Rather, looking to OSIC's own allegations, funds were sent *to* Stanford accounts at TD by CD *investors*, or funds were later sent *out* of Stanford accounts at TD to third parties. *Id.* TUFTA does not apply in either circumstance because no funds were transferred to TD by Stanford.

OSIC's Response simply ignores this argument. But the absence of this required statutory element dooms the claim because *there was no transfer by the debtor* to TD. Thus, TUFTA simply does not apply, and these claims must fail as a matter of law.

B. TD Was Not A TUFTA “Transferee” Of The Debtor.

TD in its Motion also argued that even if somehow the debtor did make a “transfer,” banks are mere conduits – and not “transferees” – under well established and uncontroversial federal and Texas law. TD Mot. at 12-15. OSIC now concedes this point, as it must: “The Committee does not assert avoidance claims against the Banks for funds transferred by the Stanford entities or CD investors into Stanford Entity accounts maintained by the bank.” Response at 43. Of course, nowhere in the IC did OSIC actually limit its claims in this way, so ~~this concession is most welcome.~~

Instead, OSIC now says that it is entitled to avoid and recover “only . . . the *bank fees* paid by the Stanford Entities to the [Banks].” Response at 43 (emphasis in original). OSIC claims that TD’s attempt, “without citing any authority,” to include the fees in the conduit transactions “defies reason.” *Id.* It is OSIC, once again, whose arguments “defy reason.”

TD actually did cite two specific cases so applying the conduit theory. OSIC conveniently ignores *Matter of Coutee*, 984 F.2d 138, 141 (5th Cir. 1993), discussed in TD’s Motion at 13-14. *Coutee* adopted the conduit theory in the Fifth Circuit, and specifically noted the inclusion of fees. *See id.* at 140. The court said that of the \$48,000 at issue, some 25% of it was paid in fees to the conduit law firm, *id.* at 140 n.1. It then went on to hold that the law firm’s role as a conduit was to accept funds, deposit the money in trust, “*keep as fees*” what the client agreed to, and pay the balance to the directed third party. *Id.* at 141 (emphasis added). The Fifth Circuit unmistakably included fees in the conduit transaction, and the entire \$48,000 was exempted.

When Texas courts specifically adopted the conduit theory under TUFTA, *Newsome v. Charter Bank Colonial*, 940 S.W.2d 157, 165 (Tex. App. 1996), *writ denied*, *see* TD Mot. at 14, the court relied on *Coutee* and likewise did not bifurcate the bank’s fees from the conduit

transaction. Rather, the court said that “[b]ecause we hold that the bank was not a transferee, there was no transfer giving rise to liability.” *Id.* at 165 (emphasis added). TD in fact cited six cases from Texas federal or state courts, TD Mot. at 12-16, that applied the conduit theory, and not one of them separated the fees from the transactions. Further research has revealed no such case in Texas or applying Texas law.

So it is OSIC that has failed to cite a single case in support of its position. It is implausible to believe, were OSIC’s position correct, that in the 25 years since *Bonded Financial Services* first applied the conduit theory, untold Receivers and creditors simply left fees on the table and walked away. Rather, courts have carefully included fees because to hold otherwise negates the very purpose of the theory and puts the conduit right back in the center of the action it just exited. If the transaction is TUFTA exempt under the conduit theory, then so are the fees connected to that transaction. The Fifth Circuit confirmed this in *Coutee*, Texas courts concurred in *Newsome*, and no Texas decision has held to the contrary. All correspondent banking transactions, including fees, must be dismissed from this case.

IV. OSIC FAILS TO PLEAD THE TORT CLAIMS WITH SUFFICIENT PARTICULARITY

Finally, even if OSIC has standing to pursue tort claims that were not approved by the Court and are not time-barred, this Court must dismiss because the IC fails to satisfy the necessary pleading standards. TD’s Motion set forth these deficiencies, *see* TD Mot. at 26-33. In short, each tort action requires that OSIC plead with particularity that TD had actual knowledge of Stanford’s fraud and *substantially assisted it*. *See id.*; *Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996); *Schlumberger Well Surveying Corp. v. Nortex Oil and Gas Corp.*, 435 S.W.2d 854, 857 (Tex. 1968). Indeed, OSIC concedes that each claim requires actual

knowledge. *See* Response at 82, 89, 93, and 99.⁵ Moreover, because each of these tort actions sound in fraud, OSIC must also satisfy Rule 9(b)'s heightened pleading standards. *Newby v. Enron Corp. (In re Enron Corp. Sec.)*, 623 F. Supp. 2d 798, 811 n.11 (S.D. Tex. 2009).

Measured against these heightened pleading standards, OSIC fails to meet its burden. As noted throughout TD's motion, OSIC never makes a single specific allegation regarding the "who, what, when, where and how" required to provide notice to defendants. *See Carroll v. Fort James Corp.*, 470 F.3d 1171, 1174 (5th Cir. 2006). Rather, OSIC reverts to the discredited "group" pleading doctrine. *See Biliouris v. Sundance Res., Inc.*, 559 F. Supp. 2d 733, 736 (N.D. Tex. 2008) (Godbey, J.); *Newby v. Enron Corp. (In re Enron Corp. Sec.)*, 761 F. Supp. 2d 504, 570 (S.D. Tex. 2011). OSIC's myriad allegations about what "all the Defendants" knew is wholly inadequate to satisfy fraud or plausibility standards. *See, e.g.*, IC ¶¶ 46-47, 53-54, 65-69, 89, 91, 94, 99. OSIC's group allegations are more deficient than is typical in group pleading cases, because the "group" usually consists of a single company and its own management or other insiders. *See, e.g., Biliouris*, 559 F. Supp. 2d at 736. In this case, the "group" consists of five separate corporate entities. These entities are located in different countries, do not have overlapping ownership or management, and are not even alleged to have had any communications among them, let alone a "meeting of the minds." *See Newby*, 761 F. Supp. 2d at 570 (rejecting allegations against financial institutions as a group because "[i]t is impermissible under Rule 9(b) to make general allegations that lump all defendants together").

⁵ This concession on the relevant standard includes OSIC's action for aiding-and-abetting fraudulent transfers, *see* Response at 82, if that is indeed a valid cause of action in Texas. As TD argued in its Motion, the Fifth Circuit and this Court have held that Texas's fraudulent transfer statutes (both pre-and-post enactment of TUFTA) do not create personal liability for third parties or co-conspirators beyond amounts actually transferred to them. *See* TD Mot. at 16-18 (citing *Mack v. Newton*, 737 F.2d 1343, 1361 (5th Cir. 1984), *In re Mortg. Am. Corp.*, 714 F.2d 1266, 1272 (5th Cir. 1983), and *FDIC v. White*, No. 3:96-cv-560, 1998 U.S. Dist. LEXIS 3020, *6-7 (N.D. Tex. Mar. 5, 1998)). In fact, while OSIC argues that *Mack v. Newton* and *In re Mortg. Am. Corp.* are "inapposite because, among other reasons, these cases were decided before TUFTA was enacted in 1987," Response at 84 n.37, OSIC ignores *FDIC v. White*, where this Court specifically rejected that distinction. *See FDIC*, 1998 U.S. Dist. LEXIS 3020, at *7.

OSIC is thus left asserting in its Response that the following “facts,” alleged *collectively* against TD, HSBC, BoH, and Trustmark, demonstrate each bank’s actual knowledge: that the “Banks” knew that Stanford CDs yielded high returns, that government agencies issued “warnings” about Antigua banks 10 years earlier (which warnings, OSIC neglects to acknowledge, were *withdrawn* shortly thereafter), that the Banks were required to conduct unspecified due diligence on their customers, and that the Banks engaged in transactions with the Stanford entities under “highly suspicious circumstances” that OSIC never explains, other than to note that Stanford often transferred money to other Stanford accounts, which is not *per se* illegal or suspicious. *See* Response at 90-91. None of these “facts”—even if they were specific to TD—remotely demonstrates TD’s actual knowledge that Stanford was running a Ponzi scheme, or shows any improper assistance to the scheme, or any agreements with other banks to participate in or cover up the scheme.

OSIC’s cited cases do not help it. *See* Response at 90-94. In *Wight v. BankAmerica Corp.*, 219 F.3d 79, 92 (2d Cir. 2000) the Second Circuit found allegations of knowledge sufficient based on *testimonial admissions of knowledge* by the defendant’s own employees in sworn depositions. The employees testified that they knew their customer was cycling money through shell companies for an unknown business purpose, that two employees discussed that the customer might be using the bank to launder money, and that they “continued to cycle money for [their customer] for two years after it knew the Bank was involved in money laundering.” *Id.* OSIC asserts no such admissions by TD or its employees and makes no specific allegations against TD.

Likewise, in *Metz v. Unizan Bank*, No. 5:05-cv-1510, 2008 WL 2017574, at *18 (N.D. Ohio May 7, 2008) a district court found sufficient allegations that the Bank opened accounts

without corporate authorizations, based upon facially-invalid documentation. It applied *Ohio law*, which requires only “a minimal showing of knowledge.” *Id.*⁶ Not only has OSIC failed to plead such specific deficiencies, but *Texas law* clearly requires a much higher standard of knowledge. *See Schlumberger Well Surveying Corp.*, 435 S.W.2d 854, 857 (holding that facts showing the defendant could have discovered the conspiracy *by the slightest degree of diligence* was not enough to show actual knowledge).

OSIC next cites this Court’s recent decision in *Janvey v. Adams & Reese*, No. 3:12-cv-495, at *17-18 (N.D. Tex. Sept. 11, 2013) [ECF 58] for the proposition that allegations of “red flags” sufficiently plead actual knowledge. Response at 94. But that case involved conspiracy claims against *directors* of Stanford Trust Company (“STC”), who owed *fiduciary duties* to the estate, and those “red flags” demonstrated far more specific information against defendants who were themselves directly involved in the actual Stanford operations. The allegations included that the directors knew STC had an “incestuous” relationship with other Stanford entities; STC engaged in self-dealing in SIB CDs; that other Stanford entities were under investigation; and that STC *itself* “was under repeated investigation.” *See id.* at *18. STC directors also “came in contact with the directors for SFC and Stanford himself regularly.” *Id.*

By contrast, here OSIC does not allege that TD owed fiduciary duties to Stanford Entities or anyone else. It does not allege any self-dealing, or that anyone at TD had regular contact with Allen Stanford, or that anyone at TD knew the Stanford entities were under repeated investigation. TD was located in Canada, was regulated by different authorities, and it is not alleged that anyone at TD even *met* Allen Stanford. In these circumstances, there are no

⁶ In *Metz*, the court then went on to *dismiss the claims* after finding that allegations that the banks opened accounts and processed transactions for the wrongdoer were insufficient to show substantial assistance. *See* 2008 WL 2017574, at *19.

plausible “red flags” that remotely satisfy Texas law requiring actual knowledge of, and overt assistance to, an illegal scheme.

V. INCORPORATION OF ARGUMENTS BY CO-DEFENDANT BANKS

All of the Banks sued in this case are filing replies in support of their Motions to Dismiss. In order to avoid duplication and redundancy, TD here incorporates by reference the arguments and authorities asserted in those replies as additional grounds for dismissal.

CONCLUSION

~~The fraudulent transfer claims must be dismissed because the transactions of conduit~~
banks such as TD – including related fees – are not subject to TUFTA.

The tort claims must be dismissed because (a) they were not timely filed or authorized pursuant to Rule 24; (b) OSIC lacks standing to bring tort claims; (c) none of the tort claims meet the required particularity and plausibility standards. This case is nothing more than an expedition fishing for deep pockets and it must be dismissed.

Dated: December 4, 2013

Respectfully submitted,

/s/ Robert Plotkin

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of December 2013, I electronically filed the foregoing with the Clerk of the District Court using the CM/ECF system, which sent notification of such filing to all counsel of record.

/s/ Robert Plotkin
Robert Plotkin

Exhibit 1: OSIC's Claims and Applicable Statutes of Limitations

<i>Claim</i>	<i>Claim Assigned to OSIC?</i>	<i>Statute of Limitations</i>	<i>Date First Pleaded by OSIC</i>	<i>Application of Statute to Receiver</i>	<i>Application of Statute to OSIC</i>
Fraudulent Transfer (Count I)	? Not specified	Within 4 years of transfer or 1-year of discovery of fraudulent nature (August 27, 2009). ¹	Rule 24 Motion to Intervene: Dec. 5, 2011	Exclude all transfers occurring prior to Dec. 5, 2007 (<i>i.e.</i> , 4 years before filing of Motion to Intervene).	Exclude all transfers occurring prior to Dec. 5, 2007 (<i>i.e.</i> , 4 years before filing of Motion to Intervene).
Aiding, Abetting, or Participation in Fraudulent Transfers (Count II)	? Not specified	Within 4 years of transfer or 1-year of discovery of fraudulent nature (August 27, 2009). ²	Intervenor Complaint ("IC"): Feb. 15, 2013 [Not in Rule 24 Motion]	Exclude all transfers occurring prior to Feb. 15, 2009 (<i>i.e.</i> , 4 years before filing of IC).	Exclude all transfers occurring prior to Feb. 15, 2009 (<i>i.e.</i> , 4 years before filing of IC).
Aiding, Abetting, or Participation in a Fraudulent Scheme (Count III)	? Not specified	4 years ³	IC: Feb. 15, 2013 [Not in Rule 24 Motion]	If a valid claim, this claim may be timely.	If a valid claim, this claim may be timely.
Aiding, Abetting, or Participation in Conversion (Count IV)	? Not specified	2 years ⁴	IC: Feb. 15, 2013 [Not in Rule 24 Motion]	Statute expired on August 27, 2011 (2 years from James Davis Plea)	Statute expired on August 10, 2012 (2 years from OSIC formation).
Civil Conspiracy (Count V)	? Not specified	2 years ⁵	IC: Feb. 15, 2013 [Not in Rule 24 Motion]	Statute expired on August 27, 2011 (2 years from James Davis Plea)	Statute expired on August 10, 2012 (2 years from OSIC formation).

¹ See TEX. BUS. & COMM. CODE § 24.010; *Janvey v. Democratic Senatorial Campaign Comm., Inc.*, 712 F.3d 185, 195 (5th Cir. 2013).
² If this is a valid cause of action in Texas, it would be subject to—at latest—the same statute of repose as the underlying fraudulent transfers. *Cf. Thomas v. Barton Lodge II, Ltd.*, 174 F.3d 636, 647 (5th Cir. 1999) (holding the statute of limitations for a derivative claim is the same as the underlying claim).
³ If this is a valid cause of action in Texas, it would be subject to the same statute as fraud, or four years. See TEX. CIV. PRAC. & REM. CODE § 16.004.
⁴ If this is a valid cause of action in Texas, it would be subject to the same statute as conversion, or two years. See TEX. CIV. PRAC. & REM. CODE § 16.003.
⁵ TEX. CIV. PRAC. & REM. CODE § 16.003.