UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERT J. DARTEZ, LLC ET. AL.	§	
vs.	§	**CIVIL ACTION NO. _________**
THE UNITED STATES OF AMERICA	§	
Defendant	§	

PLAINTIFFS' ORIGINAL COMPLAINT - FEDERAL TORT CLAIMS ACT

This complaint is filed on behalf of the plaintiffs listed below, who, because of the negligence and misconduct of employees of the United States Securities and Exchange Commission ("SEC"), lost their investments in Stanford International Bank, Ltd ("SIBL"). The SEC employees were at all times material acting within the scope and course of their offices and employment, and under circumstances in which their employer, the United States, if a private person, would be liable to the plaintiffs in accordance with the law of the place where their acts or omissions occurred. SIBL and its affiliated or related companies, including Stanford Group Company (SFG), were known at all times material by the SEC to be participants in a massive Ponzi scheme, and the SEC, which has a mandate to protect the public interest, in this case had both the authority and the duty to put an end to this scheme. But for the negligent acts and omissions, misconduct, and breaches of duty by Spencer Barasch, a former SEC regional Enforcement Director, the negligent supervision of Barasch by his SEC supervisors, and other inexcusable acts of negligence by SEC employees, the plaintiffs would not have made, and lost, their SIBL investments, as the following facts, and admissions by the SEC, show:

I. PARTIES

1.

The Plaintiffs herein are as follows:

- Plaintiff Robert Juan Dartez, LLC, is a Louisiana LLC that has its principal place of business in Lafayette, Louisiana.
- Plaintiff David B. Sturlese is a citizen of the United States of America residing in Lafayette, Louisiana.
- Plaintiff Cynthia R. Dore is a citizen of the United States of America residing in Lafayette, Louisiana and Houston, Texas.
- Plaintiff Robert Hollier is a citizen of the United States of America residing in Opelousas, Louisiana.
- Plaintiff Randolph J. Hebert is a citizen of the United States of America residing in Lafayette, Louisiana.
- Plaintiffs Michael R. Robicheaux and Cheryl T. Robicheaux are citizens of the United States of America residing in Breaux Bridge, Louisiana.
- Plaintiff Brittany Robicheaux is a citizen of the United States of America residing in Breaux Bridge, Louisiana.
- Plaintiff Hollam Pinnacle Group, LLC is a Delaware LLC with its principal place of business located in Opelousas, Louisiana.

2.

The Defendant is the United States of America.

II. JURISDICTION AND VENUE

3.

This Court has jurisdiction under the Federal Tort Claims Act, 28 U.S.C. 2671 *et seq.* and 28 U.S.C. 1346(b). Pursuant to 28 U.S.C. § 2675(a), each of the plaintiffs filed administrative claims with the SEC, and more than six months has elapsed, with no response, from the filing of these claims.

4.

Venue is proper, under 28 U.S.C. 1402, as this is the district wherein the acts or omissions complained of occurred.

II. SUMMARY

5.

In February, 2009, the SEC filed an action in the U.S. District Court for the Northern District of Texas, alleging that Robert Allen Stanford and his companies (collectively, "Stanford") orchestrated an $8 billion fraud that was based on false promises of guaranteed returns related to so-called "certificates of deposit" ("CDs") issued by the Antiguan-based SIBL. OIG Report p. 1.[1] The SEC later filed an amended complaint against Stanford further alleging that Stanford was conducting a Ponzi scheme. *Idem*.

6.

The Court found that the Stanford fraud was a Ponzi scheme. *See* Case No. 3:09-

[1] References to "OIG Report" are to the March 31, 2010 Report by the SEC Office of Inspector General ("OIG") titled "Investigation of the SEC's Response to Concerns Regarding Robert Allen Stanford's Alleged Ponzi Scheme." References to exhibits herein are to OIG exhibits.

CV-0724-N, Doc. 456 at 2 ("The Stanford scheme operated as a classic Ponzi scheme, paying dividends to early investors with funds brought in from later investors."), at 11 ("[T]he Receiver presents ample evidence that the Stanford scheme . . . was a Ponzi scheme."), and at 13 ("The Court finds that the Stanford enterprise operated as a Ponzi scheme . . ."). In an opinion filed on December 15, 2010, the Fifth Circuit upheld the Court's findings that the Stanford fraud was a Ponzi scheme. *See Janvey v. Alguire*, No. 10-10617, 2010 WL 5095506, at 1, 17 (5th Cir. December 15, 2010). In particular, the Fifth Circuit made several rulings on the nature of the Stanford fraud, as follows:

We find that the district court did not err in finding that the Stanford enterprise operated as a Ponzi scheme.
***

The Davis Plea and the Van Tassel Declarations provide sufficient evidence to support a conclusion that there is a substantial likelihood of success on the merits that the Stanford enterprise operated as a Ponzi scheme. . . . The Davis Plea, when read as a whole, provides sufficient evidence for the district court to assume that the Stanford enterprise constituted a Ponzi scheme *ab initio*.
***
The Receiver carried his burden of proving that he is likely to succeed in his prima facie case by providing sufficient evidence that a Ponzi scheme existed . . .
***
Here, the Receiver provided evidence of a massive Ponzi scheme.
Id. at 9-13.

7.

On March 31, 2010, the SEC Office of Inspector General (OIG) issued a report of its investigation of the SEC's response to Stanford. The OIG investigation found that the SEC's Fort Worth office ("FWDO") had been aware since 1997 - only two years after Stanford Group Company ("SGC") registered with the SEC - that Stanford likely was operating a Ponzi scheme. OIG Report at 16. The OIG found that between 1997 and 2005, the SEC's Fort Worth Examination group conducted four examinations of

Stanford, in 1997-1998, 2002, 2003, and 2004-2005, "finding in each examination that the CDs could not have been 'legitimate,' and that it was 'highly unlikely' that the returns Stanford claimed to generate could have been achieved with the purported conservative investment approach." OIG Report at 149. Thus, the Examination group determined on four separate occasions that Stanford was operating a Ponzi scheme. "The only significant difference in the Examination group's findings over the years was that the potential fraud grew exponentially…" OIG Report at 16. On September 22, 2010, the Unites States Senate banking Committee took testimony from Mr. David Kotz, the SEC Inspector General, which included, *inter alia*, the following sworn testimony:

In summary, our report concluded that the SEC's Fort Worth Office was aware since 1997 that Stanford was likely operating a Ponzi scheme after conducting examination after examination for a period of eight years, but merely watched the alleged fraud grow and failed to take any action to stop it.

8.

After each examination, the Fort Worth Examination group urged the Fort Worth Enforcement program ("Enforcement") to open and conduct an investigation of Stanford. Despite these efforts and the growing evidence that Stanford was perpetrating a fraud, Enforcement made **"no meaningful effort"** to investigate the potential fraud or to bring an action to attempt to stop it until late 2005. OIG Report at 16. The SEC negligently failed to supervise Barasch's performance. Moreover, after Barasch left the SEC in March 2005, the SEC negligently continued to fail to investigate Stanford. As a result of this negligence, Stanford was able to continue to operate more than ten years after the SEC had identified that Stanford was operating a Ponzi scheme. The OIG further concluded that Barasch improperly "sought to represent Stanford on three separate

occasions after he left the SEC, and represented Stanford briefly in 2006 before he was informed by the SEC Ethics Office that it was improper to do so." OIG Report at 27.

III. FACTUAL BACKGROUND

9.

The OIG report concluded that Spencer Barasch, the former FWDO head of Enforcement, played a significant role in multiple decisions over the years to **"quash"** investigations of Stanford. OIG Report at 151. Mr. Barasch was the FWDO Enforcement Director who received examination staff referrals on Stanford from 1998 to April 2005. In his capacity as the Enforcement Director, Spencer Barasch had the decision-making authority to act on - and the power to undermine - referrals concerning SIBL from the Examination staff. Barasch refused to open investigations of Stanford despite repeated recommendations from the Examination group, and multiple letters from Stanford investors and former employees reporting fraud. On several occasions, Barasch informed his staff that it was not necessary for the SEC to open an investigation of Stanford because he had forwarded the SEC examination results or letters of complaint to other regulatory agencies. During the OIG investigation, Barasch offered similar assertions that he had informed other regulatory agencies about the potential fraud. In fact, the OIG found no evidence that he made any such reports. His conduct distorted and delayed the process of proper enforcement action against SIBL long after he left the SEC in March, 2005, such that the SEC did not stop the Ponzi scheme until February 2009.

10.

The FWDO Examination group conducted four examinations of Stanford and, after each investigation, recommended to Enforcement that it conduct an investigation of

potential fraud. While Barasch was at the FWDO, he rejected these recommendations. In sum, Enforcement failed to investigate Stanford on the following occasions:

- In 1998, Barasch opened a brief inquiry into Stanford, but then closed it after only 3 months, when Stanford failed to produce documents in response to a voluntary document request from the SEC.
- In 2002, Barasch opened no investigation even after the examiners specifically identified multiple violations of securities laws by Stanford in an examination report.
- In 2003, after receiving three separate complaint letters about Stanford's operations, Barasch did not open an investigation or even an inquiry, and did not follow up to obtain more information about the complaints.
- In 2005, in response to a detailed report outlining evidence of a potential fraud, Barasch indicated that he was not interested in opening an investigation of Stanford.

These examinations and Enforcement's refusal to investigate the matter are discussed in detail below.

The SEC First Investigates Stanford in 1997 and 1998[2]

11.

In 1997, the SEC conducted its first examination of Stanford and determined that Stanford likely was running a Ponzi scheme. Julie Preuitt, then a branch chief in the FWDO Broker-Dealer Examination group, reviewed Stanford's annual audit reports and observed that Stanford had "gone from very little revenue to an incredible amount of revenue in" only two years. OIG Report at 30. Based on this "extraordinary" revenue, Preuitt suspected that Stanford's CD sales were fraudulent and, accordingly, opened an

[2] OIG Report at 29-46.

examination of Stanford. OIG Report at 30.

12.

The Examination observed that Stanford described its investment strategy as low risk, but that its above-market returns were inconsistent with a conservative investment approach. Preuitt reviewed the examination results and concluded that Stanford was not selling legitimate CDs, as did other SEC Examiners. OIG at 30-32. Consequently, "[t]he 1997 Examination Report concluded that an investigation of Stanford for violations of Rule 10b-5 was warranted" and referred the Stanford matter to Enforcement in September 1997. OIG Report at 33.

13.

Eight months later, in May 1998, Enforcement finally opened a Matter Under Inquiry ("MUI")). The SEC requested that Stanford produce documents. Outside counsel for SGC responded to the SEC's request for documents, refusing to produce many of the requested documents. The OIG found no evidence that the SEC made further efforts to investigate this matter after receiving this refusal from SGC. OIG Report at 36. In August 1998, Barasch closed the Stanford investigation. OIG Report at 37.

14.

Barasch proffered several purported justifications for the decision to close the MUI. Barasch told the OIG that he had "a very specific recollection" that he reviewed the Stanford investigation when he became the Assistant District Administrator for the FWDO Enforcement Group in mid-1998. OIG Report at 37. Barasch told the OIG that he recalled deciding to close the Stanford MUI and to refer the Stanford matter to the

National Association of Securities Dealers ("NASD"). OIG Report at 37. The OIG, however, found no evidence that Barasch referred the investigation the NASD. OIG Report at 37 n.18.

15.

Purportedly, the matter was closed because (1) the Stanford fund at that time involved only a limited number of U.S., as opposed to foreign, investors, and (2) the SEC believed it would be difficult to subpoena documents from Antigua, where many of Stanford's documents were located. OIG Report at 38-39. Barasch informed the OIG that he called the SEC's Office of International Affairs ("OIA") and asked how hard it would be to get documents located in Antigua, and OIA responded that it would be "almost impossible." But the OIG found no evidence that any Enforcement staff contacted OIA or sought assistance or information about obtaining documents from Antigua before closing the 1998 Stanford MUI. Moreover, OIA staff has no record or recollection of any contact by the FWDO regarding Stanford before December 2004. OIG Report at 39.

16.

Preuitt suggested an alternative ground—and, on information and belief, the real reason—for the decision by Barasch to close the MUI. She informed that OIG that, in mid-2009, Barasch told her that he had relied on a representation from Wayne Secore, who had been the District Administrator of the FWDO in the 1980s, that the 1998 Stanford MUI should be closed. According to Preuitt, on a trip to New Orleans in mid-2009, Preuitt asked Barasch why he had not pursued an investigation of Stanford in 1998. Preuitt testified that **Barasch told her it was because "Wayne Secore had told him**

there was nothing there." OIG Report at 41.

17.

In an effort to influence regulators and prevent an investigation of Stanford, Allen Stanford hired individuals who had been federal regulators represent him. In 1998, Secore was one of Stanford's lawyers. Stanford also later hired a former head of the FINRA (Financial Industry Regulatory Authority – formerly the NASD) regional office, and another former SEC attorney. Barasch told OIG that he "vaguely" recalled Secore having represented Stanford, but he adamantly denied that Secore influenced his decision to close the Stanford MUI. Barasch told the OIG that he recalled discussing the Stanford case with Preuitt during their trip to New Orleans in mid-2009, and that Preuitt may have brought up the 1998 MUI in this conversation. Barasch, however, denied telling Preuitt that he closed the MUI because of a representation by Wayne Secore about Stanford, stating that "I would never have said that. . . . I would never accept an attorney's representation about anything. . . . [T]hat's absurd." OIG Report at 41. On information and belief, Mr. Barasch said what Ms. Preuitt says he said. His comment on "absurdity" shows his misconduct, in his own words.

The SEC Investigates Stanford in 2002[3]

18.

Between 1998 and 2002, Stanford's operations had grown significantly, and, in 2002, the SEC conducted a second examination of Stanford. Once again, the Examination found numerous red flags indicating that Stanford might be running a Ponzi

[3] OIG Report at 47-60.

scheme, including high returns that were inconsistent with legitimate investments and inadequate due diligence on investments.

19.

During the course of this Examination, the SEC received a letter (the "2002 Letter") from an accountant whose 75-year-old mother was an investor in Stanford, in which the accountant raised concerns similar to those raised by the Examination staff. OIG Report at 53. The SEC viewed these concerns as legitimate and a staff member drafted a response letter requesting additional information. OIG Report at 55. This response letter, however, was never sent. The staff member who drafted the response letter testified that he had been told that Barasch had decided to forward the 2002 Letter to the Texas State Securities Board ("TSSB"). According to a tracking report and a notation made on the response letter, the 2002 Letter was forwarded to the TSSB "per Barasch" on December 10, 2002. OIG Report at 56. This staff member indicated that he thought this decision was "puzzle[ing]" because he did not believe that the TSSB would have more authority to investigate this report than the SEC. OIG Report at 56. Indeed, an employee of the TSSB told the OIG that the SEC was the more appropriate body to investigate Stanford. OIG Report at 64.

20.

In December 2002, the Examination group referred the 2002 Examination to Enforcement staff. OIG Report at 57-59. On December 16, 2002, an enforcement staff attorney wrote in an email that before he learned of the investigation, "Spence [Barasch] had already referred it to the TSSB based on a complaint . . . . We decided to let the state continue to pursue the case." OIG Report at 57. Barasch stated that he did not recall why

he decided not to open an investigation based on the 2002 Letter or the Examination Report, and he further stated that he had never seen those documents. OIG Report at 59. The OIG investigation concluded that, “contrary to what the Examination staff was told, the Stanford matter was not referred to the TSSB; rather Barasch just decided not to pursue the matter.” OIG Report at 59. Denise Crawford, Texas State Securities Commissioner, told the OIG that the TSSB had searched its files and found no record of receiving the letter. OIG Report at 56. Crawford also stated that the TSSB regularly keeps records of letters it receives from the SEC and “the fact that the TSSB does not have a record of such a letter in their files would indicate that the TSSB never received such a letter from the SEC.” OIG Report at 56. Similarly, the SEC had no record of Barasch having referred the matter to the TSSB.

21.

During the OIG investigation, Barasch offered similar assertions to the investigators that he had informed other regulatory agencies about the potential fraud, including a claim that he had referred the Stanford matter to the national Association of Securities Dealers in 1998. In fact, the OIG found no evidence that he made any such reports. OIG Report p. 59.

The SEC Investigates Stanford in 2003[4]

22.

In 2003, the SEC received two letters from external agencies expressing concern that Stanford was running a Ponzi scheme. The first letter was sent to the TSSB in July

[4] OIG Report at 63-70.

2003 and then forwarded to the SEC in August 2003. A TSSB employee called Barasch upon receiving the July 2003 Letter because of the importance of the allegations. During this call, Barasch did not mention the 2002 Letter he supposedly had sent to the TSSB in 2002. OIG Report at 65. Barasch sent the July 2002 Letter to a branch chief in the Enforcement group.

23.

The second letter was sent to NASD in September 2003 and forwarded to the SEC in October 2003. The September 2003 Letter was written by Leyla Basagoitia Wydler, a former Stanford employee and included detailed allegations of fraud against Stanford. Specifically, the former employee wrote:

> STANFORD FINANCIAL IS THE SUBJECT OF A LINGERING CORPORATE FRAUD SCANDAL PERPETUATED AS A "MASSIVE PONZI SCHEME" THAT WILL DESTROY THE LIFE SAVINGS OF MANY, DAMAGE THE REPUTATION OF ALL ASSOCIATED PARTIES, RIDICULE SECURITIES AND BANKING AUTHORITIES, AND SHAME THE UNITED STATES OF AMERICA.

Ms. Wydler's letter detailed that the investors were being misled into believing that the CD's were safe because SFG was a U.S. regulated corporation – an unequivocal ground for SEC intervention, as the OIG report later noted. She correctly pointed out that Stanford International Bank Ltd. (SIBL) refused to produce verifiable portfolio appraisals, and was using investor money to make unsecured loans and purchases of "real estate" - means by which Allen Stanford is now alleged, in a federal criminal indictment, to have looted SIBL. She pointed out that SIBL had never been independently audited. She pointed out that Allen Stanford had been accused of bribery regarding the Antiguan government, which "regulated" SIBL - and he now stands so accused by the U.S.

government. She attached a copy of SIBL's 2000 and 2001 financial statements, now recognized by the DOJ to be part of a fraud scheme. SEC files clearly document Mr. Barasch's receipt and lack of meaningful action in response to this letter. Of course, he had been aware since 1997 that Stanford was a Ponzi scheme, and by this time knew that it was growing "exponentially," and continued to take no action. When confronted by OIG about the matter, Barasch "did not remember" it:

> "Barasch told the OIG that he did not recall seeing the anonymous September 1, 2003 complaint. Barasch Interview Tr. at 44-45..."

The SEC Investigates Stanford in 2004-2005[5]

24.

In October 2004, the Examination Staff initiated a fourth investigation "solely for the purpose of making another Enforcement referral." OIG Report at 70. In March, 2005, just prior to the departure of Barasch from the SEC, Victoria Prescott, a lawyer for the Examination staff, gave a presentation concerning Stanford to Barasch and other SEC personnel. OIG Report at 79. Barasch, according to Prescott, told her immediately after the presentation that pursuing Stanford "was not something they were interested in." OIG Report at 80. Prescott explained further:

> It was a very perfunctory conversation, and it was very -- it was not a matter for -- it was not up for discussion. I was being told. … And, you know, I just -- I felt a little bit – I don't know, I felt like I'd been put in an awkward position. … I had no idea what all had gone on, apparently, and here I though[t] I'd turned in a good piece of work and was talking about it to significant players in the regulatory community, and I no sooner sit down, shut up and the meeting ended, but then I got pulled aside and was told this has already been looked at and we're not going to do it."

[5] OIG Report at 70-95.

OIG Report at 80.

Barasch informed the OIG that he attended the March 2005 meeting, but he had no recollection of Prescott's presentation or their conversation. OIG Report at 80 n.60. Preuitt explained that the Examination staff "waited until after [Barasch] left to actually send over the enforcement memo" in order "to avoid a repeat of before." OIG Report at 80.

25.

Mr. Barasch left the SEC in April, 2005. Only two months later, on June 20, 2005, Barasch emailed the SEC stating that he had been "approached" to represent Stanford, and - incredibly - that he was "not aware" of any conflicts that might present. The OIG report goes on to detail Mr. Barasch's subsequent maneuverings and paid employment by Stanford. His statement that he was "not aware" of any conflict was patently false. His expeditious post-employment contact with Stanford, and his subsequent willingness to twist facts in an effort to circumvent conflict of interest prohibitions, indicate that his conduct regarding Stanford while at the SEC was affected by the prospect of employment, which he knew Stanford liked providing to former regulators. He did not refuse to act against Stanford solely for his own benefit, but his actions violated the SEC's formally enacted rules of conduct. When interviewed by OIG, Barasch made the following statement about his post-SEC employment with Stanford: "Every lawyer in Texas and beyond is going to get rich over this case. Okay? And I hated being on the sidelines." Barasch Interview at 61.

26.

Mr. Barasch's actions during the course of the OIG investigation bespeak his negligence and misconduct - and his present guilty knowledge. To OIG, Mr. Barasch falsely:

a. Claimed to have referred Stanford to the NASD; OIG Report p.37

b. Claimed to have called the Justice Department Office of International Affairs for assistance; OIG Report p.39

c. Denied his statements to Julie Prueitt about Wayne Secore; OIG Report p.41

d. Claimed he had referred Stanford to the Texas State Securities Board; OIG Report p.56

e. Pretended not to remember Leyla Basagoitia's fraud referral; OIG Report p.65

f. Pretended not to remember Prescott's detailed presentation of the Stanford fraud made to him as Enforcement director in March 2005, which was only 3 months before he sought to represent Stanford and claimed that he would not have a conflict of interest. OIG Report p. 80.

Mr. Barasch did not engage in these false statements and evasions for fear that an "exercise of discretion" would be exposed. Rather, he did so for fear that his unethical and willful neglect of duty and his actionable negligence would be exposed.

27.

The OIG Report summarized provisions from various sources of law that governed the conduct of the SEC and its employees, including the following provisions.

Conduct Regulation: The Commission's Regulation Concerning Conduct of Members and Employees and Former Members and Employees of the Commission (hereinafter "Conduct Regulation"), at 17 C.F.R. §§ 200.735-1 *et seq*., sets forth the standards of ethical conduct required of Commission members and current and former

employees of the SEC (hereinafter, referred to collectively as "employees").

The Conduct Regulation states in part:

> The Securities and Exchange Commission has been entrusted by Congress with the protection of the public interest in a highly significant area of our national economy. In view of the effect which Commission action frequently has on the general public, it is important that . . . employees . . . maintain unusually high standards of honesty, integrity, impartiality and conduct. 17 C.F.R. § 200.735-2.

Canons of Ethics: The Commission's staff has the obligation to continuously and diligently examine and investigate instances of securities fraud, as set forth in the Commission's Canons of Ethics. 17 C.F.R. §§ 200.50, *et seq*.

The Canons of Ethics state that "[i]t is characteristic of the administrative process that the Members of the Commission and their place in public opinion are affected by the advice and conduct of the staff, particularly the professional and executive employees." 17 C.F.R. § 200.51. Hence, "[i]t [is] the policy of the Commission to require that employees bear in mind the principles in the Canons." *Id*.

The Canons provide that "[i]n administering the law, members of this Commission should vigorously enforce compliance with the law by all persons affected thereby." 17 C.F.R. § 200.55.

The Canons acknowledge that Members of the Commission "are entrusted by various enactments of the Congress with powers and duties of great social and economic

significance to the American people," and that "[i]t is their task to regulate varied aspects of the American economy, within the limits prescribed by Congress, to insure that our private enterprise system serves the welfare of all citizens." 17 C.F.R. § 200.53. According to the Canons, "[t]heir success in this endeavor is a bulwark against possible abuses and injustice which, if left unchecked, might jeopardize the strength of our economic institutions." *Id.*

The Canons also affirm, "A member should not be swayed by partisan demands, public clamor or considerations of personal popularity or notoriety; so also he should be above fear of unjust criticism by anyone." 17 C.F.R. § 200.58. The Canons further state, "A member should not, by his conduct, permit the impression to prevail that any person can improperly influence him, or that any person unduly enjoys his favor or that he is affected in any way by the rank, position, prestige, or affluence of any person." 17 C.F.R. § 200.61.

Standard of Ethical Conduct for Employees of the Executive Branch: **T**he Standards of Ethical Conduct for Employees of the Executive Branch include the following general principles that apply to every federal employee:

> (1) Public service is a public trust, requiring employees to place loyalty to the Constitution, the laws and ethical principles above private gain.
>
> . . .
>
> (5) Employees shall put forth honest effort in the performance of their duties.
>
> . . .
>
> (14) Employees shall endeavor to avoid any actions creating the appearance that they are violating the law of the ethical standards set forth in this part. Whether particular circumstances create an appearance that the

> law or these standards have been violated shall be determined from the perspective of a reasonable person with knowledge of the relevant facts.

5 C.F.R. § 2635.101(b).

Conflicts-of-interest: As discussed above, federal conflict-of-interest laws impose on former government employees a lifetime ban on making a communication to or appearance before a federal agency or court "in connection with a particular matter – (A) in which the United Sates . . . is a party or has a direct and substantial interest, (B) in which the person participated personally and substantially as such officer or employee, and (C) which involved a specific party or specific parties at the time of such participation, shall be punished as provided in section 216 of this title. 18 U.S.C. § 207(a)(1).

In discussing when a person will be found to have participated personally and substantially in a matter, the regulations include the following example:

> A Government employee participated in internal agency deliberations concerning the merits of taking enforcement action against a company for certain trade practices. He left the Government before any charges were filed against the company for certain trade practices. He has participated in a particular matter involving specific parties and may not represent another person in connection with the ensuing administrative or judicial proceedings against the company.

Comment 1 to 5 C.F.R. § 2641.201(h)(4).

Clearly, the language above was included in the OIG Report to identify the conduct of Spencer Barasch as in breach of those regulations, conduct that the "discretionary function" exception to the Federal Tort Claims Act does not protect. It is unequivocally clear that the OIG investigation of the SEC's handling of Stanford found it to be distorted by misconduct, not merely by poor or even abusive exercises of Enforcement discretion.

The SEC's negligence continues after Barasch leaves office

28.

The SEC's negligence continued beyond the departure of Spencer Barasch. Stanford Group Company (SGC) had registered with the Commission as an investment adviser in September 1995, and as a broker-dealer in October 1995. *See* Exhibit 49 at 1; Exhibit 55 at 2. SGC was owned by Robert Allen Stanford, who also owned several affiliated companies, including SIBL, an offshore bank located in St. John's, Antigua, West Indies. Exhibit 49 at 1. Among other things, the OIG Report noted the following regarding FWDO's negligence:

> (Examiner 1) testified that one of his concerns about SGC that arose during the 1998 Examination was the complete lack of information SGC had regarding the CDs and the SIB investment portfolio that purportedly supported the CDs unusually high and consistent returns… "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[27] 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."
> Testimony Tr. at 41-44.

The OIG report concluded on this, referring to post-Barasch management:

> Most significantly, the Enforcement staff **did not even consider** bringing an action against Stanford under Section 206 of the Investment Advisers Act, which establishes federal fiduciary standards to govern the conduct of investment advisers. Such an action against SGC could have been brought for its *admitted* failure to conduct any due diligence regarding Stanford's investment portfolio based upon the complete lack of information produced by SGC regarding the SIB portfolio that supposedly generated the CDs returns. OIG Report, p. 24.

29.

An action under section 206, filed at any time between 1998 and February 16, 2011 (the SEC's horribly belated filing date), would have stopped the sales of the Stanford "certificates of deposit" in the United States - and completely prevented the plaintiffs' losses. Alternatively, the proper identification of the investments as securities at any such time, and a securities action, would likewise have stopped those sales, just as it did in 2009. As "Examiner 1" put it concerning his work in 1998 – eleven years before action was finally taken:

> My thought at the time was -- is that we've got SEC- registered entities selling an investment. ... My idea ... was ... that the enforcement staff would ... send out a voluntary request for information from the registered entities, we want information about what's happening to the money offshore, and probably they would not provide it. At that point, you get a formal order. Then you subpoena the information from those regulated entities. They say, we don't have it, we can't get it. At that point, now you can file a public subpoena enforcement action in a federal court and lay out all of your suspicions about those CDs for the entire world to know. **It would be about two weeks after that you found out whether there was a Ponzi [scheme] or not.** Testimony Tr. at 57.OIG Report p.104

This is basically what occurred when the SEC finally acted. Simple and direct – even easy - but Spencer Barasch didn't want to do it, for reasons of his own, and his successors just negligently missed the point. As the OIG Report put it:

> (1) a Section 206 claim would not have posed the jurisdictional question of whether the SIB CDs were securities; (2) SGC's lack of due diligence regarding its sales of the SIB CDs would have more easily supported a Section 206 fiduciary-based claim than a claim that those sales violated the NASD suitability rule; and (3) Section 206(2) has a lower scienter standard in which only a showing of negligence is necessary for a successful action. OIG Report p.118
>
> **Simply, the filing of such an action against SGC could have potentially given investors and prospective investors notice that the SEC considered SGC's sales of the CDs to be fraudulent. As a practical matter, many of Stanford's victims would not have purchased the CDs with such notice. Moreover, had the SEC successfully prosecuted such an action against SGC, SGC could have been permanently enjoined and barred from selling the CDs as an investment adviser. OIG Report p.109**
>
> **Had the SEC successfully prosecuted an injunctive action against SGC for violations of Section 206, an anti-fraud provision, it could have completely stopped the sales of the SIB CDs through the SGC investment adviser**. OIG Report p.116

30.

Katherine Addleman, Barasch's successor as Enforcement Director, admitted to OIG that she did not know SGC was a registered investment advisor, and that she had not even read the 2002 Examination report on Stanford. In her testimony during the OIG investigation, the following exchange took place:

> As noted above, Addleman was not aware that SGC was a registered investment adviser until her OIG testimony. During that testimony, Addleman testified regarding the missed opportunity to have filed a Section 206 action against SGC, in the following exchange:
>
> Q: ... [The examiners' Section] 206 argument was focused on the fact that the Investment Adviser in Houston would not provide them any information about ... what [SIB] was investing the proceeds in to generate these returns. And, in fact, affirmatively represented that they had no such information, alternatively saying that there was a prohibition in Antiguan bank secrecy laws that prevented SGC from getting that information and then secondly ... claiming there was a Chinese wall between the entities. And so the theory that they proposed in essence was that ... the investment

> adviser did not have enough due diligence to satisfy its fiduciary duty to its clients under either [Sections] 206(1) [or] 206(2). ... [D]o you have an opinion on the viability of that case?
>
> A: As I sit here, I have a bit of a pit in my stomach, because I wish I had known that. ... Adviser cases are always easier than broker-dealer cases because of the heightened fiduciary duty standard. And it always does give an alternative way to look at facts. If I knew that and I overlooked it, I apologize. If I didn't know it, I'm a little frustrated but.
>
> Q: But if you had known that at that time, would that have been a very good avenue to bring a case against Stanford under Section 206 of the Advisers Act?
>
> A: Well, I don't want to overstate it, but it would have been an alternative theory that has some potential, yeah.

Admirably, OIG was not satisfied with this response. The questioning continued:

> The OIG then asked Addleman to review the 2002 Examination Report. After reviewing that report, Addleman testified in the following exchange:
>
> Q: ... [D]o you have a sense of the viability or the potential for bringing a Section 206 case in order to get into court and if nothing else shut down the sale of the CDs by the Investment Adviser entity until they had adequate due diligence and perhaps through the civil discovery process ... obtain the evidence of a Ponzi scheme. Do you have an opinion about that?
>
> A: I do. I think that the issue when you're dealing with an adviser versus a broker-dealer here gives the ability to sort of add on that due diligence component .... [W]hen you put it in the fiduciary realm and you have, for example, the chart in here that shows the difference between what the U.S. CDs were paying and this purportedly Antiguan CD, there's reason to raise a red flag that would require additional fiduciary duties upon an adviser that wouldn't or might not be there with respect to a broker. *So, yes, I see that as a potentially straightforward way to have attempted to approach it.*
>
> *Addleman testimony* at 45-46. OIG Report p. 118 (emphasis in the original).

Clearly, Enforcement after Barasch was negligent in failing to recognize the availability and significance of a 206 action. It also failed to do the research necessary to properly

identify the "certificates of deposit" as securities. It didn't make an "executive decision" or a "policy decision" not to act – as a result of its negligence, it was incompetent to act.

31.

Belatedly, the SEC did an about face regarding Stanford. SIBL sold more than $1 billion in CDs per year between 2005 and 2007, including sales to U.S. investors. The bank's deposits increased from $3.8 billion in 2005, to $5 billion in 2006, and $6.7 billion in 2007. After the receivership action was finally filed in February 2009, a receivership order was promptly entered. The only intervening "fact" was the exposure of the Madoff fraud, and its attendant publicity. The OIG report notes that it was this publicity, not new facts, that moved the SEC to file an action against Stanford:

> The OIG found in its earlier report regarding the Stanford investigation as follows, "**Immediately after the revelations of the Madoff Ponzi scheme became public in December 2008, the Stanford investigation became more urgent for the FW[D]O** and, after ascertaining that the DOJ investigation was in its preliminary phase, the FW[D]O staff asked DOJ if it could move forward with the Stanford investigation." Report of Investigation, Case No. OIG-516, entitled "Investigation of Fort Worth Regional Office's Conduct of the Stanford Investigation" at 10. OIG Report p. 128

The reference to "DOJ" is in the report because by the time the Madoff fraud was exposed, the SEC had contacted the Department of Justice about Stanford. Urgency should be driven by duty, not by negative publicity.

32.

Further, in its recent conduct the SEC has shown additional guilty knowledge of its culpability. A member of the Senate Banking Committee conducted a hearing on Stanford in Baton Rouge in the summer of 2009, which many Stanford victims attended. Significantly, at that point in time the extent of the SEC's involvement was not known to the victims. At the hearing, the then-director of the SEC's FWDO (her departure from the

SEC was announced on March 9, 2011) gave a prepared statement, purportedly to inform the victims about the SEC's involvement. Incredibly, the statement begins and ends without any acknowledgement of the SEC's awareness of the Ponzi scheme since 1997, the four fraud referrals presented by the Examinations office to Enforcement Director Spencer Barasch, or any knowledge or activities at all regarding Stanford while Barasch was in office. In response to a question about Leyla Basagoitia's fraud referral letter, the Director described it as insufficient. She did not say that when it received this letter, the SEC already knew that Stanford was a "massive Ponzi scheme." This conduct was questioned at the Senate hearing in Washington and amounts to both an admission of SEC knowledge of liability and an attempt to cover up that liability.

IV. CLAIMS

33.

The claims here set forth are predicated on: a) the willful neglect of duty and the unethical and negligent conduct of Spencer Barasch, b) the negligent supervision of Barasch by his superiors, and c) the negligent actions of the SEC with regard to Stanford, viewed in their totality. Plaintiffs assert the following counts of intentional tort and negligence:

Count 1: Intentional Tort

From 1998 to 2005, Spencer Barasch intentionally ensured that the SEC did nothing about a known, multi-billion dollar Ponzi scheme. He later outrageously claimed to only vaguely remember the case, and associated himself with Allen Stanford and SIBL within two months of leaving the SEC, if not before. It is quite clear that the OIG report found

violations of federal laws and regulations by Barasch. He violated those rules, and duties to the investing public in general and to these plaintiffs in particular. Had Barasch not violated the rules as he did, none of the plaintiffs would or even could have invested with SIBL – it's doors would have been shut - and the damages suffered by the plaintiffs would have been completely avoided. Barasch's conduct - as detailed and acknowledged on March 21, 2010 by the SEC itself in it's report - cannot be rationalized or explained as legally permissible exercises of "discretion."

Count 2: Negligent supervision

The failure of Barasch's superiors to properly review and supervise his conduct - and put a stop to it - was clearly negligence, and not an exercise of law enforcement discretion or policy discretion. They did not "decide to allow" his misconduct. Rather, they negligently failed to supervise him and identify it. There are several references in the OIG report to pressure from higher ranking SEC officials to give lower priority to Ponzi schemes than to "accounting" schemes – schemes "like Enron" as one employee put it. But that is no explanation and no defense to this lack of supervision. Such general observations "from above" cannot competently or legally be understood or followed in a vacuum, without regard to the reality of a then clearly identified, multi-billion dollar Ponzi scheme. Competent and reasonable attention to the many findings and opinions of the FWDO examination staff, which constantly sought action only to be undermined by Barasch, would have caused Barasch to be overruled by his supervisors, and plaintiffs' damages to be prevented.

Count 3: Negligence

In addition to its negligent supervision of Barasch, the SEC was negligent from 1997 to 2009 in its overall response to the Stanford Ponzi scheme. *Inter alia*, the Enforcement staff failed to properly evaluate Examination staff proposals to commence an action under Section 206 of the Investment Advisers Act, and failed to properly identify the Stanford "certificates of deposit" as securities. Also, the conduct of Spencer Barasch, to the extent that it did not constitute willful misconduct, was also grossly negligent.

34.

The SEC failed to give due care to Stanford, and the acts in question were not protected exercises of discretion as a matter of law. The SEC's conduct is not shielded by the doctrine of sovereign immunity or by the exceptions set forth in 28 U.S.C. 2680, because it did not occur in the performance of "permissible" discretion as a matter of law. The language of the statute does not immunize the breach of conduct regulations, or conflict of interest laws, or improper influence. Further, those members of the SEC staff who investigated Stanford were not crafting policy or making rules. Rather, the SEC staff was carrying out their usual and regular obligations to examine and investigate its registrants and potential wrongdoing within the context of defined policies and routine common-sense practices, and they negligently failed to fulfill their duties. At all times relevant, the SEC knew Stanford to be a "massive Ponzi scheme." Through its negligent actions and inactions, the SEC caused Stanford's scheme to continue and expand, eventually resulting in billions in losses by investors, including the Plaintiffs herein. The SEC owed a duty of care to the Stanford investors, including the Plaintiffs herein, because it was reasonably foreseeable that they would rely on the SEC to remove

the danger posed by Stanford if the SEC had information confirming the existence of that danger. The SEC breached its duty of care and, in doing so, proximately caused the Plaintiffs' injuries, in that those injuries were the natural, probable, and foreseeable outcome of the SEC's negligence. The accumulation of evidence by the FWDO examiners was such that it mandated action by Enforcement to properly assess it. It didn't do that.

35.

The plaintiffs purchased the investments shown below, which have been determined to be without value by the Stanford Receiver. The government is therefore liable to the plaintiffs in the amounts shown below:

- Plaintiff Robert J. Dartez, LLC $638,397.79
- Plaintiff David B. Sturlese $695,591.06
- Plaintiff Cynthia R. Dore $3,089,909.76
- Plaintiff Robert Hollier $4,808,065.01
- Plaintiff Randolph J. Hebert $7,236,739.64
- Plaintiffs Michael R. Robicheaux and Cheryl T. Robicheaux $1,645,515.95
- Plaintiff Brittany Robicheaux $51,604.32
- Plaintiff Hollam Pinnacle Group, LLC $571,491.47

The damages set forth above correspond to the plaintiffs' SIBL accounts now deemed worthless. As further damages for loss of their opportunities to earn on their investments, the plaintiffs also claim as damages the interest those accounts would have earned since the date the receivership was filed, until paid.

WHEREFORE, Plaintiffs pray that upon final judgment the Plaintiffs recover their damages from Defendant as alleged herein, and their costs and expenses of suit, including reasonable attorneys' fees as they may be allowed by law. Plaintiffs pray for such other relief to which they may be justly entitled.

s/ Edward J Gonzales III
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