MEMORANDUM REGARDING THE LEGAL AUTHORITY OF STANFORD TRUST COMPANY LIMITED TO ESTABLISH A TRUST REPRESENTATIVE OFFICE IN THE STATE OF FLORIDA

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I. INTRODUCTION AND BACKGROUND

This memorandum is submitted on behalf of our client, Stanford Trust Company Limited (the "Trust Company"), a trust company organized under the laws of Antigua and Barbuda. As of September 30, 1998, the Trust Company had approximately U.S.$60,000,000 in assets under management. Established in 1990, the Trust Company is solely owned by Stanford Financial Group Limited, an Antigua-based financial services holding company. Other subsidiaries of Stanford Financial Group Limited include both The Bank of Antigua and Stanford International Bank Limited, each an "international banking corporation" (as defined under Chapter 663, Florida Statutes) organized under the laws of Antigua and Barbuda.

On October 12, 1998, Greenberg Traurig, P.A., the Trust Company's United States outside counsel, submitted a letter to the Division of Banking of the Florida Department of Banking and Finance (the "Banking Division") notifying it that the Trust Company expected to open a trust representative office ("TRO") in Miami, Florida. Greenberg Traurig notified the Banking Division that, consistent with the long-standing position of the Banking Division with respect to TROs of out-of-state trust companies, as discussed in Section II.B. below, the TRO would act only as a representative of the Trust Company and would not make discretionary investment decisions or accept, approve or otherwise administer fiduciary accounts in Florida.

We now understand that the staff of the Banking Division is suggesting that Florida law may require the Trust Company to apply to the Banking Division for an international representative office license in order engage in the activities that it would have engaged in through the proposed TRO.

Below, we explain why Florida law neither requires nor permits the Trust Company to obtain an international representative office license from the Banking Division. We then review the pertinent statutory authority and the Banking Division's

historical approach to out-of-state trust companies seeking to establish an office in Florida.

II. LEGAL ANALYSIS

A. The Trust Company Does Not Qualify for an International Representative Office License Under Chapter 663, Florida Statutes

For the reasons explained more fully below, because the Trust Company is not an "international banking corporation," and because the TRO would not engage in "banking business" in Florida, the Trust Company and the TRO fall outside of Chapter 663, Florida Statutes, altogether.

1. Pertinent Definitions in Chapter 663

Chapter 663 requires that "international banking corporations" become licensed before they can engage in a "banking business" in Florida[1] and, to that end, specifically permits international banking corporations to obtain "international representative office" licenses in order to engage in representative office-type activities in Florida.[2]

Florida Statutes § 663.01(8) defines an international representative office as "an office of a representative of an *international banking corporation* established for the purpose of engaging in the activities described in § 663.062."[3] In turn, Florida Statutes § 663.062, in relevant part, states:

> An international representative office may promote or assist the *deposit-taking, lending or other financial or banking activities of an international banking corporation*; an international representative office may serve as a

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1 Fla. Stat. § 663.04 ("No international banking corporation shall transact a banking business, or maintain in [Florida] any office for carrying on such business . . . unless such corporation has . . . [r]eceived a license duly issued to it by the [Florida Department of Banking and Finance].").

2 Fla. Stat. §§ 663.06(1), 663.062.

3 Fla. Stat. § 663.01(8) (emphasis added).

> liaison in Florida between an *international banking corporation* and its existing and potential customers.[4]

Chapter 663 defines the term "international banking corporation" to mean, in relevant part, as

> a banking corporation organized and licensed under the laws of a foreign country . . . . The term 'international banking corporation' includes, without limitation, a foreign commercial bank, foreign merchant bank, or other foreign institution that *engages in banking activities usual in connection with the business of banking* in the country where such foreign institution is organized or operating . . . which has the power to receive deposits from the general public in the country where it is chartered and organized; and which is under the supervision of the central bank or other bank regulatory authority of such country.[5]

In turn, the Florida Banking Code defines the term "banking business" to mean "receiving deposits, paying of checks or other instruments, making loans, or any other activity authorized in [Chapter 663] for an international banking corporation or its offices."[6]

2. The Trust Company Is Not an International Banking Corporation

The Trust Company is a trust company organized under the laws of Antigua and Barbuda. It is not a "banking corporation," any more than a domestic trust company chartered in this country would qualify as a "bank" under Section 658.12(2), Florida Statutes. Nor is the Trust Company "a foreign commercial bank, foreign merchant bank, or other foreign institution that engages in banking activities." As shown by the affidavit of Errol Cort, Esq. attached hereto as Exhibit A, the Trust Company may not, under the laws of Antigua and Barbuda, act as a "banking corporation" or otherwise engage in banking activities such as receiving deposits, paying checks, or making loans.

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4 Fla. Stat. § 663.062 (emphasis added).

5 Fla. Stat. § 663.01(6) (emphasis added).

6 Fla. Stat. § 663.01(1).

Instead, the Trust Company falls squarely within the Florida statutory definition of a "trust company," which means "any business organization, other than a bank or state or federal association, which is authorized by lawful authority to engage in trust business." Fla. Stat. § 658.12(21) (emphasis added). A "trust business," in turn, means "the business of acting as a fiduciary when such business is conducted by a bank, state or federal association, or a trust company, and also when conducted by any other business organization as its sole or principal business." Fla. Stat. § 658.12(20).

In his affidavit attached hereto as Exhibit A, Mr. Cort spells out clearly why the Trust Company does not qualify as an "international banking corporation," but instead meets the foregoing definition of a "trust company." In his affidavit, Mr. Cort testifies, among other things, that:

(a) "The Trust Company is duly licensed under the International Business Corporations Act [of Antigua and Barbuda] . . . and is duly authorised by the Government . . . through the International Business Corporations Department and under its Articles of Incorporation to carry on an international trust business."

(b) "In connection with its trust business, the Trust Company acts as a fiduciary on behalf of its customers;"

(c) "Pursuant to Sections 246 and 254 of the International Business Corporations Act [of Antigua and Barbuda], the Trust Company does not and cannot engage in any general banking business and, accordingly, the Trust Company does not accept deposits, cash cheques, make loans, or engage in any other banking activities. Moreover, under the laws of Antigua and Barbuda, the Trust Company is not a commercial bank, merchant bank, or other institution that engages in banking activities."

With respect, should the Banking Division take the position that the Trust Company is required to obtain an international representative office license for its proposed TRO under Chapter 663, Florida Statutes, the situation would be reminiscent of the case *Board of Governors of the Federal Reserve System v. Dimension Financial Corp.*, 474 U.S. 361 (1986). *Dimension* concerned "nonbank banks" – institutions that offer many services similar to those offered by banks. On its own, the Federal Reserve effectively attempted to redefine the term "bank" as used in the Federal Bank Holding

Company Act of 1956, as amended, to include "nonbank banks," thereby subjecting them to the Federal Reserve's jurisdiction. A unanimous United States Supreme Court summarily rejected this effort, noting:

> Congress defined with specificity certain transactions that constitute banking subject to regulation. The statute may be imperfect, but the [Federal Reserve] has no power to correct flaws that it perceives in the statute it is empowered to administer. Its rulemaking power is limited to adopting regulations to carry into effect the will of Congress as expressed in the statute.
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> If the Bank Holding Company Act falls short of providing safeguards desirable or necessary to protect the public interest, that is a problem for Congress, and not the [Federal Reserve] or the courts, to address . . . . Our present inquiry, however, must come to rest with the conclusion that the action of the [Federal Reserve] in this case is inconsistent with the language of the statute for here . . . '[o]nce the meaning of an enactment is discerned . . . the judicial process comes to an end.'

474 U.S. 361 at 374-75 (citing *TVA v. Hill*, 437 U.S. 153, 194 (1978)) (footnote omitted).

Of course, *Dimension* is consistent with literally hundreds of Florida court decisions, including a dozen or more Florida Supreme Court decisions, which stand for the cardinal principle of Florida statutory construction that a term must be given its "plain" or "ordinary" meaning.[7] Here, the "plain" or "ordinary" meaning of the term "international banking corporation" does not encompass the Trust Company. And like the Federal Reserve, the Banking Division "has no power to correct flaws that it perceives in the statute it is empowered to administer."

B. The Banking Division's Historical Position on the Establishment of TROs by Out-of-State Trust Companies

[7] *E.g., Thayer v. State*, 335 So. 2d 815 (Fla. 1976) (the law clearly requires the legislative intent be determined primarily from the language of the statute because the statute is to be taken, construed and applied in the form enacted); *American Bankers Life Ins. Co. of Fla. v. Williams*, 212 So. 2d 777 (Fla. 1st DCA 1968) (Florida courts are "without power to construe an unambiguous statute in a way which would extend, modify, or limit its expressed terms for its reasonable and obvious implications; to do so would be an abrogation of legislative intent"); *Brooks v. Anastasia Mosquito Control Dist.*, 148 So. 2d 64 (Fla. 1st DCA 1963) (the general rule is that the courts may not, in the process of construction, insert words and phrases in a statute or supply an omission that to all appearances was not in the minds of the legislature when the law was enacted).

Section 660.41 of the Florida Statutes contains the only express restriction under Florida law on trust activities in Florida conducted by out-of-state companies (and, for that matter, corporations generally other than banks, associations and trust companies organized under Florida law).[8] That statute purports to prohibit an out-of-state trust company from acting in Florida as a personal representative of the estate of any decedent, as well as receiver or trustee under appointment of any Florida court, or in certain corporate trust capacities. The Trust Company's proposed TRO would not engage in any of these activities – in fact, as noted above, it would act only as a representative of the Trust Company and would not make discretionary investment decisions or accept, approve or otherwise administer fiduciary accounts in Florida. Accordingly, Section 660.41 under its plain meaning does not apply to the activities of the proposed TRO.

Moreover, there is no express provision under Florida law that actually prohibits the establishment of a "trust service" office in Florida of an out-of-state trust company such as the Trust Company or that requires its licensing by the Banking Division.[9] In this regard, Section 660.33 only requires licensing by the Banking Division "for any trust service office" to be established by "a trust company or trust department with its principal place of doing business in [Florida]."

Notwithstanding the plain statutory language, the Banking Division in the past has taken the position that out-of-state trust companies (such as the Trust Company) may not maintain Florida "trust service" offices. Aware of the Banking Division's position and desirous of complying with that position to the extent not completely inconsistent with its own business objectives, the Trust Company voluntarily elected to open the much more

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8 See Fla. Stat. § 660.41 ("All corporations, except banks or associations and trust companies incorporated under the laws of [Florida] and having trust powers and except national banking associations or federal associations located in [Florida] and having trust powers, are prohibited from exercising any of the powers or duties and from acting in any of the capacities, within [Florida], as follows: (1) As personal representative of the estate of any decedent . . . . (2) As receiver or trustee under appointment of any court in this state. (3) As assignee, receiver, or trustee of any insolvent person or corporation . . . . (4) As fiscal agent, transfer agent, or registrar of any municipal or private corporation . . . .").

9 See Fla. Stat. § 660.33(1).

limited TRO, which the Banking Division -- since at least as early as the 1980s -- has permitted other non-Florida trust companies to establish.

Finally, we note that there is no provision of Chapter 660, or of other Florida law, which differentiates between out-of-state domestic trust companies on the one hand and foreign trust companies on the other.