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,	§	CASE NO. 3:09-CV-0724-N
v.	§	
JAMES R. ALGUIRE, ET AL.,	§	
Defendants.	§	

RESPONSE IN OPPOSITION TO THE RECEIVER'S MOTION FOR PRELIMINARY INJUNCTION OR WRIT OF ATTACHMENT

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I.
INTRODUCTION

More than 15 months ago, the Receiver seized the personal assets of Stanford's employees -- innocent professionals who were themselves victims of the Stanford fraud. The FAs lost their jobs, lost money on their own CD investments, and lost access to their personal assets, including their retirement accounts. In November 2009, the Fifth Circuit ordered the release of all investor accounts that the Receiver had frozen as security for his clawback claims. The employee accounts, however, remained frozen. It is now time – indeed, it is past time – to release the FAs' frozen accounts.

For at least four reasons, the Receiver's motion is fatally flawed:

(1) The Court cannot grant injunctive relief because the Receiver's claims are subject to arbitration. In the Fifth Circuit, a party cannot seek a pre-arbitration injunction unless the arbitration agreement specifically contemplates such relief.

(2) The Receiver is not entitled to a pre-judgment attachment because this remedy is unavailable for tort claims, the Receiver has offered no evidence that he is likely to lose his "debt" without an attachment, and the Receiver has failed to meet the other procedural and statutory requirements for an attachment.

(3) The Receiver likewise is not entitled to an injunction. First, the relief he seeks is properly characterized as an attachment, as the Receiver himself has acknowledged. Second, the Receiver has failed to state a claim for relief in the Second Amended Complaint, and therefore, he cannot show a substantial likelihood of success on the merits. Third, the Receiver cannot show irreparable injury based on the speculative fear that he will be unable to collect on a money judgment.

(4) Finally, the Receiver's numbers are flawed and substantially overstated. The Receiver uses pre-tax figures that do not reflect the funds actually paid to the FAs; he seeks to recover profits on the FAs' personal CD investments, but ignores any losses; he does not take into account any contractual forgiveness, cancellation, or release agreements; and he seeks amounts going beyond the 4-year limitations period. The Receiver also seeks to attach qualified retirement accounts, which are exempt from attachment under Texas law.

II.
OBJECTIONS TO INADMISSIBLE EVIDENCE

As a threshold matter, the FAs object to the Receiver's attempt to introduce into evidence the March 31, 2010 "Report of Investigation" of the SEC's Office of the Inspector General. *See* Exhibit 5 to the Receiver's Appendix, Document #393, pp. 37-196 of 291 (also numbered as Appendix pp 28-186). This report is irrelevant to the Receiver's motion, but it is inadmissible nonetheless, and it should be stricken from the record.

On its face, the report states that it should not be copied or disseminated without the Inspector General's approval. *See* Document #393, p. 38 of 291. It is an internal report prepared by the SEC's Inspector General for the limited purpose of assessing the SEC's performance of its regulatory obligations. The Report is heavily redacted, does not contain any of its 200+ exhibits, and is replete with double and triple hearsay.

The Receiver asserts that the report "is admissible under the hearsay exception for factual findings from an investigation made pursuant to an authority granted by law." *See* Receiver's TRO Application, at 4, n. 4. This argument is misplaced. In *United Technologies Corp. v. Mazer*, 556 F.3d 1260 (11th Cir. 2009), the Eleventh Circuit explained the limits of Rule 803(8) as follows:

> For the exceptions to apply, the report must contain "factual findings" that are "based upon the knowledge or observations of the preparer of the report," as opposed to a mere collection of statements from a witness. *Miller v. Field*, 35 F.3d 1088, 1091 (6th Cir. 1994). . . . In other words, "[p]lacing otherwise inadmissible hearsay statements by third-parties into a government report does not make the statements admissible." *Commodity Futures Trading Comm'n v. Wilshire Inv. Mgmt. Corp*., 407 F.Supp.2d 1304, 1315 n. 2 (S.D. Fla. 2005), *aff'd in part, vacated in part on other ground*s, 531 F.3d 1339 (11th Cir. 2008).

Id. at 1278.

Here, the Inspector General's report does not contain relevant "factual findings that are based on the knowledge or observations of the preparer of the report." *Id.* The Inspector General did not purport to investigate the alleged fraud itself (i.e., who participated in the fraud, what actions they took, etc.) Instead, he looked at the SEC's regulatory actions in hindsight to assess the agency's performance of its enforcement duties. The Inspector General did not formally investigate the actions of Stanford's former employees, and his report cannot be used as evidence against them.

Moreover, the report contains inadmissible "hearsay within hearsay." Even in circumstances in which a government report is admissible, "hearsay statements contained in the report are not." *Federal Deposit Ins. Corp. v. Mmahat*, 907 F.2d 546, 551 n.6 (5th Cir. 1990), *cert. denied*, 499 U.S. 936 (1991). The Inspector General report is built *entirely* on hearsay -- the Inspector General acknowledges that his sole sources are SEC e-mail correspondence, documents obtained from the SEC's and FINRA's files, and various statements made in testimony and interviews (the transcripts of which are unavailable). *See* Document #393, pp. 47-54 of 291. Accordingly, the report is inadmissible as a matter of law.

III.
FACTUAL BACKGROUND

In February 2009, the Court froze all accounts introduced through Stanford Group Company ("SGC"), an SEC and FINRA registered broker-dealer, and it directed the Receiver to take custody and control of those accounts. The frozen accounts included customer-owned accounts, plus the personal and retirement accounts of Stanford's employee financial advisors. The Receiver began releasing investor accounts over the next few weeks and months, but he refused to release the FAs' accounts even after he terminated their employment.

In June 2009, the Court issued an order stating that if the Receiver wished to maintain the asset freeze for investor accounts, he must assert claims against the individual investors along with "claims for prejudgment attachment." *See* Doc. 533 in Case No. 3:09-cv-298. Based on the Court's order, the Receiver sued hundreds of investors as relief defendants and requested a preliminary injunction to continue the freeze of their accounts. After a hearing, the Court ruled that the freeze could continue only as to purported CD interest payments received by the investors. *See* Doc. 35.

On appeal, the Fifth Circuit held that the investors were not proper relief defendants because they had a legitimate ownership interest in their frozen accounts, even if those accounts contained SIB CD proceeds. Accordingly, the Fifth Circuit ordered the Receiver to release the investors' frozen accounts. *See Janvey v. Adams*, 588 F.3d 831 (5th Cir. 2009).

Ironically, on the same day that the Fifth Circuit issued its opinion, the Receiver filed an amended complaint against the financial advisors, naming dozens of new defendants. *See* Doc. 118, 119. In this November 2009 complaint, the Receiver continued to sue the former employees as "relief defendants." The Fifth Circuit's opinion, however, clearly prohibited the Receiver from bringing "relief defendant" claims against former employees. *See Janvey v.*

Adams, 588 F.3d at 834 ("[R]eceipt of funds as payment for services rendered to an employer constitutes one type of ownership interest and would preclude proceeding against the holder of the funds as a nominal defendant.") (quoting *CFTC v. Kimberlyn Creek Ranch*, 276 F.3d 187, 192 (4th Cir. 2002)).

The Receiver subsequently dropped his relief defendant claims, but he continues to cut corners in his complaint, lumping more than 300 former employees together without any discussion of the specific claims asserted against each individual defendant. The Receiver is now asserting direct claims against the FAs for fraudulent transfer and unjust enrichment. These claims are subject to mandatory arbitration, and they also fail to satisfy the heightened pleading requirements of Rule 9(b). The FAs have filed a motion to compel arbitration and an alternative motion to dismiss the Receiver's complaint. *See* Doc. 201. These motions are pending and ripe for determination.

Because the Fifth Circuit's November 13, 2009 opinion "gives rise to arguments about the continuation of the freeze as to former employees," the SEC, the Receiver, and the FAs compromised on a partial release of the FAs' frozen accounts and a timetable for the complete release of FA accounts. *See* Doc. 174 (Agreed Motion for Order Authorizing Partial Release of Former Employee Accounts). On January 15, 2010, the Court entered an order authorizing an immediate partial release of FA accounts, followed by a complete release on April 1, 2010 absent further order of the Court. *See* Doc. 214. On March 31, 2010, the FAs, the SEC, and the Receiver agreed to a further partial release and a second, short extension of the freeze on the remaining accounts. On April 6, 2010, based on the parties' agreement, the Court ordered the release of: (a) any IRA or other designated retirement account upon SEC approval, and (b) upon demand, any account belonging to any individual from whom the Receiver seeks to recover less

than $50,000 in alleged SIB CD "commissions" or "bonuses."[1] Doc. 379. The Court further ordered that all frozen accounts be released on June 1, 2010. *Id.*

Two weeks after negotiating this agreement, the Receiver filed his TRO application and motion for attachment/injunction seeking to continue the asset freeze until the conclusion of this suit. *See* Doc. 392. The Receiver has held the FAs' accounts since February 2009, and now he wishes to continue the freeze indefinitely. He even continues to hold retirement accounts, which he could not seize even if he were to prevail on his claims. Based on the Receiver's own figures, approximately one-third (64 of 199) of the accounts he seeks to freeze are IRA accounts. *See* Doc. 393, at 22-28. The Receiver is not entitled to the harsh and extraordinary relief he seeks. The asset freeze must end.

IV.
THE COURT CANNOT GRANT INJUNCTIVE RELIEF BECAUSE THE RECEIVER'S CLAIMS ARE SUBJECT TO ARBITRATION

The Receiver stands in the shoes of Stanford Group Company, and he is obligated to arbitrate all claims asserted against the company's former financial advisors.[2] Accordingly, the FAs have filed a motion to compel arbitration pursuant to FINRA rules, their Forms U-4, and the terms of their written agreements with SGC. *See* Doc. 201. The FAs filed their motion to compel on January 15, 2010. The Receiver filed his response brief on February 16, 2010. *See* Doc. 316. The FAs' filed their reply brief on March 26, 2010. *See* Doc. 364. The motion is now pending before the Court.

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[1] On April 30, 2010, the undersigned counsel sent a letter to the Receiver demanding the release of these accounts. To date, the Receiver has not responded to this request.

[2] Indeed, the Receiver's failure to submit such claims to arbitration is a violation of FINRA rules and "inconsistent with just and equitable principles of trade." *See* FINRA IM-13000 "Failure to Act Under Provisions of Code of Arbitration Procedure for Industry Disputes."

In the Fifth Circuit, if a dispute is subject to arbitration, the court may not issue an injunction unless the arbitration agreement specifically contemplates the use of injunctive relief pending arbitration. *RGI, Inc. v. Tucker & Assocs., Inc.*, 858 F.2d 227, 230 (5th Cir. 1988); *Positive Software Solutions, Inc. v. New Century Mortgage Corp.*, 259 F.Supp.2d 531, 534 n. 4 (N.D. Tex. 2003) (Godbey, J.); *Corporate Relocation, Inc. v. Martin*, 2006 WL 4101944, *8, No. 3:06-cv-232 (N.D. Tex. Sept. 12, 2006) (Lindsay, J.); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Chapman*, 1998 WL 792501, No. 3:98-cv-1615 (N.D. Tex. Nov. 3, 1998)(Fitzwater, J.) (finding terms of employment agreement explicitly provided for injunctive relief).

Here, the parties' agreements do not allow for the injunctive relief sought by the Receiver, nor do FINRA rules. *See* Doc. 202 at Ex. 3 (202-6 to 202-11) and Ex. 5 (202-13); FINRA CODE OF ARBITRATION PROCEDURE FOR INDUSTRY DISPUTES Rule 13200. Therefore, the Court may not issue the requested injunction.

V.
THE RECEIVER IS NOT ENTITLED TO A PRE-JUDGMENT ATTACHMENT

The Receiver asks the Court to give him continuing control over the FAs' personal and retirement accounts so that he can collect on an eventual judgment. This is a request for attachment – nothing more, nothing less. The Receiver is not entitled to a prejudgment attachment, however, because he fails to meet *any* of the procedural and statutory requirements for an attachment under Texas law, most notably: (1) an attachment may not issue for a tort-based or unliquidated damage claim, and (2) the Receiver has offered no competent evidence that he is likely to lose his debt without the attachment.

A. Regardless of Labels, the Receiver Clearly Seeks an Attachment

While the Receiver attempts to couch his request primarily as an injunction under the Texas Uniform Fraudulent Transfer Act ("TUFTA"), the Receiver is clearly seeking a

prejudgment attachment. The Receiver makes clear that his application is sought for the sole purpose of holding assets in order to satisfy a judgment. For instance, the Receiver states: "This application seeks to enjoin removal of assets from the accounts of the former employees while the lawsuit is pending to prevent dissipation of those assets, which total over $24 million and represent the bulk of the known assets available to satisfy, if only partially, a judgment against the defendants subject to this application." Doc. 392, at 2. The Receiver also states that "[t]he funds in the Accounts represent the Receiver's best chance to recover on his claims for the benefit of the defrauded investors." *Id.* at 9.

The Receiver's own description of his request fits squarely within the definition of an attachment, which is "the seizing of a person's property to secure a judgment." Black's Law Dictionary, Second Pocket Edition; *see also* THE LATE CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, 11A Fed. Prac. & Proc. Civ. § 2932, FN 14 (2d ed.) (2010) (defining attachment as "an ancillary remedy by which plaintiff acquires a lien upon property of defendant in order to obtain satisfaction of a judgment that plaintiff might ultimately obtain at the conclusion of litigation").

The Receiver cannot avoid the requirements for obtaining an attachment by framing his request as a TUFTA injunction. He is seeking to seize property to secure a judgment, and he is therefore subject to the requirements of Fed. R. Civ. P. 64 and Tex. Civ. Prac. & Rem. Code § 61.001, *et seq*. *See In re Fredeman Litigation,* 843 F.2d 821, 824 (5th Cir. 1988) (dissolving an asset freeze order against RICO defendants because the order was a prejudgment attachment that did not comply with Fed. R. Civ. P. 64 and Texas law).

Furthermore, the Receiver's attorney defines the instant application as a writ of attachment, not an injunction. In his declaration filed in support of the Receiver's motion, Mr.

Sadler states: "***This writ of attachment*** is not sought for the purpose of injuring or harassing the Accountholders subject to this application, but only to ensure the Receiver does not lose the debt owed to him by the Accountholders." Doc. 393, App. 187, ¶ 3 (emphasis added). Mr. Sadler further states: "The Receiver will probably lose his debt unless ***this writ of attachment*** is issued." *Id.* at 188, ¶ 5 (emphasis added). Mr. Sadler never describes the Receiver's request as a TUFTA injunction, or anything other than what it is – a request for attachment.

Indeed, the current asset freeze -- which is set to expire on June 1st and which the Receiver seeks to continue – is also an attachment. Initially, the asset freeze may have been intended to maintain the status quo while the Receiver untangled the financial threads of the various Stanford entities. But once the Receiver began to express his intention to satisfy judgments out of the defendants' own frozen assets, the asset freeze turned into a prejudgment attachment. The Court recognized this transition in June 2009, when it gave the Receiver five weeks to assert claims against the investors, "together with claims for prejudgment attachment." *See* Docket #533 in Case No. 09-298. For at least the last year, the Receiver has used the asset freeze as a way to keep control of the assets of the people against whom he seeks a judgment as a convenient method of collection. But he is not entitled to attach the FAs' accounts without meeting the procedural and statutory requirements of Texas law.

B. The Receiver Cannot Meet the Requirements for an Attachment

"Attachment is a harsh, oppressive remedy; therefore, attachment is not available unless statutory safeguards are strictly observed." *S.R.S. World Wheels, Inc. v. Enlow,* 946 S.W.2d 574, 575 (Tex.App. -- Fort Worth 1997, no pet.). Prejudgment seizures of property offend the U.S. Constitution's Due Process clause unless they meet specific procedural requirements. *See, e.g., Connecticut v. Doehr*, 501 U.S. 1, 111 S.Ct. 2105 (1991); *N. Georgia Finishing, Inc. v. Di-*

Chem, Inc., 419 U.S. 601, 95 S.Ct. 719 (1975); *Fuentes v. Shevin*, 407 U.S. 67, 92 S.Ct. 1983 (1972). These constitutional requirements include those embodied in the prejudgment attachment statutes and procedures of Texas, which are applicable in this case pursuant to Fed. R. Civ. P. 64.

First, before an attachment may issue, Texas law requires the following procedural requirements to be met, which the FAs are not willing to waive:

(a) an application for prejudgment attachment in which the specific facts relied upon are supported by affidavit;

(b) a hearing as to each application for attachment;

(c) a written order of the court that makes "specific findings of facts to support the statutory grounds found to exist"; and

(d) a bond in an amount sufficient to adequately compensate the defendant for his damages if the attachment later proves to have been wrongful.

See TEX. R. CIV. P. 592, 592a.

Second, in addition to the foregoing procedural requirements, prejudgment attachment is only available under Texas law if the defendant is justly indebted to the plaintiff, the attachment is not sought for the purpose of injuring or harassing the defendant, the plaintiff will probably lose his debt unless attachment is granted, *and* one of the nine statutory grounds exists. TEX. CIV. PRAC. & REM. CODE §§ 61.001, 61.002 (Vernon 2009). These requirements are fatal to Receiver's request for a prejudgment attachment.

1. The Receiver Cannot Obtain an Attachment Based on Tort Claims

As a matter of law, the Receiver cannot establish that the defendants are "justly indebted" to him. In the context of attachment proceedings, a "debt" is defined as an obligation to pay a liquidated sum on an express or implied contract. *E.E. Maxwell Co., Inc. v. Arti Decor, Ltd.*, 638 F.Supp. 749, 752 (N.D. Tex. 1986); *In re Argyll Equities, LLC*, 227 S.W.3d 268, 271 (Tex. App.

- San Antonio 2007, no pet.). Writs of attachment are not available for tort damages. *S.R.S. World Wheels, Inc. v. Enlow*, 946 S.W.2d 574 (Tex. App.- Fort Worth, 1997, no pet.). Here, the Receiver's claims sound in tort and are for unliquidated damages. Therefore, a writ of attachment is inappropriate and unavailable under Texas law.

2. The Receiver Offers No Evidence That He Will Lose His Debt Without an Attachment

Second, the Receiver also must produce evidence – not mere suspicions – that he will likely lose his debt without the issuance of a writ of attachment. *Compare In re Argyll Equities, LLC*, 227 S.W.3d 268, 272 (Tex.App. -- San Antonio 2007, no pet.) (affidavit stating that plaintiff "is extremely concerned about [defendant's] financial viability and its wherewithal to satisfy its debt based on [defendant's] lack of candor and past disposal of [plaintiff's] collateral" was insufficient evidence) *with E.E. Maxwell Co., Inc. v. Arti Decor, Ltd.*, 638 F.Supp. 749, 752 (N.D. Tex. 1986) (affidavit was sufficient where it showed that defendant was insolvent or imminently insolvent and would be unable to pay a judgment). The only evidence offered on this element is a single sentence in Mr. Sadler's declaration stating: "The Receiver will probably lose his debt unless this writ of attachment is issued."[3] This is pure speculation, and it does not satisfy the Receiver's burden. The Receiver has not offered any evidence as to any of the individual FAs, and therefore he cannot sustain his burden on this element.[4]

[3] The Receiver also relies on an anecdotal discussion of David Nanes, who has not appeared in this suit, apparently cannot be located, may not reside in the United States, and (according to the receiver) is evading service of process. *See* Receiver's Motion, at 32 n. 41. This has no relevance whatsoever to the FAs represented by the undersigned counsel.

[4] In support of his application, the Receiver filed a spreadsheet listing the accounts at issue and indicated the "net worth" in the account. As confirmed by the Receiver's forensic accountant, Karyl Van Tassel, this exhibit only reflects the balance in the relevant account and does not purport to state the net worth of the relevant individual defendant. App. at 080 - 081 (80:5-81:11).

3. The Receiver Cannot Show the Statutory Grounds for an Attachment

Third, in order to obtain an attachment, the Receiver must show, as to each defendant, that at least one of nine statutory grounds exists.[5] TEX. CIV. PRAC. & REM. CODE § 61.002 (Vernon 2009). The Receiver tries to argue that "the assets will be dissipated nation-wide to many different institutions . . . ." Motion, at 9. But he offers no evidence to support this claim, and at least for the numerous FAs who are Texas residents, this allegation doesn't even make sense. Mere speculation does not suffice; rather, the Receiver is required to offer admissible evidence as to each element, for each Defendant. He has not done so, and therefore he has not established any of the nine required statutory grounds for a writ of attachment.

4. The Proposed Attachment Is Overly Broad

In addition to the procedural and substantive defects described above, the Receiver's proposed attachment is overly broad. First, as discussed in section VII, *infra*, the Receiver's calculation of his claims, even accepting them as legitimate, is flawed and his numbers are substantially overstated. Second, the freeze includes individual retirement accounts ("IRAs") that are exempt from attachment under Texas law. *See* TEX. PROP. CODE § 42.0021; TEX. CIV. PRAC. & REM. CODE § 61.041 (Vernon 2009); *In re Volpe*, 943 F.2d 1451 (5th Cir. 1991). Indeed, nearly one-third of the frozen employee accounts have been identified by the Receiver as IRA accounts. *See* Doc. 393, at Ex. 2. These accounts are exempt from any kind of seizure, including attachment.

[5] The specific grounds are: (1) the defendant is not a resident of this state or is a foreign corporation or is acting as such; (2) the defendant is about to move from this state permanently and has refused to pay or secure the debt due the plaintiff; (3) the defendant is in hiding so that ordinary process of law cannot be served on him; (4) the defendant has hidden or is about to hide his property for the purpose of defrauding his creditors; (5) the defendant is about to remove his property from this state without leaving an amount sufficient to pay his debts; (6) the defendant is about to remove all or part of his property from the county in which the suit is brought with the intent to defraud his creditors; (7) the defendant has disposed of or is about to dispose of all or part of his property with the intent to defraud his creditors; (8) the defendant is about to convert all or part of his property into money for the purpose of placing it beyond the reach of his creditors; or (9) the defendant owes the plaintiff for property obtained by the defendant under false pretenses. TEX. CIV. PRAC. & REM. CODE § 61.002.

VI.
THE RECEIVER IS NOT ENTITLED TO AN INJUNCTION

Even if the Court determines that the Receiver's request should not be characterized as an attachment, the Receiver is not entitled to injunctive relief. As the Court is aware, to obtain a preliminary injunction, the Receiver must show "(1) a substantial likelihood that he will prevail on the merits, (2) a substantial threat that he will suffer irreparable injury if the injunction is not granted, (3) that his threatened injury outweighs the threatened harm to the party he seeks to enjoin, and (4) that granting the preliminary injunction will not disserve the public interest." *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company*, 418 F.3d 535, 545 (5th Cir. 2005).

A. The Receiver Cannot Show a Substantial Likelihood That He Will Prevail

The Receiver cannot show a substantial likelihood of success because he does not even have a viable pleading. He has sued 300+ former employees without making any attempt to state an individual claim against any of them. In addition to their motion to compel arbitration, the FAs therefore have moved to dismiss the Receiver's claims for failure to state a claim under Fed. R. Civ. P. 9(b) and 12(b)(6). *See* Doc. 201.

The Receiver asserts a claim for fraudulent transfer, alleging that the "Stanford Defendants" made transfers "with the actual intent to hinder, delay, or defraud creditors." Sec. Amend. Compl. at ¶ 34-35. The Receiver also asserts an unjust enrichment claim. Both of these claims are subject to the heightened pleading requirements of Rule 9(b). *Quilling v. Stark*, 3:05-CV-1976-L, 2006 WL 1683442, at *5 (N.D. Tex.. June 19, 2006) (Lindsay, J.) (applying Rule 9(b) to fraudulent transfer claims); *Eastern Poultry Distributors, Inc. v. Yarto Puez*, Civ.A. 3:00-CV-1578-M, 2001 WL 34664163 (N.D. Tex.. Dec. 3, 2001) (Lynn, J.) (same); *Breckenridge*

Enterprises, Inc. v. Avio Alternatives, LLC, 3:08-CV-1782-M, 2009 WL 1469808, *10 (N.D. Tex., May 27, 2009) (Lynn, J.) (applying Rule 9(b) to unjust enrichment claim).

The Fifth Circuit has mandated that a plaintiff, in order to satisfy Rule 9(b), must plead "who, what, when, and where" with specificity. *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 178 (5th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997). The Fifth Circuit has emphasized that Rule 9(b) should be applied stringently. As the *Williams* court noted, "we apply [Rule 9(b)] with force, without apology." *Williams*, 112 F.3d at 178.

The Receiver utterly fails to meet this standard. Lumping together more than 300 former Stanford employees without once specifying any individualized facts, the Receiver asserts that they received, at unspecified times and from unspecified "Stanford Defendants," what the Receiver characterizes as "CD Proceeds." Sec. Amend. Compl. at ¶¶ 2, 34-35, 42-44, 50-54. To support that the FAs allegedly received "CD Proceeds," the Receiver merely alleges that his investigation has determined that the majority of the income for the nine Stanford Defendants (during some unspecified time period) came from SIB CD sales, but offers no further details. *Id.* at ¶ 2.

The Receiver alleges that the "uncontroverted facts establish that the Stanford Defendants were running a Ponzi scheme . . . ." Second Amend. Compl., at ¶ 35. The Receiver, however, does not make any attempt to show that SGC was a Ponzi scheme, as opposed to SIB. It is undisputed that the FAs received their compensation from SGC, and not from SIB. App. 050 - 051 (50:8-51:3). And the Receiver's own forensic accountant has admitted that SGC was solvent from 2004 to 2008 based upon its audited balance sheets. App. 016 - 017 (16:1 - 17:2).

Furthermore, the Receiver has yet to identify the "creditor" on whose behalf he asserts a fraudulent transfer claim. The Receiver's failure to identify the party for whom he seeks relief

(and the party who had a debtor-creditor relationship with SGC) is fatal to his claims. *See, e.g.*, *Steinberg v. Alpha Fifth Group*, No. 04-60899-CIV, 2008 WL 906270,*4 (S.D. Fla. March 31, 2008) ("the Receiver has neither identified on which specific entity's behalf he is suing as a creditor, nor has he clearly articulated the basis upon which the transferor would be a debtor. Because the Complaint contains no specific factual allegations establishing the debtor creditor relationship between any Receivership Entity and Defendants, it fails to state a cause of action for fraudulent transfer or unjust enrichment.").

In an effort to bolster his attachment request and paper over the deficiencies in his complaint, the Receiver has selected a handful of documents from his vast private collection and used them to make accusations against a few of the defendants. These accusations do not cure the deficiencies in the complaint – the Receiver cannot use a few documents, taken out of context, and relating to a handful of defendants, as a means to establish that he is likely to prevail against each and every one of the 300+ defendants. The pleading requirements of Rule 9(b) must be met with respect to *each defendant*. *See In re URCARCO Sec. Lit.*, 148 F.R.D. 561, 566 (N.D. Tex. 1993), *aff'd sub nom.*, *Melder v. Morris*, 27 F.3d 1097 (5th Cir. 1994). The Receiver fails to meet this standard.

B. The Receiver Cannot Show Irreparable Injury

In an attempt to show irreparable injury, the Receiver claims that the FAs "almost certainly will transfer the released assets to third parties or to accounts or institutions in other jurisdictions . . . ." Receiver's Motion, at 9. But he offers not one shred of evidence to support this claim as to any of the FAs submitting this response. And even if he could do so, it would be insufficient to establish irreparable injury.

An injury that can be compensated monetarily is not irreparable under Fifth Circuit law. *PCI Transportation, Inc. v. Fort Worth & Western Railroad Company*, 418 F.3d 535, 545 (5th Cir. 2005). "Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Morgan v. Fletcher*, 518 F.2d 236, 240 (5th Cir. 1975).

Further, it is irrelevant that the Receiver may sustain more expense and energy to collect on a judgment. "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Aon Re, Inc. v. TIG Insurance Co.*, 2009 WL 3075584 at *4, No. 3:09-cv-0300 (N.D. Tex. Sept. 28, 2009) (Boyle, J.) (quoting *Renegotiation Bd. v. Bannercraft Clothing Co.*, 415 U.S. 1, 24 (1974)). "Although the court's denial of this TRO may force [plaintiff] to wait and spend more time and energy in order to satisfy her judgment, the Fifth Circuit has held that such inconveniences do not constitute irreparable harm. In short, even if, as [plaintiff] fears, [defendant] whisks the settlement money away so that she cannot reach it, the harm to her will be purely pecuniary." *Rotella v. Mid-Continent Cas. Co.*, 2009 WL 1287834 (N.D. Tex. May 08, 2009) (Fish, J.).

The Receiver's claim that he will suffer harm is too speculative to meet his burden of showing a likelihood of irreparable injury. "Speculation or the mere risk of irreparable harm is not a sufficient showing of irreparable harm. There must be a present threat of substantial, noncompensable harm." *Aon Re, Inc.*, 2009 WL 3075584 at *4.

C. The Receiver Has Not Met His Burden On the Remaining Elements for an Injunction

The Receiver cannot credibly argue that he is subject to potentially greater harm than the FAs, when he has not even stated a viable claim for relief, his claims are subject to arbitration, and his requested injunction is overly broad. In contrast, the FAs have suffered financial harm caused by the 15-month seizure of their personal and retirement assets.

Further, the interests of the Stanford investors do not outweigh those of the FAs. The mere pennies that an investor may receive in a theoretical distribution from a successful recovery by the Receiver does not outweigh the FAs' interest in their own assets.

VII. THE RECEIVER'S NUMBERS ARE FLAWED AND SUBSTANTIALLY OVERSTATED

Even if an attachment were otherwise permissible, the Receiver's motion is overly broad because his numbers are flawed. The Receiver overstates his claims in numerous respects. In support of his claims, the Receiver has compiled a spreadsheet that purportedly reflects the compensation received by the FAs, and which forms the basis for his claims. *See* Doc. 157. The compensation amounts were derived from the work of Karyl Van Tassel of FTI Consulting, Inc., the Receiver's lead forensic accountant.

Based upon Ms. Van Tassel's deposition, the following is a summary of some of the flaws with the amounts claimed by the Receiver:

- The compensation that the Receiver seeks to recover from the FAs is identified using gross, pre-tax numbers. The Receiver therefore overstates by 30% or more the amounts that the FAs actually received. App. 032, 038 (32:17-21; 38:3-25);

- While Ms. Van Tassel is aware that many former employees lost all or part of their personal investments in SIB CDs, those losses were not taken into account, nor did Ms. Van Tassel attempt to determine whether the former employees used the compensation at issue to purchase their personal SIB CDs. In other words, while the Receiver seeks to clawback amounts that he claims the FAs should not

have received, he did not consider whether the FAs had already returned the money via a personal SIB CD investment. App. 039 - 043 (39:3-43:25);

- The Receiver's claims go back to at least January 1, 2005, and for loan payments go back much further (including the entire loan amount if any portion of the loan balance had not been forgiven or paid back by January 1, 2005). App. 044 - 045; 110 - 111 (44:25-45:5; 110:23-111:22). The TUFTA has a four-year statute of limitations. TEX. BUS. & COM. CODE ANN. § 24.009 (Vernon 2009). Although the Receiver filed this case against some of the FAs in April 2009, this is true for just 66 of the 300+ defendants, and he named them only as relief defendants. It was not until months later that the Receiver named the remaining defendants, and it was not until December 19, 2009 that the Receiver named the FAs as true defendants and asserted real causes of action against them. Because the Receiver has admittedly included amounts going beyond the statute of limitations and has not made any attempt to state the amounts paid within the limitation period, his numbers cannot be the basis for an attachment or injunction;

- For loan amounts, Ms. Van Tassel admitted to a number of problems. First, neither she nor the Receiver took into account the amortization of the loan based upon the forgiveness provision in all Promissory Notes. App. 068 - 069 (68:11-69:6). Second, neither she nor the Receiver considered the applicability of cancellation provisions for changes in control of the Stanford companies. *Id.* at 069 (69:7-16). Third, while Ms. Van Tassel was aware that a number of FAs accepted portions of their loans in the form of Performance Appreciation Rights (PARs) for which they never received any financial benefit, she could not say for certain that the value of non-vested PARs were deducted from the amount she listed for "Loans." *Id.* at 063 - 067 (63:20-67:19).

- Ms. Van Tassel admitted that the FAs may have unpaid compensation owed to them by SGC for non-SIB CD activities, but she did not attempt to take this into account in deriving her figures, despite having complete access to all of Stanford's records and systems. *Id.* at 046 - 048 (46:1-48:4); and

- With regard to severance payments that the Receiver seeks to recover, Ms. Van Tassel was not aware of anyone reviewing the actual agreements under which the payments were made, and she admitted she had no idea whether the severance payments had anything to do with SIB CD sales. *Id.* at 076 - 079 (76:25-79:11).

The Receiver has not provided the Court with accurate and reliable figures that would allow it to narrowly tailor a continued asset freeze, even if the Receiver were entitled to one. It was the Receiver's burden to provide accurate figures, and his failure to do so is another reason why his request should be denied.

VIII.
CONCLUSION

The Receiver has no equitable or legal basis to continue the asset freeze, and his motion seeking an injunction or attachment should be denied. The asset freeze should be lifted immediately, and the affected accounts should be returned to their rightful owners.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of May 2010, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. The electronic case files system sent a "Notice of Electronic Filing" to all counsel of records, each of whom have consented in writing to accept this Notice as service of this document by Electronic means.

s/Bradley W. Foster