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

RALPH JANVEY, IN THIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK, LTD., ET AL	§	
Plaintiffs,	§	
	§	Case No.: 3:10-CV-00617-N
v.	§	
NANCY R. JOHNSON, ET AL,	§	
Defendants.	§	

RECEIVER'S RESPONSE TO THE BERGERONS' MOTION TO DISMISS RECEIVER'S COMPLAINT AGAINST CERTAIN STANFORD INVESTORS

Defendants Billy J. and Bernadette C. Bergeron (the "Bergerons") assert that the Receiver's Complaint Against Certain Stanford Investors (the "Complaint") should be dismissed under Rule 12(b)(6) because the Complaint lacks the specificity required by Rule 9(b). The Court should deny this motion, since it is well-established that the heightened pleading standards of Rule 9(b) do not apply to the fraudulent-transfer and unjust-enrichment claims the Receiver asserts; in fact, this Court so held in another case a mere 6 months ago. But even if Rule 9(b) did apply to the claims the Receiver's asserts, the Complaint more than satisfies the standard set forth in the Rule. In particular, the Receiver asserts very specific allegations about the Stanford Ponzi fraud and sets forth the specific amounts received by and claimed from each named defendant. Further, Rule 9(b) is not to be applied blindly; the Court must consider several important factors, including the complexity of the case and the number of transactions at issue. Considering these factors, Rule 9(b)'s standards should be less stringently applied — if applied at all — to the Receiver's claims.

The Bergerons also move to dismiss the Receiver's claims under Rule 12(b)(6) for failure to comply with the basic pleading requirements of Rule 8. The Receiver's Complaint complies with both the word and spirit of Rule 8: the Receiver has specified grounds for the Court's jurisdiction, pleaded facts and claims demonstrating his entitlement to relief, and requested relief from the Court.

Finally, although the Receiver contends his pleadings more than meet the requirements of the Federal Rules of Civil Procedure, it would be inappropriate to dismiss the Complaint under either Rule 8 or Rule 9 when the Receiver has not been afforded an opportunity to replead to cure any alleged defects.

ARGUMENTS & AUTHORITIES

I. The Complaint gives the Bergerons ample notice of the claims and satisfies all relevant pleading standards.

A. The adequacy of the Complaint must be assessed in light of the elements of fraudulent-transfer and unjust-enrichment causes of action.

To analyze whether the Complaint sufficiently pleads a particular cause of action, one must begin with the elements of that cause of action.

1. The elements of a fraudulent-transfer cause of action.

The Texas Uniform Fraudulent Transfer Act sets forth two grounds for recovery: actual fraud and constructive fraud.[1] TEX. BUS. & COMM. CODE ANN. §§ 24.001–.010 (Vernon 2009). Actual

[1] Section 24.005(a) of TUFTA contains the actual fraud and constructive fraud grounds:

> A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose before or within a reasonable time after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:
>
> (1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or
>
> (2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:
>
> (A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or
>
> (B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

fraud occurs when the debtor/transferor (in this case, SIB) makes a transfer "with actual intent to hinder, delay, or defraud any creditor." *Id.* at § 24.005(a)(1). Constructive fraud occurs when the debtor/transferor makes a transfer without receiving "reasonably equivalent value" and when either: (i) the debtor was undercapitalized or was made so as a result of the transfer; or (ii) the debtor intended or should have known that it was incurring debts it would be unable to pay. *Id.* at § 24.005(a)(2); *Donell v. Kowell,* 533 F.3d 762, 770 (9th Cir. 2008); *Armstrong v. Collins*, Nos. 01 Civ. 2437(PAC), 02 Civ. 2796(PAC), 02 Civ. 3620(PAC), 2010 WL 1141158, at *19-22 (S.D.N.Y. Mar. 24, 2010). The transferee's intent (in this case, the Bergerons') is not an element of the plaintiff's case under either ground. *See* TEX. BUS. & COMM. CODE ANN. § 24.005. Indeed, "'the transferees' knowing participation is irrelevant under [UFTA]' for purposes of establishing . . . [even the actual fraud] premise . . . ." *SEC v. Res. Dev. Int'l, LLC*, 487 F.3d 295, 301 (5th Cir. 2007) (quoting *Warfield v. Byron*, 436 F.3d 551, 559 (5th Cir. 2006)).

In addition, when the debtor is a Ponzi scheme, its actual intent to defraud, its inability to pay debts, and its undercapitalization are all conclusively presumed. *See Quilling v. Schonsky*, 247 F. App'x 583, 586 (5th Cir. 2007) ("Under the UFTA, transfers made from a Ponzi scheme are presumptively made with intent to defraud, because a Ponzi scheme is, as a matter of law, insolvent from inception."); *Donnell*, 533 F.3d at 770-71 ("Proof that transfers were made pursuant to a Ponzi scheme generally establishes that the scheme operator '[w]as engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or a transaction,' . . . or '[i]ntended to incur, or believed or reasonably should have believed that he or she would incur, debts beyond his or her ability to pay as they became due.'").

Further, an investor does not give reasonably equivalent value for payments that he receives in excess of the amount he invested. "The vast majority of courts that have considered the issue

have held that a debtor does not receive reasonably equivalent value for any payments made to investors that represent false profits." *Warfield v. Carnie*, No. 3:04-CV-633-R, 2007 WL 1112591, at *12 (N.D. Tex. Apr. 13, 2007) (citing *In re Hedged-Investors Assocs., Inc.*, 84 F.3d 1286, 1290 (10th Cir. 1996)); *Scholes v. Lehmann,* 56 F.3d 750, 757-58 (7th Cir. 1995). "[I]nvestors in illegal Ponzi schemes have only provided reasonably equivalent value up to the portion of their actual investment in the scheme. The false profits they may have gained from the illegal scheme are not reasonably equivalent value." *Warfield*, 2007 WL 1112591, at *12.

The Complaint pleads in detail that the Stanford parties conducted an immense fraud, which was a Ponzi scheme from its inception and which paid the Bergerons and other transferee defendants more than they invested. [*See* Doc. 1 at ¶¶ 14-25 (alleging that Stanford fraud was a massive Ponzi scheme *ab initio* and that named investors received CD Proceeds from the scheme)]; [Doc. 1-3 (listing CD Proceeds that investors — including the Bergerons — received from the Stanford Ponzi scheme).] In fact, this Court recently found that the Stanford fraud was indeed a Ponzi scheme. [*See* Case No. 3:09-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 . . . .")][2] Because of the presumptions that arise

[2] The Bergerons claim that the Stanford fraud was not a typical Ponzi scheme because it had a small amount of legitimate investments. [*See* Doc. 8 at 3.] However, as this Court has recognized, just because some aspects of the Stanford Ponzi scheme may have been legitimate does not mean that the entire scheme was not a Ponzi scheme. [*See* Case No. 3:09-CV-0724-N, Doc. 456 ("[Defendants] argue that, to the extent the Stanford enterprise had any legitimate revenue-generating activity, it was not a Ponzi scheme. This is incorrect. . . . Just because the typical Ponzi scheme lacks any legitimate revenue-producing activity does not mean the Stanford scheme was not a Ponzi scheme.")]; *see also In re IFS Fin. Corp.*, 417 B.R. 419, 439 n.15, 440 (Bankr. S.D. Tex. 2009) ("The Fifth Circuit's reasoning applies whether the organization neatly fits within a judicially constructed definition of Ponzi scheme or was a fraudulent scheme that had some, but perhaps not all, attributes of the traditional Ponzi scheme. When an organization perpetuating a fraud makes a transfer necessary for continuation of the fraud, the transfer is made with actual intent to defraud. . . . The fact that the scheme may have contained some revenue-generating businesses is not sufficient to defeat a finding of fraudulent intent where the revenue-generating businesses could not have reasonably been expected to fund the operations.").

when the transferor was a Ponzi scheme, the Receiver has addressed each element of the Receiver's fraudulent-transfer claim.

2. The elements of a disgorgement claim for unjust enrichment.

A disgorgement claim for unjust enrichment must allege that "one person has obtained a benefit from another by fraud, duress, or the taking of an undue advantage." *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). In this case, the Receiver has pleaded that the Bergerons obtained a benefit by taking an undue advantage, as follows: "The Stanford Investors hold CD Proceeds they obtained as a result of taking undue advantage[.] . . . The market losses these Stanford Investors avoided by investing in the Stanford Ponzi scheme have come at the expense of the thousands of other investors[.]" [Doc. 1 at ¶¶ 38-39.] As a result, the Receiver has addressed all elements of unjust enrichment.

B. Rule 9(b)'s heightened particularity requirement does not apply to the Receiver's claims, but even if it did, the Complaint satisfies the Rule 9(b) standard.

The heightened particularity requirement of Rule 9(b) only applies "in alleging fraud or mistake" and is only required as to "circumstances constituting fraud and mistake." FED. R. CIV. P. 9(b). The purpose of Rule 9(b) is "to safeguard potential defendants from lightly made claims charging the commission of acts that involve some degree of moral turpitude." 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, WRIGHT & MILLER, FEDERAL PRACTICE AND PROCEDURE § 1296, at 31 (3d ed. 2004). Thus, Rule 9(b) does not apply here because, as demonstrated in the preceding section, neither fraudulent-transfer nor unjust-enrichment requires a showing of fraud on the part of the transferees. A transfer can be a "fraudulent transfer" even though "[n]othing in the complaint or record indicates that [the transferees] committed any fraudulent act that caused the funds to be transferred." *GE Capital Comm., Inc. v. Wright & Wright, Inc.*, No. 3:09-CV-572-L, 2009 WL 5173954, at *10 (N.D. Tex. Dec. 31, 2009).

The Northern District of Texas recently held that Rule 9(b) does not apply to a fraudulent-transfer claim. In *GE Capital*, plaintiff GECC asserted a fraudulent-transfer claim against a defendant under the "actual fraud" prong of the Texas fraudulent-transfer statute. *Id.* Defendant PlainsCapital argued that GECC's claim was the same as a fraud claim and, therefore, was subject to Rule 9(b). *Id.* The court disagreed and held, instead, that the fraudulent-transfer claim was subject only to the basic pleading requirements of Rule 8:

> GECC has alleged that PlainsCapital is a "transferee" under TUFTA with respect to the $525,000 seizure of funds obtained by Prather, allegedly through fraud. These allegations comport with Rule 8 in that they provide PlainsCapital with a short and plain statement of GECC's fraudulent transfer claim, showing that GECC is entitled to relief. GECC has not alleged fraud against PlainsCapital or Moving Defendants, which is the contemplation of Rule 9(b). Plaintiffs have merely alleged that Moving Defendants were the recipient of funds fraudulently obtained. Nothing in the complaint or record indicates that Moving Defendants committed any fraudulent act that caused the funds to be transferred. . . . Accordingly, the heightened pleading standard of Rule 9(b) does not apply.

Id. Other courts have held the same. *See, e.g., Pearlman v. Alexi*s, No. 09-20865-CIV, 2009 WL 3161830, at *5 (S.D. Fla. Sept. 25, 2009) (fraudulent-transfer claim is not subject to Rule 9(b)); *Court-Appointed Receiver for Lancer Mgmt. Group LLC v. 169838 Canada, Inc*., No. 05-60235-CIV, 2008 WL 2262063, at *3 (S.D. Fla. May 30, 2008) (same).

The fraudulent-transfer-specific cases cited by the Bergerons[3] have been superseded by this Court's ruling in *GE Capital*. But even if they were applied, dismissal would be inappropriate. In *Quilling v. Stark*, which was pre-*GE Capital*, this Court noted that it was "debatable under Fifth Circuit law" whether Rule 9(b) applied to the pleading of fraud in a fraudulent-transfer action. No. 3:05-CV-1976-L, 2006 WL 1683442, at *5 n.4 (N.D. Tex. June 19, 2006) (quoting *Ind. Bell Tel. Co., Inc. v.*

[3] The Bergerons only cite two cases in their entire motion that concern fraudulent-transfer actions. [*See* Doc. 8 at 12.] The rest of the cases they cite are easily distinguishable, as none address fraudulent-transfer causes of action. Instead, each of those cases addresses securities fraud and/or common-law fraud claims. Simply put, the Receiver is not asserting a fraud claim of any type against the Bergerons or any of the Stanford Investors he has sued.

Lovelady, No. SA-05-CA-285-RF, 2006 WL 485305, at *1 (W.D. Tex. Jan. 11, 2006)). More than three years later, however, the *GE Capital* court determined that Rule 9(b) did not apply in such an action. Importantly, though, the *Stark* court held that a fraudulent-transfer complaint alleging a Ponzi scheme and transfers from the Ponzi scheme was sufficient "[e]ven under the more exacting standards of Rule 9(b)." 2006 WL 1683442, at *6. This was because "[t]he existence of a Ponzi scheme as alleged in the complaint makes the transfer of investor funds fraudulent as a matter of law." *Id.* If the plaintiff's complaint in *Stark* was sufficient to meet the Rule 9(b) pleading standard, then so is the Complaint in this case, particularly in light of this Court's recent finding that a Ponzi scheme, in fact, existed here.

The other case cited by the Bergerons, *Alexander v. Holden Business Forms, Inc.*, No. 4:08-CV-614-Y, 2009 WL 2176582 (N.D. Tex. July 20, 2009), also pre-dated *GE Capital* and reached a conclusion that does not call the Complaint in this case into question. Even though the Court in *Alexander* generally held that Rule 9(b) can apply to certain types of fraudulent-transfer claims, it recognized that courts across the nation have concluded that Rule 9(b) does not apply to claims brought under UFTA. *Id.* at *3. Moreover, the *Alexander* court held that even though Rule 9(b) can apply to fraudulent-transfer claims, it does not require that a fraudulent-transfer claim be pleaded with the same particularity as a common-law fraud claim. The *Alexander* court's holding was, in fact, significantly more limited:

> [A fraudulent-transfer] plaintiff need not make allegations that would support a claim of common-law fraud. Thus, [the plaintiff] need not plead the sort of particulars that are necessary under Rule 9(b) in a common-law fraud case. Rather, [the plaintiff] need only allege that [the debtor] disposed of or parted with an asset or an interest in an asset or incurred an obligation, with intent to hinder, delay, or defraud any of its creditors.

Alexander, 2009 WL 2176582, at *4 (internal citations and quotation marks omitted). The Receiver's Complaint clearly meets this standard.

The only facts related to fraud are the Stanford parties' acts, and those are pleaded with a specificity that meets — if not exceeds — the requirements of Rule 9(b).[4] In nearly twenty paragraphs containing specific factual allegations, [*see* Doc. 1 at ¶¶ 2-4, 14-25, 29-30], the Receiver recounts facts showing that the Stanford parties operated a massive, global Ponzi scheme and, in doing so, transferred funds to Stanford Investors, including the Bergerons. The Appendix to the Complaint alleges the total of all payments the Bergerons received from SIB and the portion of that total that constitutes "CD Proceeds Received in Excess of Investments." [Doc. 1-3 at 1.] These facts more than suffice to state a fraudulent-transfer cause of action, even under the heightened pleading standard of Rule 9(b), particularly given the presumptions that arise when the transferor is a Ponzi scheme (*see* previous section).

The Bergerons cite only one case specific to unjust enrichment, *Breckenridge Enters., Inc. v. Avio Alternatives, LLC*, No. 3:08-CV-1782-M, 2009 WL 1469808, at *10 (N.D. Tex. May 27, 2009). [*See* Doc. 8 at 13.] The court in *Breckenridge*, however, based its dismissal of the plaintiff's unjust-enrichment claim upon the fact that it essentially mirrored the plaintiff's dismissed fraud claim. *Id.* at *10-11. As a result, the court held that it would be nonsensical to dismiss the fraud claim per Rule 9(b) but not the unjust-enrichment claim. *Id.* The instant case, however, is clearly distinguishable. Not only is the Receiver's unjust-enrichment claim an alternative to and separate from the fraudulent-transfer claim (which is not a fraud claim at all), but the Receiver clearly pleads the Bergerons' "taking of undue advantage" — not "fraud" — as his basis for pursuing the claim. As a result, neither Rule 9(b) nor the holding in *Breckenridge* applies to the Receiver's unjust-enrichment claim.

[4] Rule 9(b) is not applied blindly and without regard to the complexity of the case. *U.S. ex rel. Johnson v. Shell Oil Co.*, 183 F.R.D. 204, 206–07 (E.D. Tex. 1998); *Fujisawa Pharm. Co., Ltd. v. Kapoor*, 814 F. Supp. 720, 726 (N.D. Ill. 1993); *In re Sunrise Sec. Litig.*, 793 F.Supp. 1306, 1312 (E.D. Pa. 1992); *P & P Mktg., Inc. v. Ditton*, 746 F. Supp. 1354, 1362–63 (N.D. Ill. 1990). If the Court chose to apply Rule 9(b) to the Receiver's claims, such factors would militate in favor of a less stringent application in this complex case.

C. The Receiver has also satisfied the pleading requirements of Rule 8.

The Bergerons also assert that the Receiver has failed to meet the basic pleading requirements of Federal Rule of Civil Procedure 8. These are:

> (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

FED. R. CIV. P. 8(a). Under Rule 8, a complaint need only "give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests." *Swierkiewicz v. Sorema N.A.*, 534 U.S. 506, 512 (2002) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

The Receiver's Complaint far exceeds this minimal standard in the detail that it provides. It states grounds for the Court's jurisdiction [Doc. 1 at ¶¶ 9-13]; describes the facts and legal theories that entitle the Receiver to relief [*id.* at ¶¶ 26-35, 38-39]; and requests relief [*id.* at ¶¶ 5-6, 36-37, 40-42]. This is more than sufficient. This Court in *GE Capital* held that a complaint alleging a transfer of funds to the defendant in violation of fraudulent-transfer law met the requirements of Rule 8. 2009 WL 5173954, at *10; *see also Court-Appointed Receiver for Lancer Mgmt. Group LLC*, 2008 WL 2262063, at *3 (complaint alleging fraudulent-transfer and unjust-enrichment claims against multiple defendants was sufficient even though it did not specify which transfers went to which defendants and in what capacity the defendants received the transfers).

II. Dismissal is not an appropriate remedy for a violation of Rules 9(b) or 8.

As described above, the Complaint safely meets the requirements of Rules 8 and 9(b) (even though Rule 9(b) does not apply). The Bergerons' motion, in effect, is an effort to obtain discovery by way of forced repleading. This effort is both premature and inappropriate, especially given that the Bergerons themselves likely possess the information they purportedly want the Receiver to insert into the Complaint.

Moreover, dismissal is typically inappropriate for initial pleading deficiencies. *See Ind. Bell Tel. Co. Inc*, 2006 WL 485305, at *1 n.4 (denying a Rule 12(b)(6) motion based on a plaintiff's failure to comply with Rule 9(b), but ordering plaintiff to amend); *see also Redden v. Smith & Nephew, Inc.*, Civil Action No. 3:09-CV-1380-L, 2010 WL 184428, at *5 (N.D. Tex. Jan. 19, 2010) (ordering plaintiff to replead breach of contract claim to comply with Rule 8). Generally, a pleading deficiency should first be addressed by amendment. *See Redden*, 2010 WL 184428, at *5*; Naranjo v. Universal Sur. of Am.*, 679 F. Supp.2d 787, 801 (S.D. Tex. 2010) ("there is a general consensus that plaintiffs should be provided with an opportunity to amend their complaint to meet Rule 9(b)'s requirements before ordering dismissal"); *Vetco Sales, Inc. v. Vinar*, No. Civ.A. 3:02-CV-1767, 2003 WL 21488629, at *4 (N.D. Tex. Apr. 23, 2003) (addressing 12(b)(6) motion based on counterclaim's violation of Rule 8 and concluding that "dismissal should be avoided until the defendants have been afforded an opportunity to file an amended complaint"). The Bergerons present no argument to justify a departure from this general rule.

Thus, if the Court were to determine that the Complaint fails to meet either Rule 8 or 9(b), the Receiver respectfully requests an opportunity to amend to meet any deficiencies identified by the Court.

CONCLUSION

For all of these reasons, the Receiver requests that the Court deny the Bergerons' motion to dismiss per Rules 8, 9(b), and 12(b)(6) and grant the Receiver such other and further relief to which he may be entitled.

Dated: June 30, 2010

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Kevin M. Sadler

Kevin M. Sadler
Texas Bar No. 17512450
kevin.sadler@bakerbotts.com
Robert I. Howell
Texas Bar No. 10107300
robert.howell@bakerbotts.com
David T. Arlington
Texas Bar No. 00790238
david.arlington@bakerbotts.com
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, Texas 78701-4039
(512) 322-2500
(512) 322-2501 (Facsimile)

Timothy S. Durst
Texas Bar No. 00786924
tim.durst@bakerbotts.com
2001 Ross Avenue
Dallas, Texas 75201
(214) 953-6500
(214) 953-6503 (Facsimile)

ATTORNEYS FOR RECEIVER RALPH S. JANVEY

CERTIFICATE OF SERVICE

On June 30, 2010, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. I hereby certify that I will serve all counsel of record electronically or by other means authorized by the Court or the Federal Rules of Civil Procedure.

/s/ Kevin M. Sadler
Kevin M. Sadler