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.	§ §	
and JAMES R. ALGUIRE, ET AL.,	§ §	
Defendants.	§	

BRIEF IN SUPPORT OF MOTION
TO COMPEL ARBITRATION AND TO DISMISS

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ATTORNEYS FOR 116 FORMER STANFORD EMPLOYEES

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I.

INTRODUCTION

The moving defendants are innocent professionals who had the misfortune of working for Stanford. The financial advisors did not benefit from the Stanford fraud; they are victims. They lost their jobs, lost their clients, lost money on their own CD investments, and their remaining assets at Stanford have been frozen for almost a year. Their reputations have been damaged and their lives have been turned upside down -- and they did nothing wrong.

The Securities and Exchange Commission has publicly stated that Allen Stanford, James Davis, and Laura Pendergest-Holt "lied to financial advisors." SEC's Amend. Compl., ¶¶ 54-60 (Doc. 48 in Cause No. 3:09-cv-00721). Likewise, the Receiver has acknowledged previously that the financial advisors are "innocent and committed no wrongdoing." *See* Receiver's Amend. Compl. (Doc. 14), ¶¶ 9, 43. Nevertheless, the Receiver is seeking to recover compensation, and even loans, covering multiple years -- the vast majority of which had nothing whatsoever to do with the sale of Stanford CDs.

Indeed, 19 of the 116 moving defendants never received a dollar from the sale of a Stanford CD, and 9 others earned less than $700 in CD commissions. The Receiver is suing one of the moving defendants for just $100 in CD commissions. Surely, the Receiver's army of advisors spent many times that amount simply to come up with this number, and will spend far more prosecuting this nonsensical claim.

The Receiver is overstepping his legal authority, and he has no legal right to pursue Stanford's former employees in this manner. In the prior versions of his complaint, the Receiver attempted to sue the financial advisors as "relief defendants." The Fifth Circuit's November 13, 2009 opinion, however, clearly prohibits the Receiver from bringing "relief defendant" claims against former employees. *See Janvey v. Adams*, 588 F.3d 831, 834 (5th Cir. 2009) ("[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)).

While the Receiver has since dropped his relief defendant claims, 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 asserting fraudulent transfer and unjust enrichment claims, which are subject to the heightened pleading requirements of Rule 9(b), and yet his bare-bones and conclusory allegations fail to meet even the more lenient standards of Rule 8.

Furthermore, the Receiver stands in the shoes of Stanford Group Company, and he is therefore obligated to arbitrate all claims asserted against the financial advisors. Indeed, the Receiver's failure to submit his claims to arbitration is an express violation of FINRA rules, which is subject to penalty as "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." Defendants therefore request that the Court issue an order compelling the Receiver to pursue his claims in arbitration.

II.

BACKGROUND

Ralph Janvey, in his capacity as the Receiver for Stanford Group Company ("SGC"), seeks to recover employment compensation that SGC paid to the defendant financial advisors (the "FAs"). SGC is registered as a broker-dealer with the Securities and Exchange Commission ("SEC")[1] and is a member of the Financial Industry Regulatory Authority ("FINRA")[2].

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[1] In its latest Complaint, the SEC confirms that SGC is currently registered as a broker dealer. *See* Sec. Amend. Compl. at ¶ 14, *SEC v. Stanford Int'l Bank, Ltd., et al.*, Civil Action No. 3:09-cv-0298-N, Doc. # 952.

The Receiver does not specify in the Second Amended Complaint which Stanford entity paid the compensation he seeks to recapture, but he is more candid on his official "Stanford Financial Group Receivership" website. In describing a prior version of his complaint that is substantially similar to the current one, the Receiver states that he filed the suit "to recover commissions, front-end loans and other CD-related compensation that *Stanford Group Company* paid to certain former financial advisors. These amounts were paid to the financial advisors as compensation . . . ."[3] App. at 79 (Exhibit 2 to Nielsen Decl.) (emphasis added).

In his earlier complaints, the Receiver sought disgorgement under a "relief defendant" theory. Following the Fifth Circuit's November 13, 2009 opinion addressing similar claims brought against innocent investors, the Receiver was forced to recognize that the Defendant FAs had a legitimate claim to the compensation they received from SGC, and he abandoned his relief defendant theories. *See* Sec. Amend. Compl., at ¶ 10. The Receiver now resorts to vague claims of fraudulent transfer and unjust enrichment, while ignoring FINRA rules and contractual requirements that obligate him to submit his claims exclusively to FINRA arbitration.

The Receiver seeks to disgorge from the FAs the following categories of compensation they received from SGC: (1) up-front payments the FAs received in exchange for moving their businesses to SGC, accompanied by agreements containing arbitration provisions; (2) "SIBL Commission;" (3) "SIBL Quarterly Bonuses;" (4) Branch Managing Director Quarterly Compensation; and (5) Severance Payments.[4] From the 116 moving defendants, the Receiver

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[2] *See* Exhibit 1 to Declaration of Matthew Nielsen. Appendix to Mtn. Dismiss ("App.") at 43 (Stanford Group Company FINRA Broker Check as of January 14, 2010).

[3] In the August 26th supplement complaint that was the subject of the Receiver's comments, he named all 116 of the moving FAs except Brent Sutton, Donal Bahrenburg, John Santi, and Sandy Steinberg. These four individuals were likewise exclusively employed as financial advisors by SGC.

[4] While the Receiver seeks disgorgement of Performance Appreciation Rights ("PARs") payments received by certain former Stanford employees, none of the 116 FAs are alleged to have received such payments. *See* Second

seeks approximately $110 million in compensation, the majority of which consist of upfront loan payments (approximately $58.5 million).[5] The Receiver's computation ignores the FAs' own losses in personal SIB CD investments, unpaid commissions, unrealized PAR grants included in the FAs' upfront payment amounts, and many other damages caused by Stanford.

The Receiver asserts that the FAs should disgorge their employment compensation because the funds they received allegedly came from fraudulent investments in Stanford International Bank ("SIB") CDs. The Receiver claims that the sole purpose of the FAs was to sell SIB CDs, and that SGC was nothing more than the means by which SIB obtained CD investments. This is untrue -- the Receiver has expressly admitted that 60+% of SGC's revenues in 2008 came from non-CD brokerage activities.[6]

Indeed, before Stanford was shut down in February 2009, SGC had an outstanding reputation as a specialty brokerage firm that recruited some of the best and brightest high-end financial advisors from large wire-houses like Smith Barney, Deutsche Bank, Merrill Lynch, and Goldman Sachs. App. at 1 and 15 (Robinson Decl. at ¶¶ 2-3 and Ex. 1 (executive search firm Kaye/Bassman report on SGC)). For instance, when they were recruited to join SGC in Dallas,

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Amend. Compl. at ¶ 52. Further, only two of the 116 FAs (Nelson Ramirez and John Santi) are alleged to have received a severance payment. *Id.* at ¶ 54. Many FAs received PARs grants that are reflected in the amount of their upfront payment from SGC, but those grants never vested and the FAs never received any financial benefit. *See e.g.*, App. at 5 (¶ 14), 29. Nevertheless, the Receiver seeks to disgorge the full value of the PAR grants never realized by the FAs.

[5] For nearly 11 months, the Receiver steadfastly maintained a freeze on all personal accounts of the FAs in the custody of SGC's clearing firms and sought to use those accounts to collect on his now-abandoned relief defendant claims. He did so although, in many instances, the accounts consist of assets well beyond the claims of the Receiver and many of the accounts are qualified retirement accounts not subject to execution of judgment. Following the Fifth Circuit's ruling, and with the assistance of the SEC, the Receiver recently joined the SEC and FAs in seeking partial release of the FAs' accounts. Notably, the Receiver agreed that his claims relating to upfront payments should not be the basis for the continued freeze of the FAs' accounts. *See* Agreed Mtn. for Order Authorizing the Partial Release of Former Employee Accounts (Doc. 174).

[6] Report of Receiver Dated April 23, 2009 at 8-9 [Doc. # 336, *SEC v. Stanford Int'l Bank, Ltd., et al.*].

Mr. Robinson and his business partner were the largest producers at the Dallas branch of Deutsche Bank, with more than $650 million in assets under management. *Id.* at 1 (¶ 3).

Over the past decade, many experienced financial advisors believed that large bank-affiliated firms did not sufficiently focus on their brokerage business, but rather directed their resources to activities such as investment banking. These advisors did not believe that the large brokerage firms provided them with the tools and flexibility they needed to best serve their client base: high-net worth individuals and middle-market institutions. SGC provided an attractive alternative for those advisors and their clients. *Id.* at 2 (¶ 5) and 14-27. These FAs were not recruited to be a sales force for SIB CDs. They provided full-service brokerage services to their clients.

The majority of the compensation the Receiver seeks to disgorge from the FAs -- upfront loan payments -- had nothing to do with SIB CD sales. Upfront payments are a common form of compensation paid to FAs when they move brokerage firms. The upfront payments received by the FAs here, which constituted consideration for the FAs' books of business built upon decades of work, were calculated from the commissions earned by the FAs at their prior firms using percentages common in the industry. These payments, by definition, did not take into account any SIB CD sales. *Id.* at 5 (¶ 15).

The upfront payments are notable because all of those payments were documented with Promissory Notes that included substantially the same broad-form arbitration clause: "Borrower hereby agrees that any controversy arising out of or relating to this Note, or default of this Note, shall be submitted to and settled by arbitration pursuant to the constitutions, by-laws, rules and regulations of the Financial Industry Regulatory Authority (FINRA) [or its predecessor, the

NASD] in the local area of the office the Borrower is employed [or in some cases, "of the principal office"]." *Id.* at 33 (and generally 80-384).

After joining SGC, many of the FAs did eventually sell SIB CDs to some of their clients. Like their clients, the FAs were deceived by lies, fraud, and falsified documents into believing that the SIB CD was a low-risk, fixed-income investment with a solid track record of success that offered a good return for their clients. *Id.* at 6-7 (¶¶ 19-20). And, contrary to the Receiver's claims, the FAs were not showered with lavish commissions. Stanford financial advisors generally received only 1% in commissions from SGC for CD sales. They also received no money whatsoever from SIB. Report of Receiver Dated April 23, 2009 at 8. The commission rate paid by SGC on SIB CDs was consistent with the rates paid on other fixed income products; various hedge and mutual funds, among other products, would have provided the FAs with higher commissions than the SIB CDs. App. at 6-7 (¶¶ 17-20). In short, it is simply untrue that the FAs were lured into inappropriately selling SIB CDs based upon excessively large commissions.

Further, many of the FAs personally invested in the SIB CDs themselves. For example, Mr. Robinson invested $650,000 in the SIB CDs -- far more than what he allegedly received in SIB CD commissions -- and like many other investors, he lost his entire investment. *Id.* at 8 (¶ 23) and App. to Sec. Amend. Compl.

The FAs were employed by SGC, and they received their compensation from SGC. At no time were they employees of SIB, nor did they ever received any payments from SIB. They received standard employee paychecks from SGC, from which tax withholdings were made. App. at 8 (¶ 22). And they used their paychecks just like any other person would -- to feed, clothe, and shelter their families and plan for retirement.

The FAs are among the long list of victims of the Stanford fraud. They lost their jobs and income and had to scramble to find new jobs in the midst of a devastated economy. And they had to find those jobs with the taint of having been associated with Stanford, despite their own innocence. Their unfortunate association with Stanford has largely vitiated the FAs' lifetime of work in building client relationships.

Now, the FAs have become victims of the Receiver as well. Despite losing their jobs, clients, decades of work, and reputations, the FAs are being asked to pay back the employment compensation they received from SGC, and which they used to support their families. The Receiver insisted on asserting unfounded claims against the FAs as relief defendants for nearly a year, and he refused to stand down until the Fifth Circuit left him no choice. All the while, the Receiver has frozen the FAs' assets. While the Receiver has a multi-million dollar war chest, the FAs have had to pool their resources in order to defend themselves against the Receiver's claims.

III.

THE RECEIVER'S CLAIMS MUST BE ARBITRATED

A. FINRA Rules Require Arbitration

FINRA rules provide that "a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among: members; members and associated persons; or associated persons." FINRA CODE OF ARBITRATION PROCEDURE FOR INDUSTRY DISPUTES Rule 13200(a). SGC is and was at all relevant times a member of FINRA (or its predecessor, the NASD) and is bound by the FINRA requirement to arbitrate all disputes with associated persons. FINRA MANUAL Rule 0140(a) ("The Rules shall apply to all members and persons associated with a member. Persons associated with a member shall have the same duties and obligations as a member under the Rules."). Indeed, it is a violation of FINRA Rules for SGC to fail to submit its disputes with the

FAs to arbitration or to require the FAs to waive arbitration of any disputes covered by Rule 1300. *See* FINRA IM-13000.

All of the FAs are "associated persons" as defined by FINRA because they are all natural persons registered under the Rules of FINRA and/or were engaged in the securities business under the control of SGC. FINRA Rule 13100(r). All associated persons are required to make an application for registration with a member firm, which is done through a Form U-4. FINRA Bylaws, Art. V, section 2; *see also* App. at 386 (Form U-4 Uniform Application For Securities Industry Registration or Transfer). Form U-4 includes an arbitration provision stating: "I agree to arbitrate any dispute, claim, or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or bylaws of the [Self Regulatory Organizations]." *Id*. FINRA Rule 2263 further makes clear that when associated members join a member firm, the associated person is "agreeing to arbitrate any dispute, claim or controversy that may arise between you and your firm, or a customer, or any other person that is required to be arbitrated under the rules of the self-regulatory organizations with which you are registering." FINRA Rule 2263(1). That agreement is not unilateral, and member firms are held to the same arbitration requirements as associated persons under FINRA regulations. *Millas v. Morgan Stanley & Co., Inc.*, No. 09-cv-0573-MJR, 2008 WL 5095917, at *5 (S.D. Ill. Dec. 1, 2008) ("Morgan Stanley is held to the same arbitration requirements as [a broker] under the FINRA regulations. Thus, there is no merit to [the broker's] argument that arbitration provision in the U-4 is unilateral.").

The Receiver's claims seeking the return of compensation paid by SGC to the FAs unquestionably "arises out of the business activities" of both SGC and the FAs. The phrase "arises out of" in Rule 13200 is broadly construed and means "originating from," "growing out of," or "flowing from" the business activities of either SGC or the FAs. *Williams v. Imhoff*, 203 F.3d 758, 765 (10th Cir. 2000). The Receiver's claims are based on the sales activities of the FAs at SGC and the compensation they received from SGC while they were employed at SGC. Sec. Amend. Compl. at ¶¶ 2, 4, 28, 29, 38. The Receiver seeks return of compensation paid by SGC to the FAs in agreeing to join SGC as financial advisors (upfront payments), for selling SIB CDs (SIB commissions and bonuses), for running branch offices (branch managing director compensation), and in agreeing to end their employment (severance). *Id.* at ¶¶ 50, 51, 53, 54. Further, claims relating to the compensation of financial advisors are within the scope of Rule 13200 and Form U-4 arbitration requirements. *Brennan v. Aetna Life Ins. Annuity Co.*, No. Civ. A 3:00-cv-205-BC, 2001 WL 167954, at *2 (N.D. Tex. Jan. 19, 2001) (Boyle, M.J.).

B. The FAs' Promissory Notes Also Require Arbitration

Much of the compensation that the Receiver seeks to recapture consists of upfront loan payments received by the FAs. These upfront payments were made in accordance with the terms of forgivable Promissory Notes between SGC and the FAs. App. at 80-372, 377. Every single Promissory Note contain virtually the same arbitration clause: "Borrower hereby agrees that any controversy arising out of or relating to this Note, or default of this Note, shall be submitted to and settled by arbitration pursuant to the constitutions, by-laws, rules and regulations of the Financial Industry Regulatory Authority (FINRA) [or its predecessor, the NASD] in the local area of the office the Borrower is employed [or in some cases, "of the principal office"]." *Id.* Therefore, the Promissory Notes also require arbitration of the Receiver's claims.

C. The Receiver Is Bound by SGC's Arbitration Agreements

The Receiver must honor SGC's arbitration agreements. A receiver "is bound to the arbitration agreements to the same extent that the receivership entities would have been absent the appointment of the receiver." *Javitch v. First Union Securities Inc.*, 315 F.3d 619, 627 (6th

Cir. 2003); *see also Capitol Life Ins. Co. v. Gallagher*, No. 94-1040, 1995 WL 66602, at *2 (10th Cir. Feb. 7, 1995) ("[the receiver] may be compelled to arbitrate because a receiver 'stands in the shoes' of the [receivership entity]"); *U.S. Small Bus. Admin. v. Coqui Capital Mgmt., LLC*, No. No. 08 Civ. 0978(LTS)(THK), 2008 WL 4735234, at *2 (S.D. N.Y. Oct. 27, 2008) ("[A] receiver's ability to litigate claims in federal court is limited by any valid agreement, previously executed by the receivership entity, that mandates arbitration."); *Moran v. U.S. Bank, N.A.*, No. 3:06-cv-050, 2007 WL 1023447, at *7 (S.D. Ohio Jan. 4, 2007) (applying arbitration agreement to receiver); *Phillips v. Lincoln Nat'l Health & Cas. Ins. Co.*, 774 F.Supp. 1297, 1299 (D. Colo. 1991).

Because the Receiver stands in the shoes of SGC, he is "subject to the same claims and defenses as the received entity he represents." *Wuliger v. Mfrs Life Ins. Co.*, 567 F.3d 787, 798-99 (6th Cir. 2009); *see also FDIC v. Ernst & Young, LLP*, 374 F.3d 579, 584 (7th Cir. 2004). Despite the fact that he is attempting to bring fraudulent transfer claims, the Receiver cannot escape his obligation to arbitrate. The Receiver of SGC is seeking to disgorge compensation that SGC (a FINRA member) paid to its employees (FINRA "associated persons") for work they did for and while employed by SGC. Those compensation claims unquestionably fall within the scope of FINRA Rule 13200.

D. The Court Should Compel Arbitration and Stay or Dismiss the Case

As this Court is aware, arbitration is heavily favored as a matter of public policy. *See, e.g., Southland Corp. v. Keating*, 465 U.S. 1, 10 (1984) (citing "national policy favoring arbitration"). The United States Supreme Court requires that the question of arbitrability be addressed with a "healthy regard for the federal policy favoring arbitration." *Moses H. Cone Memorial Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). "[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id*. In other words, courts must "rigorously enforce arbitration agreements." *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987), quoting *Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 221 (1985).

In deciding to compel arbitration, the Court must determine "whether there is a valid agreement to arbitrate between the parties; and . . . whether the dispute in question falls within the scope of that arbitration agreement." *Webb v. Investacorp, Inc*., 89 F.3d 252, 258 (5th Cir. 1996). As demonstrated above, there are valid agreements to arbitrate under FINRA Rules, the Form U-4 of every FA, and the Promissory Notes. Once the court determines there is a valid agreement to arbitrate, it "must pay careful attention to the strong federal policy favoring arbitration and must resolve all ambiguities in favor of arbitration." *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004).

There are no statutory or policy reasons for finding the Receiver's claims are non-arbitrable. The fact that SGC is in receivership does not bear upon the arbitrability of the claims here; the Receiver stands in the shoes of SGC and is bound to all obligations of SGC, including the obligation to arbitrate the instant claims. *See Javitch*, 315 F.3d at 627. Accordingly, pursuant to terms of 9 U.S.C. § 4 and applicable case law, the Court should compel arbitration of all claims asserted in the Second Amended Complaint.

Additionally, the Court should exercise its discretion and dismiss the Receiver's suit because there is no need for the Court to retain jurisdiction. *Alford v. Dean Witter Reynolds, Inc*., 975 F.2d 1161, 1164 (5th Cir. 1992). At a minimum, the Court must stay the case pending arbitration. *See* 9 U.S.C. § 3.

IV.

IN THE ALTERNATIVE, THE RECEIVER HAS FAILED TO STATE A CLAIM UPON WHICH RELIEF MAY BE GRANTED

The Receiver's claims should be dismissed, in the alternative, for failure to state a claim under FED. R. CIV. P. 9(b) and 12(b)(6).

A. The Receiver Fails to Meet the Rigorous Pleading Standards of Rule 9(b)

All claims that "sound in fraud" must satisfy the requirements of Federal Rule of Civil Procedure 9(b). Here, 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.) (dismissing unjust enrichment claim under Rule 9(b) because "it would be nonsensical to allow what is essentially a fraud claim to evade the particularity requirements through pleading under an equitable, rather than legal, theory").

Rule 9(b) states that "[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity." 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, and that all complaints failing to meet its requirements should be dismissed for failure to state a claim. As the *Williams* court noted, "we apply [Rule 9(b)] with force, without apology." *Williams*, 112 F.3d at 178.

Moreover, these stringent pleading requirements must be met with respect to *each defendant*. General allegations that lump all defendants together, rather than separately setting forth the alleged wrongdoings of each named defendant, do not satisfy Rule 9(b). *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).

Here, the Receiver utterly fails to meet this standard. He has sued 300+ different former employees without making any attempt to state an individual claim against any of them. 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 also alleges that the "uncontroverted facts establish that the Stanford Defendants were running a Ponzi scheme . . . ." *Id.* at ¶ 35. The Receiver, however, does not identify what "uncontroverted facts" he relies upon, nor does he make any attempt to show that SGC -- from whom the FAs here received their compensation -- was a Ponzi scheme, as opposed to SIB, which is the entity identified by the SEC as the Ponzi scheme. The Receiver pleads no specific facts to support his contention that the FAs were paid their compensation "solely for the purpose of concealing and perpetuating the fraudulent scheme." *Id*. at ¶ 30. The Receiver also leaves a mystery as to which creditor(s) for whom he seeks to recover the alleged fraudulent transfers.

Further, to recover for unjust enrichment, a plaintiff must show that the defendant 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). The Receiver's complaint contains no facts supporting an inference that FAs obtained any benefit by fraud, duress or the taking of undue advantage.

In short, the Receiver's group pleading and conclusory allegations are wholly insufficient under Rule 9(b), and the Complaint should be dismissed for failure to state a claim.

B. The Receiver Also Fails to Meet the Pleading Standards of Rule 8

The Receiver's bare, unsupported allegations also are insufficient under the more lenient requirements of Rule 8. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (holding that pleading "conclusory statements," "labels and conclusions," or "a formulaic recitation of a cause of action" do not suffice to support a claim); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Receiver is not allowed to take short cuts and avoid federal court pleading requirements merely because he chose to sue more than 300 defendants, but that is exactly what he has attempted to do.

Indeed, the Receiver has not even bothered to identify the legal grounds on which he seeks relief from the FAs. At a minimum, the Receiver must provide "fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. The Receiver's complaint fails to provide the FAs with the requisite "fair notice" because it does not identify which state's fraudulent transfer laws apply to the claims. This is important, as the Receiver's counsel acknowledged to the Fifth Circuit during oral argument:

> Now, why did we not bring fraudulent transfer claims? And if that's where this Court is headed, an opinion that says we are restricted to state law fraudulent transfer claims, here's what happens. We have hundreds of trials under different states' fraudulent transfer laws on the investors' affirmative defenses of objective good faith. We will spent millions of dollars wasted in litigation pursuing that kind of process . . . . Fraudulent transfer statutes do differ. For example, here in Louisiana there is not even a fraudulent transfer statute.

App. at 427-429.

The fraudulent transfer or conveyance statutes that may be applicable to the Receiver's claims include statutes from Texas, Florida, Arkansas, Louisiana, Tennessee, Pennsylvania, Georgia, Ohio, North Carolina, Virginia. All are locations where relevant events occurred, where some of the FAs reside, or where the property sought by the receiver is located.[7] State fraudulent transfer statutes vary widely, as the Receiver has acknowledged, particularly in the length of statute of limitations, the standards for establishing a good faith defense, and other defenses that could be critical to the FAs' ability to defend against the Receiver's claims. The Receiver's failure to identify the fraudulent transfer laws upon which his claims are based denies the FAs the adequate notice needed to properly defend themselves against the Receiver's claims. The Receiver's complaint, therefore, should be dismissed on this additional basis.

[7] Choice of law issues relating to fraudulent transfer or conveyance claims can be complex. Some courts have held that such claims are governed by the law of the location where the property sought currently is held, *see, e.g. Citizens Bank of Clearwater v. Hunt*, 927 F.2d 707 (2nd Cir. 1991), while other courts have applied a multi-factor test to determine the state with the most significant relationship to the dispute, *see, e.g. In re Consolidated Capital Equities Corp.*, 143 B.R. 80 (N.D. Tex. 1992); *S.E.C. v. Infinity Group Co.*, 27 F. Supp. 2d 559 (E.D. Pa. 1998). Generally speaking, contractual choice of law clauses do not control the choice of law determination for fraudulent transfer claims, as such claims are considered to be tort-based, rather than contract based. *See, e.g. Drenis v. Haligiannis*, 452 F. Supp. 2d 418 (S.D.N.Y. 2006).

V.

CONCLUSION

For the reasons stated herein, the Court should compel arbitration of all claims asserted in the Receiver's Second Amended Complaint, and dismiss or stay all proceedings in this action against the moving Defendants. In the alternative, the Court should dismiss all claims asserted in the Receiver's Second Amended Complaint pursuant to FED. R. CIV. P. 9(b) and 12(b)(6).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of January 2009, 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/Matthew G. Nielsen