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. 03:09-CV-0724-N**
v.	§	
JAMES R. ALGUIRE, et al.	§	
Relief Defendants.	§	

REPLY IN SUPPORT OF PATRICIO ATKINSON'S MOTION TO COMPEL ARBITRATION OR, IN THE ALTERNATIVE, TO DISMISS SECOND AMENDED COMPLAINT

TO THE HONORABLE JUDGE OF SAID COURT

COMES NOW Defendant Patricio Atkinson ("Mr. Atkinson"), and files this Reply in Support of his Motion to Compel Arbitration or, in the Alternative, to Dismiss Second Amended Complaint (the "Complaint").[1]

I. PRELIMINARY STATEMENT

Neither the Receiver's Response to the Motion [Doc. 337], nor his Response to similar motions by the Stanford Employees' [Doc. 316], persuasively rebut the fact that: (1) the Receiver is bound by the agreement to arbitrate or (2) his Complaint is subject to dismissal.

The Receiver contends that he brings claims in this lawsuit as a creditor, rather than a steward of the Receivership Estate. However, the Court's order appointing the Receiver grants the Receiver the power to institute actions on behalf of the Receivership Estate – ***not*** the

[1] Mr. Atkinson's Motion to Compel Arbitration or, in the Alternative, to Dismiss Second Amended Complaint will be referred to herein as the "Motion."

creditors. Thus, the receiver is bound to arbitration agreements to the same extent that the receivership entities would have been absent the appointment of the receiver. Furthermore, the Receiver's argument that the Court should exercise its discretion and deny arbitration is based entirely upon FINRA considerations, which ***do not apply*** in Mr. Atkinson's case. Mr. Atkinson was not a broker and his agreement to arbitrate is based on contract and not FINRA regulation. Accordingly, the Court should compel arbitration and stay or dismiss this case pending arbitration.

The Receiver's allegations against Mr. Atkinson are not even arguably sufficient to satisfy the Supreme Court's standard on a motion to dismiss. The Receiver's contention that Rule 9(b) does not apply is also without merit. The overwhelming weight of authority in the Fifth Circuit applies Rule 9(b) to fraudulent transfer claims, and the Receiver does not even attempt to rebut that Rule 9(b) applies to his unjust enrichment "claims." Because the Receiver's bare, unsupported allegations are neither well-pleaded, nor plausible, the Receiver cannot meet the Rule 9(b) or even the Rule 8 pleading standard. Moreover, the weight of authority holds that unjust enrichment is an equitable remedy – not an independent cause of action. Even assuming unjust enrichment was a cause of action, the Receiver could not assert it in this case because he has an adequate legal remedy in the form of the Texas UFTA. Therefore, even if arbitration is not compelled, the Receiver's claims should be dismissed.

II.
ARGUMENT AND AUTHORITIES

A. The Receiver Stands in the Shoes of the Stanford and Is Bound by the Agreement to Arbitrate.

The Receiver contends that he brings claims in this lawsuit as a creditor, rather than a steward of the Receivership Estate. Because there is a lack of case law where a "receiver suing as a creditor" was required to arbitrate fraudulent transfer cases, he argues, the Receiver should

also not be so required. The Receiver's argument fails because the Court's order appointing the Receiver grants the Receiver the power to institute actions on behalf of the Receivership Estate – ***not*** the creditors.

In artfully constructing his straw man and knocking it down, the Receiver ignores the fact that, as the administrator of the Receivership Estate, he steps into the shoes of the receivership entity. *See Capitol Life Ins. Co. v. Gallagher*, No. 94-1040, 1995 WL 66602, at *2 (10th Cir. Feb. 7, 1995) (stating that the receiver "may be compelled to arbitrate because a receiver 'stands in the shoes' of the [receivership entity]"). Paragraph 4 of the Order Appointing Receiver, entered by the Court on February 16, 2009, authorizes the Receiver "to immediately take and have complete and exclusive control, possession, and custody of the Receivership Estate and to any assets traceable to assets owned by the Receivership Estate" and to "[i]nstitute such actions or proceedings [in this Court] to impose a constructive trust, obtain possession, and/or recover judgment with respect to persons or entities who received assets or records traceable to the Receivership Estate." Order Appointing Receiver [Doc. 10 of original SEC proceeding] at ¶¶ 4, 5(c); Amended Order Appointing Receiver [Doc. 157 of original SEC proceeding] at ¶¶ 4, 5(c). While one of the Receiver's key duties is to maximize distributions to creditors, he does not stand in their shoes. *See* Amended Order Appointing Receiver [Doc. 157 of original SEC proceeding] at ¶ 5(g), (j) (ordering the Receiver to "[p]reserve the Receivership Estate and minimize expenses in furtherance of maximum and timely disbursement thereof to claimants").

In *Javitch v. First Union Securities Inc.*, 315 F.3d 619, 625-28 (6th Cir. 2003), the Circuit Court flatly rejected the receiver's argument that the receiver could escape arbitration agreements entered into by the receivership entity on the grounds that he was bringing suit on behalf of the creditors. The court explained that, although the stated objective of a receivership

may be to preserve the estate for the benefit of creditors, that does not equate to a grant of authority to pursue claims belonging to the creditors. *Id*. at 627 (citing *Jarrett v. Kassel*, 972 F.2d 1415, 1426 (6th Cir.1992)) (finding that the receiver is bound to arbitration agreements to the same extent that the receivership entities would have been absent the appointment of the receiver). As one district court explained:

> [i]It is axiomatic [the Receiver] obtain[s] the rights of action and remedies that were possessed by the person or corporation in receivership. Although a receivership is typically created to protect the rights of creditors, the receiver is not the class representative for creditors and receives no general assignment of rights from the creditors. Thus, the receiver can bring actions previously owned by the party in receivership for the benefit of the creditors, but he or she cannot pursue claims owned directly by the creditors.

Steinberg v. Alpha Fifth Group, 2008 WL 906270, at **4-5 (S.D. Fla. Mar. 31, 2008) (quoting *Freeman v. Dean Witter Reynolds, Inc.*, 865 So.2d 543, 550 (Fla. Dist. Ct. App. 2003)) (rejecting the receiver's argument that he was bringing action on behalf of the creditors of the receivership entity).

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*, 315 F.3d 619, 627; *see also Gallagher*, 1995 WL 66602, at *2 ("[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).

The Receiver does not dispute that Mr. Atkinson worked in the human resources department. He was not a broker. Mr. Atkinson's right to arbitrate arises out of his Severance Agreement with Stanford, entered into November 16, 2007, before the events leading to this receivership occurred. *See* App. to Motion [Doc. 305-2] at 4. The Receiver's arguments regarding FINRA regulation and arbitration, therefore, have no applicability to Mr. Atkinson. The Receiver does not dispute that Stanford and Mr. Atkinson, pursuant to the Severance Agreement agreed to arbitrate any and all disputes in arbitration. *See* Severance Agreement § 12, App. To Motion [Doc. 305-2] at 9-10. Accordingly, for the reasons stated herein and in Mr. Atkinson's Motion, arbitration should be compelled and this matter dismissed.

B. The Receiver's Argument that the Court Should Exercise its Discretion and Deny Arbitration is Based Entirely Upon FINRA Considerations, Which Do Not Apply to Mr. Atkinson's Agreement to Arbitrate.

The Receiver summarily argues that "the Court should exercise its broad powers in receivership cases and deny Atkinson's motion to compel arbitration." Response [Doc. 337] at 2. Yet he provides no authority or argument ***why*** the Court should exercise such discretion. The Response to the Stanford Employees' Motion is based entirely upon the expense and privacy of FINRA arbitration. *See* Response [Doc. 316] at 9. However, as stated above, Mr. Atkinson is not subject to FINRA arbitration rules. The American Arbitration Association ("AAA") rules apply to Mr. Atkinson's Severance Agreement. *See* Severance Agreement § 12, App. to Motion [Doc. 305-2] at 9-10.

AAA and FINRA arbitration differ greatly. AAA arbitration is considerably less costly than FINRA arbitration. *Compare* AAA Pilot Flexible Fee Schedule (providing for maximum fees of $4,275 in a proceeding with $300,000 or less in dispute) *with* FINRA Code of Arbitration Procedure for Industry Disputes §§ 13900-13903 (providing for maximum fees of $7,000). The AAA Rules also provide more flexibility than FINRA in allowing the parties to amend the Rules

by agreement so as to address privacy or other concerns. *See* AAA Commercial Arbitration Rule R-1. Accordingly, the Receiver's arguments in support of why the Court should exercise its discretion and deny Mr. Atkinson's motion to arbitrate do not even apply to Mr. Atkinson.

C. <u>The Receiver's Complaint Does Not Comply With Rule 9(b), Which Applies to All His Claims Against Mr. Atkinson</u>.

1. The Overwhelming Weight of Authority In the Fifth Circuit Holds That Rule 9(b) Applies to the Fraudulent Transfer Claims.

"Although the Fifth Circuit has not spoken directly on the subject, most courts hold that Rule 9(b) applies to fraudulent transfer actions." *Quilling v. Stark*, No. 3:05-CV-1976-L, 2006 WL 1683442, at *5 (N.D. Tex. June 19, 2006) (J. Lindsey). Indeed, the weight of authority in the Fifth Circuit applies Rule 9(b) to fraudulent transfer claims, particularly Texas state law fraudulent transfer claims like the Receiver purports to assert here. *See Quilling*, 2006 WL 1683442, at *5 (applying Rule 9(b) to fraudulent transfer claims and stating "Fifth Circuit precedent favors applying Rule 9(b) to fraudulent transfer actions"); *Eastern Poultry Distributors, Inc. v. Yarto Puez*, Civ. A. 3:00-CV-1578-M, 2001 WL 34664163, at *2 (N.D. Tex. Dec. 3, 2001) (fraudulent transfer under TEX. CIV. PRAC. & REM. CODE 24.005(a)(1) requires compliance with 9(a) even though intent to defraud not required on part of Defendant) (J. Lynn); *Indiana Bell Telephone Co., Inc. v. Lovelady*, No. SA-05-CA-285-RF, 2006 WL 485305, at * 1 (W.D. Tex. Jan. 11, 2006) (citing cases and stating that Fifth Circuit precedent favors applying Rule 9(b) to the Texas UFTA).

The Receiver purports to support his argument that Rule 9(b) does not apply to the Receiver's Texas fraudulent transfer claims by citing *Pearlman v. Alexis*, No. 09-20865-cv, 2009 WL 3161830, *2 (S.D. Fla. Sept. 25, 2009) and *GE Capital Commercial, Inc. v. Wright & Wright, Inc.*, Civ. Action No. 3:09-CV-572-L, 2009 WL 5173954, at *10 (N.D. Tex. Dec. 31, 2009) (J. Lindsey) (slip op.). *See* Response [Doc. 316] at 10-12. *Pearlman* states merely, in

dicta, that Rule 9(b) does not apply to claims brought under the Florida UFTA. *Pearlman v. Alexis*, No. 09-20865-cv, 2009 WL 3161830, at *2 (S.D. Fla. Sept. 25, 2009). *GE Capital* is simply contrary to the weight of authority in the circuit. *Compare Quilling*, 2006 WL 1683442, at *5; *Eastern Poultry Distributors*, 2001 WL 34664163, at *2; *Indiana Bell Telephone Co., Inc. v. Lovelady*, 2006 WL 485305, at *1. Accordingly, the Court should apply Rule 9(b) to the Receiver's Texas fraudulent transfer claims.

The Receiver claims his identification of the amount sought from Mr. Atkinson and the fact that it was a severance payment is sufficient to satisfy Rule 9(b). *See* Response [Doc. 316] at 12-13. It is not. As Mr. Atkinson pointed out in his Motion, 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). Here, besides 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," the Receiver has provided no information regarding the time, form or method, source, or payee of any of the challenged transfers. The Complaint therefore fails to state a claim. *See Caremerica, Inc. v. Ber Care, Inc.*, 409 B.R. 737, 750 (Bankr. E.D.N.C. July 23, 2009).

2. The Receiver Does Not Even Attempt to Rebut that Rule 9(b) Applies to Its Unjust Enrichment Claims.

The Receiver does not even argue that his unjust enrichment "claim" is not subject to Rule 9(b). *See generally* Response. Indeed, he cannot. *See Breckenridge Enterprises, Inc. v. Avio Alternatives, LLC*, 3:08-CV-1782-M, 2009 WL 1469808, at *10 (N.D. Tex. May 27, 2009) (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"). Applying Rule 9(b), the Receiver's unjust enrichment "claim" should be dismissed because the Complaint contains no facts supporting an inference that Mr. Atkinson obtained any benefit by fraud, duress or the taking of undue advantage. *See Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992).

D. The Complaint Fails to Meet the Pleading Standards of Rule 8.

The Receiver's allegations do not even arguably meet the Supreme Court's pleading standard. The Receiver utterly fails to meet his burden under Rule 8 in proffering a Complaint that is unclear and confusing. 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." *See generally*, Complaint. Furthermore, he has provided no information regarding the time, form or method, source, or payee of any of the challenged transfers. The Complaint wholly fails both the well pleaded and plausibility standards and, therefore, does not state a claim. *See Caremerica, Inc. v. Ber Care, Inc.*, 409 B.R. 737, 750 (Bankr. E.D.N.C. July 23, 2009) (citing *Ashcroft v. Iqbal*, --- U.S. ---, --- 129 S.Ct. 1937 (May 18, 2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 558 (2007)).

The Receiver cites two cases to support his untenable position that his allegations satisfy Rule 8. One was decided prior to the Supreme Court's application of the new, more stringent pleading standard in the *Twombly* and *Iqbal* line of cases, which state that there must be sufficient factual matter to: (1) support each claim for relief (the "well pleaded standard"); and (2) to state a claim that is plausible on its face (the "plausibility standard"). *See Iqbal*, 129 S.Ct. 1937; *Twombly*, 550 U.S. at 558. In the second, *GE Capital*, the plaintiff alleged the time, form

or method, payor and payee of each of the transfers. *See GE Capital*, 2009 WL 5173954, at *2 (stating that plaintiff alleged the transfers at issue were made during certain dates in July 2008 and August 2008, by wire, and identifying the particular accounts to which they were made and the owners of those accounts). In contrast, the Receiver has not alleged the time, form or method, payor or payee of any of the transfers to Mr. Atkinson. Accordingly, neither case saves the Receiver from dismissal under *Iqbal* and *Twombly*.

As stated above and in Mr. Atkinson's Motion, the Receiver's bare, unsupported allegations are neither well-pleaded, nor plausible. The Receiver's Complaint, therefore, should be dismissed.

E. The Weight of Authority Holds that Unjust Enrichment Is Not an Independent Cause of Action.[2]

The Courts have appropriately recognized the conflicting authority over whether unjust enrichment is an independent cause of action. *See Breckenridge Enterprises*, 2009 WL 1469808 ("it is unclear whether unjust enrichment may stand as an independent cause of action"); *Biliouris v. Sundance Res., Inc.*, 559 F.Supp.2d 733, 739 (N.D. Tex. 2008) (Godbey, J.) (recognizing confusion). However, the weight of authority holds that unjust enrichment is an equitable remedy – not an independent cause of action. *See R.M. Dudley Constr. Co. v. Dawson*, 258 S.W.3d 694, 703 (Tex. App. – Waco 2008, pet. denied)("Unjust enrichment, itself, is not an independent cause of action."); *Argyle ISD ex rel. Bd. of Trustees v. Wolf*, 234 S.W.3d 229, 246 (Tex. App. – Fort Worth 2007, no pet.)(same); *Baisden v. I'm Ready Productions, Inc.*, 2008 WL 2118170 at *10 (S.D. Tex. May 16, 2008) (holding that unjust enrichment is not an independent

[2] Now recognizing that disgorgement is not an independent cause of action, the Receiver contends he is not attempting to assert such a claim. Nevertheless, that this is unclear from the face of his Complaint underscores the vagueness of his allegations and their insufficiency under *Iqbal* and *Twombly*.

cause of action under Texas law and collecting cases). Therefore, the Receiver's unjust enrichment claims should be dismissed.

Furthermore, even assuming unjust enrichment was a cause of action, the Receiver could not assert it in this case because he has an adequate legal remedy in the form of the Texas UFTA. *See Best Buy Co. v. Barrera*, 248 S.W.3d 160, 161 n. 1 (Tex.2007) (quoting *BMG Direct Mktg., Inc. v. Peake*, 178 S.W.3d 763, 770 (Tex.2005) ("Like other equitable claims and defenses, an adequate legal remedy may render equitable claims of unjust enrichment and equitable defenses of voluntary-payment unavailable.")); *R.M. Dudley*, 258 S.W.3d at 703 (stating that "the availability of an adequate legal remedy may render equitable claims like unjust enrichment unavailable"). Accordingly, the Receiver's unjust enrichment claims should be dismissed on this additional basis.

IV.
PRAYER FOR RELIEF

For the reasons set forth herein and in Mr. Atkinson's Motion to Compel Arbitration or, in the Alternative, to Dismiss Second Amended Complaint and Brief in Support, the Complaint should be dismissed in its entirety, without leave to amend.

DATE: March 15, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 15, 2010, a true and correct copy of the foregoing document was submitted to the Clerk of the Court of the U.S. District Court, Northern District of Texas, using the CM/ECF system, and was served upon all counsel that have appeared in this case through this Court's electronic filing system.

/s/ Matthew D. Rinaldi
Matthew D. Rinaldi