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.,	)	
Defendants.	)	

REPLY BRIEF IN SUPPORT OF MOTION OF DEFENDANTS JULIAN "BRAD" BRADHAM, NOLAN FARHY, BLANCA FERNANDEZ, VIRGIL HARRIS, NANCY HUGGINS, LOU SCHAUFELE, HARVEY SCHWARTZ, STEVE SLEWITZKE, AND ERIC URENA TO DISMISS AND TO COMPEL ARBITRATION

COME NOW, Julian "Brad" Bradham, Nolan Farhy, Blanca Fernandez, Virgil Harris, Nancy Huggins, Lou Schaufele, Harvey Schwartz, Steve Slewitzke, and Eric Urena (the "Nine Defendants"), through undersigned counsel, and submit this reply brief in support of their motion to dismiss the Receiver's Second Amended Complaint Against Former Stanford Employees (the "Complaint") dated December 18, 2009 pursuant to Federal Rules of Civil Procedure 12(b)(3) and (6). The Receiver's brief in response presents nothing that shows or proves that his claims in the Complaint are not subject to and fall under valid mandatory arbitration clauses, or are otherwise subject to arbitration per FINRA rules. Many of the Receiver's arguments are directly controverted by the case law.

I. INTRODUCTION

If nothing else the Receiver is consistent. The former Stanford Employee defendants in this matter find themselves arguing in support of a position that is relatively obvious, and against a position that is reaching, unsupported, and in direct contrast to the existing law. The Nine Defendants, like many others in this matter, seek to compel the Receiver to resolve his claims in the manner in which the parties originally agreed to or are otherwise bound to. The Receiver takes the curious position that he never signed an agreement compelling arbitration, he is not subject to FINRA regulation, and not obligated to arbitrate. The overwhelming body of case law cited by the Nine Defendants and other similarly situated Defendants in this matter directs otherwise. The Receiver has no authority to bring claims on behalf of creditors, and his claims are subject to the pre-receivership agreements made by SGC.

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Receiver has no authority to act on behalf of SGC creditors.

It appears as though the Receiver has, as he has throughout this matter, shot first and tried to aim later. The Receiver has not been appointed to pursue claims on behalf of creditors and has no authority to bring claims on behalf of creditors. He does have authority to bring claims that will ultimately benefit SGC creditors, but there is a distinction. The order appointing the Receiver dated February 16, 2009 at Docket Entry number 10 (the "Order") in S.E.C. v. Stanford International Bank, Ltd., Civil Action No. 3-09CV0298 (N.Tex.) (the "Underlying Receivership Action") gives the Receiver specific control over the Receivership Estate, which by definition consists of the

Receivership Assets and Receivership Records. In Paragraph 1 of the Order the Receivership Assets and Records are defined as,

> "the assets, monies, securities, properties, real and personal, tangible and intangible, of whatever kind and description, wherever located, and the legally recognized privileges (with regard to the entities), **of the Defendants and all entities that they own or control**…and the books, and records, client lists, account statements, financial and accounting documents, computers, computer hard drives, computer disks, internet exchange servers, telephones, personal digital devices, and other informational resources of or in possession of the Defendants, or issued by Defendants or in possession of any agent or employee of Defendants." (emphasis added).

The Order further provides in Paragraph 3 that, "the duties of the Receiver shall be specifically limited to the matters related to the Receivership Estate and unsettled claims thereof remaining in the possession of the Receiver as of the date of this Order."

In fact, the Order implies that the Receiver does not have the power to pursue claims directly on the behalf of creditors. It states in Paragraph 5(f) that the,

> "Receiver is further authorized to contract and negotiate with any claimants against the Receivership Estate (**including, without limitation, creditors**) for the purpose of settling or compromising any claim. To this purpose, in those instances in which the Receivership Assets serve as collateral to secured creditors, the Receiver has authority to surrender such assets to secured creditors…."[1]

The Receiver has filed suit against hundreds of investor creditors and cannot possibly now stand in the shoes adverse parties. Indeed, the Receiver has previously argued that the Examiner should represent the investor creditors, an argument both the Examiner and this Court rejected. (Dkt. 29, p. 3). Further, Paragraph 7 of the Order restrains creditors from any act to obtain possession of Receivership Assets without prior approval from the Court. There is absolutely no place in the Order where the Court grants the Receiver any power to pursue claims on behalf of creditors. Perhaps most telling is the fact that

[1] It makes no sense that the Receiver is authorized to negotiate claims with creditors using assets of the Receivership Estate and to pursue claims on behalf of the creditors at the same time. The conflict of interest is obvious.

numerous creditors have sought to intervene in the Underlying Receivership Action to preserve and pursue their own claims. Apparently, they do not trust or want the receiver pursuing their claims without permission. The Receiver's brief in response states that he was appointed over both debtor and creditor entities, but there is no citation as to where this authority exists. (Dkt. 316. p. 6-7).

The cases cited in support of the Receiver's position actually support the Nine Defendants' position. To poke a gaping hole in the Receiver's argument, we need look no further than the first case cited for the premise that a receiver has standing to sue as a creditor under a fraudulent-transfer claim, Scholes v. Lehman, 56 F.3d 750 (7th Cir. 1995). The Receiver misreads Scholes entirely. It does not stand for the proposition that a receiver has standing to pursue claims on behalf of creditors. Instead, Scholes instructs that a receiver may pursue claims on behalf of the receivership entity that would recover assets, which in turn would benefit innocent investors.

> "That reason falls out now that Douglas has been ousted from control of and beneficial interest in the corporations. The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more Douglas's evil zombies. Freed from his spell they became entitled to the return of the moneys--for the benefit not of Douglas but of innocent investors--that Douglas had made the corporations divert to unauthorized purposes. That the return would benefit the limited partners is just to say that anything that helps a corporation helps those who have claims against its assets. The important thing is that the limited partners were not complicit in Douglas's fraud; they were its victims." Scholes at 754.

The distinction here is subtle, but the court in Scholes is clearly not giving the receiver authority to pursue the creditors' claims.

The remaining cases cited by the Receiver for this proposition are no more helpful to his position. The issue is not whether the Receiver may pursue a fraudulent transfer claim, but whose shoes is he standing in when he does it. The case law cited by the

Receiver actually instructs that he is not asserting his fraudulent transfer claims in the shoes of creditors, but in the shoes of SGC to recoup assets for the benefit of its investors and creditors. To use the Scholes court's metaphor, the Receiver is theoretically taking control of what was previously a zombie entity, SGC, for the purpose of attempting to right the wrongs done while it was under the wrongdoers' spell. The Receiver has the right to attempt to recoup monies that he believes SGC would have never paid out under normal circumstances, but does so in the shoes of SGC. A normal and intended byproduct of such claims is that they may benefit innocent investors and creditors to the extent money is recovered.

Why does the Receiver ignore and completely fail to address the findings in Javitch v. First Union Sec., Inc., 315 F.3d 619 (6th Cir. 2003)? Javitch is square on point regarding the issues presented in Defendants' motions to compel arbitration and to dismiss. In Javitch, the receiver asserted claims against several brokerage firms and brokers allegedly on behalf of creditors. The brokerage firms and brokers asserted that they had valid binding agreements whereby all disputes between them and the receivership entity would be resolved through arbitration. Id. at 623. The receiver argued that he was not subject to the arbitration agreements and was bringing his claims on behalf of creditors, not the receivership entities. Id. at 624. The court found that, "because they stand in the shoes of the entity in receivership, receivers have been found to lack standing to bring suit unless the receivership entity could have brought the same action. See, e.g., Goodman v. FCC, 337 U.S. App. D.C. 188, 182 F.3d 987, 991-92 (D.C. Cir. 1999) (receiver did not have standing to sue on behalf of customers and creditors of entity in receivership); Scholes v. Lehmann, 56 F.3d 750, 753-55 (7th Cir. 1995)

(receiver for corporation could sue for diversion of assets as fraudulent conveyances by controlling shareholder)."[2] Id. at 625. The court also went on to find that,

> "fraud on investors that damages those investors is for those investors to pursue-not the receiver. By contrast, fraud on the receivership entity that operates to its damage is for the receiver to pursue (and to the extent that investors as the holders of equity interests in the entity may ultimately benefit from such pursuit, that does not alter the proposition that the receiver is the proper party to enforce the claim)." Id.

"[A]lthough 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. The court ultimately found that the receiver stood in the shoes of the receivership entities for purposes of the claims made, and that the receiver was bound to the arbitration agreements in the same way the receivership entity would have been if no receiver was ever appointed. Id.

The situation at bar is almost identical to Javitch. In both cases the receiver is pursuing claims allegedly on behalf of creditors, where an arbitration agreement exists between the receivership entity and the defendants. The findings here should be no different than Javitch. Despite the Receiver's slight of hand attempt to convince the Court that he is pursuing claims on behalf of creditors, it should be clear that he is not.[3] He has no authority to pursue claims on behalf or creditors. He is only pursuing claims in the shoes of SGC and is subject to all pre-receivership contracts and agreements regarding resolution of those claims. The fact that the Receiver never signed an arbitration agreement and that he is not a member of FINRA is a non-issue so long as he

[2] Note that the Javitch court's interpretation of the holding in Scholes is substantially different than the Receiver's in his response brief.

[3] Even if it could be credibly argued that he was pursuing claims against the FA's on behalf of creditor investors, those claims would also be required to go through arbitration. Virtually every single broker-client agreement has an arbitration clause, and the broker-client agreements here are no different.

stands in the shoes of SGC. The Complaint against the Nine Defendants should be dismissed and the Receiver should be compelled to arbitrate his claims.

B. The equities do not favor the Receiver.

The Receiver's arguments regarding the equities of this matter are unsupported and ironic. The Receiver argues that arbitration would unnecessarily deplete the assets of the Receivership Estate, yet how much of the Receivership Estate has been depleted by unnecessary litigation in this matter and in the underlying Receivership action due to overreaching and unsupported positions taken by the Receiver. The Receiver notes that FINRA arbitration is not free, but neither is litigation. Based on the procedural history of this case and the Underlying Receivership Action, it is safe to assume that continued litigation of these claims will be no bargain to the Receivership Estate. FINRA arbitration would eliminate cost due to limited discovery and motion practice. FINRA arbitration would not result in inconsistent decisions on important questions of law. The examples cited by the Receiver (value of SIBL CDs and knowledge of former employees) are questions of fact, not law, and should be heard on a case by case basis. Regardless of whether or not the cases remained in this Court, each Defendant has a different set of circumstances that would have to be dealt with on a case by case basis. This also speaks to the Receiver's concern that there would be fractured suits and hundreds of arbitration actions. If this case was allowed to continue in this Court, the practical aspect of handling the cases would be no different. There would be hundreds of different sets of circumstances, different defenses for many of the Defendants, and the Court would have to go through each one bit by bit. Contrary to the Receiver's assertions, this is by no means a one size fits all case.

If nothing else, the Nine Defendants should be entitled to get the benefit they bargained for when they joined SGC. When these Nine Defendants joined SGC they signed agreements that expressly stated that such disputes would be arbitrated, or they joined SGC with the understanding and expectation that such disputes would be arbitrated because of its FINRA membership status. The Court should not strip them of the benefit of their employment bargains, which at the time they were made were not tainted under any analysis.

III. CONCLUSION

The Receiver's attempt to sidestep his obligation to arbitrate these claims must fail. He does not stand in the shoes of the creditors with regard to these claims. He was not appointed as such a representative, and he offers no authority for his position. In fact, the authority cited supports the Defendants' position. The Receiver totally ignores and has no response for the Javitch case which is on point and persuasive. It begs the question: How can you totally ignore a case that is squarely on point and not attempt to distinguish it at all? The only reasonable explanation is that the holding in Javitch is right. Based on the argument and authority set forth above and in their original brief in support, the Complaint against the Nine Defendants should be dismissed, the Receiver should be compelled to arbitrate said claims against the Nine Defendants pursuant to the arbitration clauses in the Note, Form U-4, and the FINRA Code of Arbitration for Industry Disputes, and this Court should award the Nine Defendants their attorneys' fees associated with this Motion.

Respectfully submitted this 17th day of March 2010.

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CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of March, 2010, I electronically filed the foregoing 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.

s/ Robert L. Wright
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