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

RALPH JANVEY, IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK, LTD., ET AL *Plaintiffs*	§	
v.	§	Case No: 03:10-cv-00366-N
MIGUEL VENGER, ET AL; *Defendants*	§	

DANIEL A. CAMPBELL'S AND HOLLY M. CAMPBELL'S MOTION TO DISMISS RECEIVER'S COMPLAINT AGAINST CERTAIN STANFORD INVESTORS

Daniel A. Campbell and Holly M. Campbell ("Campbell Defendants"), move to dismiss the Receiver's Complaint against them filed on February 23, 2010 (the "Complaint") pursuant to Federal Rules of Civil Procedure 12 (b)(1) and 12 (b)(6) on grounds the Court lacks subject matter jurisdiction because the disgorgement and unjust enrichment claims asserted by the Receiver are subject to the exclusive jurisdiction of the Courts of Barbuda and Antigua and because the Receiver has failed to state a claim upon which relief can be granted as more particularly set forth herein.

INTRODUCTION

1. The Receiver's Complaint arises from a well-publicized financial fraud case whereby R. Allen Stanford, James M. Davis, and Laura Pendergest-Holt ("Stanford Defendants") perpetrated an alleged Ponzi scheme in which they sold certificates of deposit ("CDs") issued by Stanford International Bank Limited in Antigua ("SIB" or

"SIBL"). The Campbell's are innocent investors who purchased the CDs in good faith and with their own hard earned money.

2. In his Complaint, the Receiver desires to make the "maximum disbursement" to defrauded investors and other investors. *See Complaint, paragraph 28.* To accomplish this end, the Receiver impermissibly seeks the return of innocent Stanford Investor's investments used to purchase CDs and any interest earned in connection with owning the CDs. The Complaint does not allege that the Campbell Defendants engaged in any wrongdoing or had any knowledge, or even any reason to suspect, that their purchase of the CDs was anything but a valid investment of their funds. Indeed, the Receiver admits that the Campbell Defendant "received money that they may have believed was a return on an investment placed with what they thought was a legitimate bank." *See Complaint, paragraph 29.* That is exactly what they believed to be the case. The Receiver asserts that the Campbell Defendants must turn over their CD proceeds to the Receivership Estate "to compensate victims of the Stanford fraud according to principles of law and equity. In fact, the Receiver is asking this Court to assist the Receiver in creating even more victims and to punish innocent Stanford Investors, like the Campbell Defendants, who have done nothing wrong.

3. The Receiver has cast an impermissibly wide net and caught within it innocent people who happen to have invested in the CDs. By lumping all of these people together into a group the Receiver calls "Certain Stanford Investors," and listing the amount of investment and interest he believes each person earned while investing in good faith in the CDs, the Receiver-though he notably has not pled any facts to support jurisdictional or substantive grounds over these people-expects this Court to magically

decide that the Receiver can grab the investment and interest of the investors who had no knowledge of any fraud.

A. RECEIVER'S DISGORGEMENT AND UNJUST ENRICHMENT CLAIMS ARE SUBJECT TO THE EXCLUSIVE JURISDICTION OF THE ANTIGUAN COURTS

4. The Receiver asserts that the funds received by the Campbell Defendants are in reality the result of a fraudulent transfer, or in the alternative, that the Campbell Defendants were unjustly enriched by the receipt of their CD proceeds. Like many Stanford Investors, the Campbell Defendants withdrew their invested funds in SIB a substantial time before the SEC initiated its enforcement proceedings in this Court. The withdrawals were made pursuant to the terms of the "Subscription Agreement" incorporating the Disclosure Statements, executed by the individual investors. Under the express provision of the Subscription Agreement, which are in the custody and control of the Receiver, the depositor agrees that the rights and obligations of the depositor and SIB "shall be construed in accordance with and governed exclusively by the laws of Antigua and Barbuda," and further "consent to the exclusive jurisdiction of the courts in Antigua and Barbuda in relation to any action or proceeding arising under this Subscription Agreement."

5. Federal law governs the enforceability of forum selection and choice of law clauses. *Haynsworth v. The Corporation,* 121 F.3d 956, 962 (5th Cir. 1997). Federal law considers forum selection clauses to be presumptively valid. *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 92 S.Ct. 1907, 1916, 32 L. Ed. 2d 513 (1972), *see also Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 594-95, 111 S. Ct. 1522, 113 L. Ed. 2d 622

(1991). The Fifth Circuit has consistently followed this rule. *See Haynsworth*, 121 F.3d at 962; *Kevlin Servs., Inc. v. Lexington State Bank*, 46 F.3d 13, 15 (5th Cir. 1995).

In reaching that conclusion the *Bremen* Court reasoned:

> For at least two decades we have witnessed an expansion of overseas commercial activities by business enterprises based in the United States. The barrier of distance that once tended to confine a business concern to a modest territory no longer does so. . . . . The expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts. . . .We cannot have trade and commerce in world markets and international waters exclusively on our terms, governed by our laws, and resolved in our courts.

Id. at 407 U.S. 9-10; 92 S.Ct. 1912; 32 L. Ed 2d 520.

6. A party resisting a forum selection clause must show that it is 'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S. Ct. 1907, 32 L. Ed. 2d 513 (1972). "Unreasonableness potentially exists where: (1) the incorporation of the forum selection clause into the agreement was the product of fraud or overreaching; (2) the party seeking to escape enforcement 'will for all practical purposes be deprived of his day in court' because of the grave inconvenience or unfairness of the selected forum; (3) the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or (4) enforcement of the forum selection clause would contravene a strong public policy of the forum state." *Haynsworth*, 121 F.3d at 963 (internal citations omitted). The burden of establishing unreasonableness is a heavy one that rests solely with the party resisting enforcement of the clause. *Mitsui & Co. v. USA, Inc. v. Mira M/V*, 111 F.3d 33, 35 (5th Cir. 1997) (citing *M/S Bremen*, 92 S.Ct. at 1913).

7. In the instant case, the CDs which are at the heart of the matter were issued by SIB in Antigua and the Subscription Agreement with SIB provides, not only

that the exclusive jurisdiction for disputes arising under the subscription agreement are to be tried in the courts of Antigua and Barbuda but also that the laws of Antigua and Barbuda are to govern. The Stanford companies operated in 14 countries and the investors are multinational. Having contracted for the specific forum and laws that are to govern their disputes, it is a "parochial concept" for the Receiver to insist that the contractual provision be ignored and that suit be maintained in this Court. The Receiver stands in the shoes of the Stanford companies and is clearly obligated to honor the forum selection provision in the SIB subscription agreements.

8. Moreover, because all of the investors were required to sign subscription agreements containing an agreement to be subject to the jurisdiction of the Antigua courts, the courts in Antigua can obtain jurisdiction over many of the foreign investors over whom this court has no jurisdiction, so as to ensure, in the event an equitable redistribution is required, that the harm is equally spread among all of the investors and not just the select individuals that the Receiver has decided to pursue.

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

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

i. 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." Compl. at ¶ 31-32. 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").

10. Rule 9(b) states that "[ijn 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. WlklX 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.

11. 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. ui*; 148 F.R.D. 561, 566 (N.D. Tex. 1993), aff'd *sub nom.*, *Melder v. Morris,* 27 F.3d 1097 (5th Cir. 1994).

12. Here, the Receiver utterly fails to meet this standard. He has sued 300+ different former investors without making any attempt to state an individual claim against any of them. Lumping together more than 300 former Stanford investors 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 also alleges that "the CD proceeds the Stanford Investors received from SIBL were , not in fact, their actual principal or interest earned on the funds they invested. Instead, the money used to make those payments came directly for the sale of SIBL CDs to other investors." Receivers' Original Complaint. at ¶3. The Receiver, however, does not identify what facts he relies upon to make such a claim. The Receiver pleads no specific facts to support his contention that the Stanford Investors were paid back their own investments "solely for the purpose of concealing and perpetuating the fraudulent scheme." *Id.* at ¶ 24. The Receiver also leaves a mystery as to which creditor(s) for whom he seeks to recover the alleged fraudulent transfers.

13. 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 the Stanford Investors obtained any benefit by fraud, duress or the taking of undue advantage.

14. 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.

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

15. 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.

16. Indeed, the Receiver has not even bothered to identify the legal grounds on which he seeks relief from the Campbell Defendants. 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 Campbell Defendants 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.

17. 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 Stanford Investors reside, or where the property sought by the receiver is located.[1] 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 Campbell Defendants' 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 Stanford Investors 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.

CONCLUSION

For the reasons stated herein, the Court should dismiss all claims for lack of subject matter jurisdiction, or, in the alternative, the claims should be dismissed for failure to state a claim upon which relief can be granted. .

Respectfully submitted,

By: */s/ Mark D. Goranson*

Mark D. Goranson
State Bar No. 08192950
Southern District No. 9093
GORANSONKING, PLLC
550 Westcott, Suite 415
Houston, Texas 77007

[1] 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).

Phone: (713) 526-9200
Fax: (713) 526-9202

ATTORNEYS FOR DEFENDANTS DANIEL AND HOLLY CAMPBELL

CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was served on opposing counsel via ECF on this 27th day of April 2010.

/s/ Mark D. Goranson
Mark D. Goranson