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-00366-N
v.	§	
MIGUEL VENGER, ET AL,	§	
Defendants.	§	

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

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Receiver Ralph S. Janvey (the "Receiver") opposes Daniel A. and Holly M. Campbell's ("the Campbells'") motion to dismiss. The Campbells assert that the Receiver's Complaint should be dismissed (1) under Federal Rule of Civil Procedure 12(b)(1) because of a forum-selection provision that they contend "subject[s this matter] to the exclusive jurisdiction of the Antiguan courts" and (2) under Rule 12(b)(6) because the Complaint lacks the specificity required by Rules 8 and 9(b). Neither ground has merit.

The Campbell's Rule 12(b)(1) motion fails because the Receiver, who is suing on behalf of Stanford International Bank Ltd's ("SIB's") creditors, was not a party to—and therefore is not bound by—the subscription agreement that contains the forum-selection/choice-of-law provision upon which they rely. Moreover, even if the Receiver were bound by such a contract, the forum-selection/choice-of-law provision would be unenforceable because it is unreasonable and contrary to public policy.

The Campbells' Rule 12(b)(6) motion fails because the Receiver's complaint easily meets the pleading requirements of Rules 8 and because Rule 9(b) does not apply to fraudulent transfer and unjust enrichment claims. Moreover, even if Rule 9(b) did apply, the Receiver's complaint has more than adequate detail to meets its requirements. Also, it would be inappropriate to dismiss a complaint under either Rule 8 or Rule 9 when the plaintiff has not been afforded an opportunity to replead.

I. The form-selection provision in the Campbell's subscription agreement does not apply and therefore does not deprive the Court of jurisdiction.

A. Standard for decision of a Motion to Dismiss based on a forum-selection clause.

The Campbells first seek dismissal based on the existence of a forum-selection provision in their Subscription Agreement with SIB that provided for at least some suits related to their CD purchase to be brought in Antigua. Although the Campbells purport to move under

Rule 12(b)(1) as to this ground, the Receiver notes that a motion to dismiss based on a forum-selection clause is more properly brought as a Rule 12(b)(3) motion asserting improper venue. *See Lim v. Offshore Specialty Fabricators, Inc.*, 404 F.3d 898, 902 (5th Cir. 2005) ("our court has treated a motion to dismiss based on a forum-selection clause as properly brought under Rule 12(b)(3)"). In any event, no matter how the motion has been denominated, the standard for decision is the same: "a court must accept as true all allegations in the complaint and resolve all factual conflicts in favor of the non-movant." *Better Bags, Inc. v. Redi Bag USA LLC*, 2010 WL 730331, at *2 (S.D. Tex. Mar. 2, 2010) (citing *Braspetro Oil Servs. Co. v. Modec (USA), Inc*., 240 Fed. App'x 612, 615 (5th Cir. 2007)).

B. The Receiver, a nonparty to the Campbells' subscription agreement, is not bound by the forum-selection and choice-of-law clauses contained in the agreement.

Even if the forum-selection and choice-of-law clauses contained in the Campbells' subscription agreement with SIB (i) were enforceable and (ii) said what the Campbells contend they say (neither of which is the case, as discussed later), they still would not bind the Receiver. This is because neither the Receiver nor the creditors whose interest he represents were parties to the Campbell-SIB subscription agreement.

Parties cannot agree to a transfer that is fraudulent as to the creditors of one of the parties and, with a contractual choice-of-law provision, block the rights of the non-party creditors to seek recovery under the Texas Uniform Fraudulent Transfer Act (or any other state's version of UFTA). This is illustrated by *In re Morse Tools, Inc*., 108 B.R. 384 (Bankr. D. Mass. 1989), in which a bankruptcy trustee sued a bank alleging that payments it had received from the debtor had been fraudulent transfers under the Massachusetts Uniform Fraudulent Conveyance Act. The bank asserted that Connecticut law applied because of a Connecticut choice-of-law provision contained in its contract with the debtor. The court rejected that argument because the

trustee, in his capacity as a representative of the debtor's creditors, was not a party to the contract and therefore not bound by it.

> [O]ne of the parties in this suit—the Trustee, who stands in the shoes of the creditors—was not a party to the contract. The parties to a contractual conveyance cannot in their contract make a choice-of-law that binds creditors who allege that they were defrauded by the conveyance. The choice-of-law binds only parties to the contract, not the Trustee or the creditors.

Id. at 386.

Similarly, in *Sw. Supermarkets, L.L.C.*, 315 B.R. 565, 569 (Bankr. D. Ariz. 2004), *op. vacated in part on other grounds*, 376 B.R. 281 (Bankr. D. Ariz. 2007), a bankruptcy trustee asserted various claims against certain defendants. Some of the claims had been assigned to him by secured creditors; others were fraudulent transfer claims that he was bringing on behalf of creditors. *Id.* at 569–71. The defendants asserted that New York law should govern because the agreements under which the alleged fraudulent transfers had been made contained a choice-of-law provision specifying New York law. *Id.* at 572. The court held that the provision did not apply to the fraudulent transfer claims.

> [T]o the extent the Trustee is asserting creditors' claims, those creditors were not parties to the agreements that contained the choice-of-law provisions. And the primary creditors whose rights the Trustee would assert are unsecured creditors rather than the secured creditors who assigned their claims to the Trustee . . . .

Id. at 573. *See also Eagle Enters., Inc.*, 237 B.R. 269, 271 (E.D. Pa. 1999) (approving bankruptcy court's holding that a contractual choice-of-law provision specifying German law "[does] not bind persons, such as the trustee in bankruptcy, who were not parties to the contract and who never agreed to be bound by its terms")

Just as the trustees in *Morse Tools* and *Southwest Supermarkets* represented creditors of the estates they were administering, the Receiver in this case represents SIB's

creditors. "Courts have routinely applied UFTA to allow receivers or trustees in bankruptcy to recover monies lost by Ponzi-scheme investors." *Donell v. Kowell*, 533 F.3d 762, 767 (9th Cir. 2008).

> [A] receiver represents not only the entity in receivership, but also the interests of its creditors. After all, the very purpose of receivership is to secure the assets of the corporation for ultimate payment to the creditors. . . . Thus, while the debtor would not be entitled to set aside a transfer in fraud of his creditors . . . the receiver acting for the creditors may attack it.

SEC v. Cook, No. CA 3:00-CV-272-R, 2001 WL 256172, at *2 (N.D. Tex. Mar. 8, 2001) (internal quotes and citations omitted). The receivership estate is "entitled to the return of the moneys—for the benefit not of [the Ponzi operator] but of innocent investors—that [the Ponzi operator] had made the corporation[] divert to unauthorized purposes." *Scholes v. Lehmann*, 56 F.3d 750, 757–58 (7th Cir. 1995). *See also McCandless v. Furlaud*, 296 U.S. 140, 159, 56 S. Ct. 41, 47 (1935) ("If the shareholders and the directors had combined with the promoters to despoil the corporation and defeat the remedies of creditors by a gift of half the assets, the gift could have been annulled either by the creditors directly or in their behalf by a receiver."); *McGinness v. United States*, 90 F.3d 143, 146 (6th Cir. 1996) ("Upon his appointment, the receiver succeeded to the rights of not only the debtor, but also the creditor."); *Wing v. Hammons*, No. 2:08-CV-00620, 2009 WL 1362389, at *3 (D. Utah May 14, 2009) ("[A] receiver in a Ponzi case *is* defined as a creditor for the purposes of establishing standing." (emphasis in original)).

Again, the Receiver brought these fraudulent transfer and unjust enrichment claims in his capacity as a representative of SIB's creditors. Neither he nor the creditors were parties to the agreement between SIB and the Campbells; therefore, he is not bound by the forum-selection/choice-of-law provision contained in that agreement.

C. Even if the forum-selection clause in the subscription agreement could somehow bind the Receiver, it still would not apply here because the Receiver's fraudulent transfer and unjust enrichment claims do not "aris[e] under" the agreement.

The forum-selection clause is contained in the same sentence as the choice-of-law clause. It reads:

> You understand that this Subscription Agreement shall be construed in accordance with and governed exclusively by the laws of Antigua and Barbuda, and *you consent to the exclusive jurisdiction of the courts in Antigua and Barbuda in relation to any action or proceeding arising under this Subscription Agreement*.[1]

In determining the scope of a forum-selection clause, a court "must look to the language of the parties' contract[] to determine which causes of action are governed by the . . . clause[]." *Marinechance Shipping, Ltd. v. Sebastian*, 143 F.3d 216, 222 (5th Cir. 1998). "When ascertaining the applicability of a contractual provision to particular claims, [a court must] examine the substance of those claims, shorn of their labels." *Phillips v. Audio Active, Ltd*., 494 F.3d 378, 388 (2nd Cir. 2007).

The first thing to observe about the clause is that, instead of being a mandatory forum-selection binding as to all parties, it is only a consent *by the Campbells* to jurisdiction in Antigua. It does not purport to bind SIB to exclusive jurisdiction in Antigua and it certainly does not (could not) bind non-parties to such jurisdiction.

Second, it does not contain the usual expansive language such as "all claims directly or indirectly relating to or arising out of . . . ." Instead, its scope is limited to actions or proceedings "arising *under* this Subscription Agreement." "Arising under" clearly requires that claims be grounded in the agreement for them to be covered. That is not the case here. The Receiver's claims are not contract-based. Fraudulent transfer is classified as a tort. *See Warfield*

[1] *See* App. 1, the SIB Subscription Agreement.

v. Carnie, Civil Action No. 3:04-cv-633-R, 2007 WL 1112591, at *7 (N.D. Tex. Apr. 13, 2007). Unjust enrichment is an equitable restitutionary doctrine independent of any contract. *Doss v. Homecoming Fin. Network, Inc.*, 210 S.W.3d 706, 709 n.4 (Tex. App.—Corpus Christi 2006, pet. denied). In no way does either claim "aris[e] under" the terms of the subscription agreement.

This case is very similar to *Phillips, supra*, in which the Second Circuit held that a forum-selection clause contained in a recording contract did not control copyright claims between the parties. The clause in issue was very much like the one here: "[A]ny legal proceedings that may arise out of [the agreement] are to be brought in England." 494 F.3d at 382. Noting that the scope of a forum-selection clause depends on its language, the court focused on the phrase "arising out of," the dictionary definition of which is "to originate from a specified source." 494 F.3d at 390. According to the court, there was no basis for expanding the meaning of the phrase given that the parties chose not to use such commonly used broader language as "related to." *Id*. The court then analyzed the facts to determine whether the claims did in fact "arise out of" the agreement. In doing so, it focused on the "source of the rights or duties sought to be enforced by the complaining party." 494 F.3d at 392.

> [T]he proceedings on the copyright infringement claims here do not originate from the recording contract; the proceedings may begin in court without any reference to the contract. The only nexus between the proceedings and the contract arises when the defendants raise their defenses. Given this sequence of events, one cannot say that the origins of the proceedings were in the recording contract.

Id. at 391-92. Based on this analysis, the court concluded that "[the plaintiff's] copyright claims did not originate in the recording contract and are therefore not governed by the forum selection clause." *Id*. at 392.

The court in *Imation Corp. v. Quantum Corp*., No. CIV. 01-1798-RHK/JMM, 2002 WL 385550 (D. Minn. Mar. 8, 2002) arrived at the same result based on similar reasoning. In that case, a technology license agreement contained a forum-selection clause requiring "all disputes arising hereunder" to be litigated in California. Later, the licensee sued the licensor and others for violations of the U.S. antitrust laws. The court held that the clause did not apply to the antitrust proceeding because such claims did not arise under the licensing agreement.

> [W]hile some of Imation's allegations may relate to the license agreement, the Court ultimately concludes that . . . the antitrust allegations do not ultimately depend on the existence of the license agreement, the resolution of the antitrust violations do not relate to the interpretation of the license agreement, and the antitrust allegations do not involve the same operative facts as a parallel claim for breach of contract.

Id. at *5.

Like the claims in *Phillips* and *Imation*, the Receiver's claims do not depend on the license agreement and are not related to a parallel breach of contract action. They depend entirely on U.S. law[2] and the Campbells' receipt of funds from a Ponzi scheme. Therefore, the forum-selection clause does not apply.

Some courts have construed phrases such as "arising under" to include *contract-dependent* tort claims. For example, in *Coastal Steel v. Tilghman Wheelabrator Ltd.*, 709 F.2d 190, 203 (3rd Cir. 1983), the court held that the phrase "any dispute arising" covered tort claims such as "negligent design, breach of implied warranty, [and] misrepresentation" because those claims "ultimately depend[ed] on the existence of the contractual relationship [between the parties to the agreement]." Similarly, in *Lambert v. Kysar*, 983 F.2d 1110, 1121-22 (1st Cir. 1993), the court held that a clause applying to "actions . . . to enforce [contractual] terms and conditions" covered "contract-related tort claims involving the same operative facts as a parallel

[2] The Receiver contends that Texas law applies.

claim for breach of contract." The Receiver's claims, however, are not contract-dependent. They in fact have no relationship to the Subscription Agreement.

D. Even if the Receiver had been a party to the subscription agreement (and he was not), the forum-selection and choice-of-law provisions would still be unenforceable because they are unreasonable and contrary to public policy.

Even if the Receiver had been a party to the Campbells' subscription agreement, the forum-selection and choice-of-law clauses contained in that agreement would still be unenforceable because they are unreasonable and contrary to public policy.

Although a forum-selection clause is presumptively binding (although only between the parties to it and only to the extent of its scope), that presumption is overcome if the clause is "'unreasonable' under the circumstances." *M/S Bremen v. Zapata Off-Shore Co*., 407 U.S. 1, 10 (1972). A clause is unreasonable if, among things, "[1] 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; [2] the fundamental unfairness of the chosen law will deprive the plaintiff of a remedy; or [3] enforcement of the forum selection clause would contravene a strong public policy of the forum state." *Haynsworth v. Corp. of Lloyd's,* 121 F.3d 956, 963 (5th Cir. 1997) (quoting *M/S Bremen*, 407 U.S. at 12–13, 15)). The forum-selection clause at issue here is unreasonable, and therefore unenforceable, for all three reasons.

1. Enforcement of a combined Antiguan forum-selection/choice-of-law provision would deprive the Receiver of his day in court.

The first unreasonableness factor—enforcement of a combined Antiguan forum-selection/choice-of-law provision would deprive the Receiver of his day in court—undoubtedly applies because, put simply, the doors of the Antiguan courthouse are closed to the Receiver. This is because Antigua does not recognize U.S. court orders, including this Court's order appointing the Receiver. In the view of the Antiguan court, the Receiver is not an officer of this

Court, but a private citizen without authority or standing to represent the interests of SIB claimants. That, in fact, was the holding of the Antiguan High Court of Justice in its April 24 judgment, denying the Receiver's application to intervene in the liquidation proceeding pending in that court (which was not commenced until after this Court's receivership).[3] According to the Antiguan court:

> The U.S. Receiver founded his interest in these local proceedings in an unenforceable order of a U.S. District Court in receivership type proceedings in the U.S.A. . . . [I]t cannot in its present state have the force of law in Antigua and Barbuda. . . . Antigua and Barbuda has no reciprocal enforcement of Judgments or orders treaty with the U.S.A. . . .
>
> The U.S. receiver, by virtue of the U.S. District Court Order, has no legal entitlement to standing in Antigua and Barbuda.

The Antiguan Court's ruling is consistent with Antigua's status as an offshore asset-protection and tax-avoidance haven. Indeed, the Antigua & Barbuda Investment Authority, an agency of the Antiguan government, seeks to attract depositors to Antigua's financial services sector by advertising the "asset protection" aspects of its law, one of which is "[t]he non-recognition of foreign judgments."[4]

2. Antiguan law is fundamentally unfair and a combined Antiguan choice-of-law/forum-selection provision contravenes a significant and long-standing public policy of both the U.S. and its various States.

The second and third factors—the fundamental unfairness of Antiguan law and the contravention of significant and long-standing U.S. public policy by the combined forum-selection/choice-of-law provision—also apply.

The U.S. Supreme Court stated in *Mitsubishi Motor Corp. v. Soler Chrysler Plymouth, Inc*., 473 U.S. 614, 637 n.19 (1985), and repeated in *Vimar Seguros Y Reaseguros v.*

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[3] *See* App. 2, a copy of the Antiguan High Court judgment.

[4] http://www.investantiguabarbuda.org/abia/offshore/financial_services.aspx.

M/V Sky Reefer, 515 U.S. 528, 540 (1995), that if "choice-of-forum and choice-of-law clauses operate[] in tandem as a prospective waiver of a party's right to pursue statutory remedies . . . , we would have little hesitation in condemning the agreement as against public policy." That was precisely the situation in *Thomas v. Carnival Corp*., 573 F.3d 1113 (11th Cir. 2009), in which the court faced the issue of whether to enforce a contractual provision in an employment contract that required a seaman to arbitrate claims against his employer in the Philippines under Panamanian law. The Eleventh Circuit held that the provision was null and void because the two clauses effectively constituted an advance waiver of the federal Seaman's Wage Act Claim, which, the court held, was against public policy. *Id.*

The same is true here. The combination of Antiguan choice of forum and choice-of-law clauses (assuming they are enforceable and apply in the manner that movants contend) constituted an advance waiver or negation of the long-standing public policies underlying this country's fraudulent transfer laws.[5] Fraudulent transfer law has existed for 450 years to provide a remedy where an insolvent debtor has transferred assets in fraud of his creditors. We inherited the basic form of today's Uniform Fraudulent Transfer Act from England, where the first such law, generally known as the Statute of Elizabeth, was enacted in the sixteenth century.

> Laws governing fraudulent transfer have existed for centuries, as codified (in terms remarkably similar to the current version of § 3439.04) in the Statute of 13 Elizabeth I. *See* An Act Against Fraudulent Deeds, Gifts, and Alienations, 1571, 13 Eliz. c. 5, s. 2 (avoiding conveyances made with the "Purpose and Intent to delaye hynder or defraude Creditors"). In construing this early codification, an English court noted, "And because fraud and deceit abound in these days more than in former times, it was

[5] For example, in *Terry v. June*, 420 F. Supp. 2d 493 (W.D. Va. 2006), a fraudulent conveyance action involving payments made from a Bahamian bank account, the court, in applying the *lex loci delecti* choice-of-law rule (not applicable here), suggested the parties submit briefing as to whether Bahamian law conflicted with Virginia public policy with respect to fraudulent conveyances. The court noted that Bahamian law is reputed to be "very debtor-friendly" and to enable persons "to shield funds from creditors." *Id.* at 506.

> resolved in this case by the whole Court, that all statutes made against fraud should be liberally and beneficially expounded to suppress the fraud." *Twyne's Case*, 76 Eng. Rep. 809, 815 (1601) (Star Chamber).

Donell, 533 F.3d at 774.

UFTA is a direct successor of not only its predecessor uniform law, the Uniform Fraudulent Conveyance Act, but also of the Statute of 13 Elizabeth.[6] Currently forty-three states and the District of Columbia have adopted UFTA.[7] The only jurisdictions that have not are Alaska, Kentucky, Louisiana, Maryland, New York, South Carolina, and Virginia, and each of those states either follows the predecessor statute, UFCA, or has another similar provision to deal with transfers that defraud creditors.[8] A fraudulent transfer provision very similar to UFTA is also incorporated into federal law in section 548(a)(1) of the United States Bankruptcy Code. 11 U.S.C. § 548(a)(1).

UFTA and similar fraudulent transfer laws apply with special force in Ponzi scheme cases. That is because an essential element of a Ponzi scheme is the fraudster's payment (indeed, overpayment) of some investors, as an inducement for new investors to purchase. In this way, the fraudster is able "to keep the fraud going by giving the false impression that the scheme is a profitable, legitimate business." *Donnell*, 533 F.3d at 777. Such "transfers [are] made for no purpose other than to hinder, delay or defraud creditors." *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 8 (S.D.N.Y. 2007) (citation omitted). Because a large share of the scheme's fraudulently-acquired funds go to a subset of investors, "[t]he largest assets of a Ponzi-

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[6] Summary, Uniform Fraudulent Transfer Act, Uniform Law Commissioners, http://www.nccusl.org/nccusl/uniformact_summaries/uniformacts-s-ufta.asp.

[7] See http://www.nccusl.org/Update/uniformact_factsheets/uniformacts-fs-ufta.asp.

[8] ALASKA STAT. § 34.40.010; KY. REV. STAT. § 378.010; LA. CIV. CODE art. 2036; MD. CODE, COM. LAW §§ 15-201 to 15-214; N.Y. DEBT. & CRED. LAW §§ 270–81; S.C. CODE § 27-23-10; VA. CODE § 55-80.

scheme estate typically are the claims that the estate has against those investors who received 'returns' on their investments." Mark A. McDermott, *Ponzi Schemes and the Law of Fraudulent and Preferential Transfers*, 72 AM. BANKR. L.J. 157, 158 (Spring 1998).

It is of course fundamentally unfair for certain investors (those whom the fraudster has chosen to prefer) to recover their original investments plus substantial returns, while others receive little or nothing. The Supreme Court, in a case arising from the original Ponzi scheme perpetrated by Charles Ponzi, admonished that "the circumstances of [a Ponzi scheme] call strongly for the principle that equality is equity." *Cunningham v. Brown*, 265 U.S. 1, 13 (1924). That principal is violated when a few creditors receive 100% of their initial investment plus a return above that, while others similarly situated receive only pennies on the dollar.

Despite the obvious need for a fraudulent transfer law to assure fair treatment of creditors, Antigua has no such a law. And believe it or not, that is a point of pride for the Antiguan government, which boasts that it has removed all vestiges of the Statute of Elizabeth from its laws in order to provide off-shore depositors with maximum "asset protection." The Antigua & Barbuda Investment Authority, a governmental agency whose board includes several ministers of the current government, advertises this fact—along with Antigua's non-recognition of foreign judgments—on its website:

> There are a number of reasons why people decide to 'go offshore' — here are a few reasons you should consider making Antigua and Barbuda your offshore jurisdiction of choice:
>
> **Asset Protection:** Antigua and Barbuda offers an enabling environment in which to protect your assets. Antigua has very strong asset protection laws such as:
>
> *The abolition of all Statute of Elizabeth provisions*; . . .
>
> *The non-recognition of foreign judgments*.

> *Because we aspire to be a market leader in asset protection, we monitor these advantages to ensure that we continue to offer the best in asset protection*.[9]

(Emphasis added).

In other words, not only is the court house door in Antigua closed to the Receiver, Antiguan law provides defrauded creditors no recourse against those "winning" investors, such as the Campbells, who received a substantial return in addition to full repayment of their investments. Thus, enforcement of Antigua as an exclusive forum with Antiguan law as the governing law would constitute a waiver or nullification not just of U.S. fraudulent transfer law (including UFTA, as enacted in forty-three states), but also the long-standing policy of fairness that underlies that law.

Further, the United States has by far the greater interest in seeing that its policies are carried out so that defrauded investors are fairly treated and receive the maximum distribution possible. Stanford and his cohorts directed the Ponzi scheme from the U.S. and caused many thousands of U.S. citizens to lose in the billions of dollars.[10] In fact, U.S. citizens purchased more SIB CDs by dollar value than citizens of any other country. The global CD sales effort was directed from the U.S. and the false financial statements and other misrepresentations

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[9] http://www.investantiguabarbuda.org/abia/offshore/financial_services.aspx. The website indicates that not only is the Antigua and Barbuda Investment Authority an official arm of the Antiguan Government, its Board of Directors includes three government ministers (and one deputy minister), including the Minister of External Affairs.

[10] *See* SEC's Second Amended Complaint, No. 3:09-CV-0298-N, Doc. 952 at ¶14 ("Stanford Group Company, a Houston-based corporation, is registered with the Commission as a broker-dealer and investment adviser. It has 29 offices located throughout the United States."); Declaration of Karyl Van Tassel, No. 3:09-CV-0721-N, Doc. 21-20 at ¶9 ("SIB, although incorporated in Antigua, was controlled and managed by Stanford and Davis, apparently with assistance from Holt, from various places in the U.S. Most core functions such as managing investments, directing fund flows, devising investment strategy, and managing legal and information technology were directed from—and for the most part, performed in—the U.S."); James M. Davis Plea Agreement, No. 3:09-CV-0298-N, Doc. 771 at 44 ("SIBL's primary investment product was referred to as a Certificate of Deposit (CD) which SIBL would solicit to potential investors in the United States and elsewhere through [Stanford Financial Group] broker-dealers.")..

that induced people worldwide to invest in SIB CDs were disseminated from the U.S. Brokers located in the U.S. sold more CDs than brokers from any other country. [11] The Campbells are U.S. citizens and purchased their CDs in the U.S. from a U.S. broker.

In contrast, Antigua's primary role in the Ponzi scheme was to provide lax—indeed, corrupt—regulatory oversight. SIB was an Antiguan institution in form only; in substance, it was part of a U.S.-run criminal enterprise.[12] Moreover, SIB served only non-Antiguans.[13] Thus, Antigua's principal interest in having its own law apply lay in preserving its franchise as a good place to hide money from creditors. Such an interest, if it can be called that, cannot override the U.S. interest in seeing that fraudulent transfers are brought back into the receivership estate for distribution to the victims (many of them U.S. citizens) of this U.S.-directed Ponzi scheme.

II. The Receiver's complaint gives the Campbells ample notice of the claims and satisfies all relevant pleading standards.

A. The adequacy of the Receiver's complaint must be assessed in light of the requirements of the fraudulent transfer cause of action.

To analyze whether the Receiver's 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.[14] TEX. BUS. & COMM. CODE §§ 24.001–.010 (Vernon 2009).

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[11] *See* Declaration of Karyl Van Tassel, No. 3:09-CV-0721-N, Doc. 21-20.

[12] *See* James M. Davis Plea Agreement, No. 3:09-CV-0298-N, Doc. 771.

[13] SIB was chartered under Antigua's International Business Corporation Act, available at http://www.laws.gov.ag/acts/chapters/cap-222.pdf. Such banks are restricted to holding only foreign-denominated currency (i.e., non-Antiguan currency), which the ordinary Antiguan cannot own without government permission. The Receiver asks the Court to take judicial notice of the Antiguan IBCA sections 4(2) and 240. Copies are attached as App. 3.

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

Actual fraud occurs when the debtor/transferor (in this case, SIB) makes a transfer "with actual intent to hinder, delay, or defraud any creditor." 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 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. *Donell*, 533 F.3d at 770; *Armstrong v. Collins*, 2010 WL 1141158, at *19–*22 (S.D.N.Y. Mar. 24, 2010). The transferee's intent (the Campbells' here) is not an element of the plaintiff's case under either ground. TEX. BUS. & COMM. CODE § 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

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> 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.

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 above 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*, 56 F.3d at 757–58. "[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 Receiver's complaint pleads in detail that the Stanford parties conducted an immense Ponzi scheme, which paid the Campbells and the other transferee defendants more than they had invested. (*See* Doc. 1 at ¶¶ 14–25 (alleging that Stanford fraud was a massive *Ponzi* scheme *ab initio* and that Investors received CD Proceeds from the scheme)); (App. 1 to Doc. 1 (listing CD Proceeds Investors received from Stanford Companies).) Because of the presumptions that arise 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 Campbells obtained a benefit by the taking an "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 ¶ 39.)

B. Rule 9(b)'s heightened particularity requirement does not apply to the Receiver's claims, but even if it did, the Receiver's 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'l, 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 cases from this Court cited by the Campbells are outdated and, in any case, would require no different a result if applied. In *Quilling*, 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. *See Quilling v. Stark*, 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. Lovelady*, No. SA-05-CA-285-RF, 2006 WL 485305, at *1 (W.D. Tex. Jan. 11, 2006)). *GE Capital* later determined that Rule 9(b) did not apply in such an action. More importantly, though, the *Quilling* court held that a fraudulent transfer complaint that alleged 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 *Quilling* was sufficient to meet the Rule 9(b) pleading standard, then so is the Receiver's complaint in this case.

The other case cited by the Campbells, *E. Poultry Distribs., Inc. v. Yarto Puez*, No. Civ.A. 3:00-CV-1578, 2001 WL 34664163 (N.D. Tex. Dec. 3, 2001), also pre-dated *GECC* and reached a conclusion that does not call the Receiver's Complaint into question. In that case, the Court applied Rule 9(b)'s requirement only to the extent the plaintiff needed to establish the "intent to defraud" element of the fraudulent transfer statute. *Id.* at *2. That holding does not apply here because, as noted above, in a Ponzi scheme case, the transferor's intent to defraud is presumed. *See Quilling v. Schonsky*, 247 F. App'x at 586 ("[T]ransfers made from a Ponzi scheme are presumptively made with intent to defraud.").

The only facts arguably related to fraud are the Stanford Companies' acts and those are pleaded with a specificity that meets, if not exceeds, the requirements of Rule 9(b).[15] In nearly twenty paragraphs containing specific factual allegations, (*see* Compl. at ¶ 2–4; 14–25; 29–30), the Receiver recounts—and the Campbells do not deny—facts showing that the Stanford Companies operated a massive, global Ponzi scheme and, in doing so, transferred funds to the Defendants. The Appendix to the Complaint alleges the total of all payments the Campbells received from SIB and the portion of that total that constitutes "Proceeds Received in Excess of Investments." (App. at 1.) Because of the presumptions that arise when the transferor is a Ponzi scheme (see previous section), these facts suffice to state a fraudulent transfer cause of action, even under the heightened pleading standard of Rule 9(b).

[15] 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).

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

The Campbells 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, 35–37, 40–42). This is more than sufficient. This Court in *GE Capital Commercial* 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 transfers to 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).

The Campbells also complain that the Receiver has failed to plead which state's law applies. The federal rules, however, contain no such pleading requirement. *Kucel v. Walter E. Heller & Co.*, 813 F.2d 67, 74 (5th Cir. 1987) ("Under federal pleading requirements, Heller need not plead the applicability of Illinois law to preserve a choice-of-law question."). In any

case, at this stage of the litigation, the Receiver believes that Texas law applies and therefore has cited Texas statutes in its Complaint. (*See* Doc. 1 at ¶ 35, stating that attorney's fees and costs are proper under Texas fraudulent transfer statutes.)

D. In any event, dismissal is not an appropriate remedy for a violation of Rules 9(b) or 8.

As described above, the Receiver's Complaint safely meets the requirements of Rules 8 and 9(b) (even if 9(b) does not apply). The Campbells' 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 Campbells themselves likely possess the information they purportedly want the Receiver to insert into the Complaint.

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.*, 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 Campbells present no viable argument to justify a departure from this general rule.

Thus, if the Court were to determine that the Receiver's complaint fails to meet either or both of these rules, 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 Campbells' motion to dismiss and grant the Receiver any other relief to which he may be entitled.

Dated: May 28, 2010

Respectfully submitted,

BAKER BOTTS L.L.P.

By:/s/Kevin M. Sadler

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CERTIFICATE OF SERVICE

On May 28, 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 have served the Court-appointed Examiner, all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/Kevin M. Sadler
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