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,	§	
V.	§	CIVIL ACTION NO. 3:09-CV-00724-N
JAMES R. ALGUIRE, ET AL.	§	
Defendants.	§	

DEFENDANTS' MOTION TO DISMISS RECEIVER'S SECOND AMENDED COMPLAINT AND BRIEF IN SUPPORT

TO THE HONORABLE COURT:

Defendants Mark Groesbeck, Lupe Northam, Donald Miller, Teral Bennett, Hank Mills, Ron Clayton, James Fontenot, Miguel Valdez, Claudia Martinez, Grady Layfield, John Schwab, Michael Word, Charles Jantzi, Gary Haindel, Susana Cisneros, Tim Parsons, Gerardo Meave-Flores, Steven Hoffman, John Fry, Aymeric Martinoia, Louis Perry, Ryan Wrobleske, Carol McCann, Shawn Morgan, Raymond Deragon, Robert Barrett, Susana Anguiano, Donna Guerrero, Abraham Dubrovsky, Janie Martinez, Miguel Garces, J. D. Perry, Lori Bensing, Rolando Mora, Marty Karvelis, Anthony Makransky, Brent Simmons and Don Cooper (collectively referred to as "Former Employees") file the following motion based on Federal Rules of Civil Procedure 12(b)(6), 12(e) and 9(b), and upon 9 U.S.C. § 1, et seq.

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SUMMARY

According to Receiver Ralph Janvey, a handful of senior officers working for Stanford Group Company and related entities (collectively, "Stanford") spent many years engaged in a secret scheme that eluded investors, regulators, auditors and foreign governments. If these allegations are true, then hundreds of former Stanford employees were deceived and defrauded by the companies Janvey now represents.

The Former Employees had established careers at other firms before they were recruited to Stanford. The relationships they developed with clients over many years, along with their careers, have been destroyed. Like their clients, many of these employees invested their own money into Stanford CDs. Their IRAs and other brokerage accounts have been frozen even though the Receiver has yet to come forward with any evidence of wrongdoing by them. The damages to this group have not been determined yet, but are undoubtedly tens of millions of dollars.

Now the Former Employees find themselves the target of an aggressive lawsuit that contains little more than vague and conclusory allegations. If there was a "massive Ponzi scheme," the Second Amended Complaint fails to provide necessary details of the plot so that the Former Employees can defend themselves.[1] The Court should dismiss the

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[1] The Receiver has revised its complaint against the Former Employees six times over the last eight months. Since the Receiver has had ample time to properly plead this complaint, dismissal is appropriate.

04/20/2009 – Receiver's Complaint Naming Stanford Financial Advisors as Relief Defendants

07/28/2009 – Receiver's Amended Complaint Naming Relief Defendants

08/26/2009 – Receiver's Supplemental Complaint Against Stanford Financial Group Advisors

09/29/2009 – Receiver's Second Supplemental Complaint

11/13/2009 – Receiver's First Amended Complaint Against Former Stanford Employees

12/18/2009 – Receiver's Second Amended Complaint Against Former Stanford Employees.

complaint because it fails to reflect these details and give proper notice of the specific actions for which the Former Employees have been individually sued.

In addition to being impermissibly vague, the claims asserted in the Second Amended Complaint are subject to mandatory arbitration agreements. This action should dismissed for the further reason that this Court is not the appropriate forum for resolution of the parties' dispute over compensation.

I.

BACKGROUND

The Receiver took control of Stanford on February 16, 2009. Since that time, it has spent tens of millions of dollars in its management and analysis of the receivership estate. Few details, however, of the alleged fraud have been provided by the Receiver and no discovery has been conducted yet that would permit scrutiny of those allegations. Accordingly, the following facts and allegations are taken from the Receiver's pleadings and are limited to background highlighting the deficiencies in the Second Amended Complaint.

Former Employees Recruited

The Former Employees consist of financial advisors, managing directors, trust employees and others that came to work at Stanford on the belief that they were working at legitimate companies offering a variety of financial services to their clients. Like the other financial institutions the Employees came from, Stanford offered a variety of financial products. At Stanford, stocks, bonds and other securities were available through the brokerage firm; precious metals could be purchased through the coin and bullion

company; and investors could buy CDs in the Antiguan Stanford International Bank Limited ("SIBL").

Most of the Former Employees were recruited from Stanford's competitors. (SEC Action, Doc. 490-2 at p. 23).[2] Stanford sought out these Employees because they had significant business (id.) and were well-established in their careers. (Id. at 8). In general, the Former Employees were hired to give clients financial advice or otherwise assist in management at Stanford.

The Former Employees relied upon the representations of Stanford as they decided to move their careers and business to the company. This included the representations that SIBL, Stanford Group Company and others were bona fide businesses. In addition, these representations were reinforced by the fact that Stanford operated in a regulated environment where the SEC, FINRA and others had reviewed and blessed the operations of Stanford.

Once recruited, the Employees did what they had previously done at other firms: provide financial services to the clients of Stanford. According to the Receiver, SGC – the brokerage company where most of the Former Employees worked -- did a substantial amount of business unrelated to the SIBL CDs. As of February 16, 2009, SGC had approximately 50,000 separate customer accounts. (SEC Action, Doc. 384, p. 3). Over $5.9 billion was invested through the brokerage accounts held at Pershing and JP Morgan. (SEC Action, Doc. 153, p.6). Significant fees were earned from brokerage accounts which did not contain any CDs. (SEC Action, Doc 490-2, p. 24).

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[2] For ease of reference citation to pleadings in the instant action or in the *SEC v. Stanford International Bank, Ltd. et al.* will be referred to by document number. Pleadings in *SEC v. Stanford International Bank, Ltd. et al.* will be referred to as "SEC Action" followed by the document number.

Stanford's Agreements with the Recruited Employees

The relationships between the Former Employees and Stanford were governed by a number of contracts. What the Receiver refers to in its complaint as "CD Proceeds" is, in reality, different forms of employee compensation paid pursuant to different agreements.[3] The terms of the agreements and the bases for the payments are different, depending on the type of payment and when it was made.

Many of the Employees were working at Stanford when the company was taken over earlier this year, while others have not worked at Stanford for several years. Although the Second Amended Complaint is unclear, it appears that the Receiver is attempting to claw back compensation earned by the Employees as far back as a decade.

Loans

Stanford gave many Former Employees compensation in the form of loans. The Receiver seeks to recover funds that were transferred to the Employees pursuant to written loan agreements.

The loan contracts set out the parties' rights and remedies. (SEC Action, Doc. 669, p. 17.) Loans that are forgiven over time in exchange for an employee's continued employment are common in the securities industry. The terms of the agreements between Stanford and its employees vary and the loan documents have apparently been reviewed by the Receiver's employment counsel. (Id.) (According to the Receiver, "Baker Botts employment lawyers reviewed numerous outstanding broker loans. . . . The review involved researching the terms of the loans, which were not consistent for all loans, in

[3] "CD Proceeds" is defined broadly in the Complaint as including "employees' salaries, loans, SIBL CD commissions, SIBL Quarterly Bonuses, PARS Payments, Branch Manager Director Quarterly Compensation and Severance Payments." (Doc. 118, p. 2). The Receiver calls all of this compensation "CD Proceeds" even though he avoids claiming that all of that compensation is traceable to the CDs. Mere labels or self-serving definitions, however, cannot be a substitute for pleading with specificity.

order to ascertain the legal rights and remedies . . .). The Second Amended Complaint, however, makes no reference to the contracts, their terms or when the transfers were made.

Upon information and belief, many of the loans were funded five to ten years ago, well outside of applicable limitations periods. Because the Receiver is in control of the documents and has not provided details of the loans, how and when they were funded, and which ones were repaid, all of the relevant details are not known by the Former Employees.

A review of available loan agreements, however, reflects that the loans consistently contained broad arbitration clauses which cover the Receiver's claims based upon the loans. For example, a number of loan documents were included in the Appendix to a Motion to Dismiss the Receiver's First Amended Complaint Against Former Stanford Employees and Compel Arbitration. (Doc. 144). The employees and Stanford agreed "that any controversy arising out of or relating to this Note . . . shall be submitted to and settled by arbitration pursuant to the constitution, by-laws, rules and regulations of the Financial Industry Regulatory Authority (FINRA) in the local area of the principal office." *See, e.g., id.* at 9, 14, 19, 24, 29, 34, 39, 44. Prior to the creation of FINRA, the arbitration clauses were similarly worded but agreed to NASD arbitration. *See, e.g., id.* at 49.

Commissions

Some of the Former Employees were compensated for work at Stanford through commissions. Commissions were paid not only on the CDs, but on many of the other financial products sold. The Former Employees were paid commissions as compensation

based upon an agreed formula. (SEC Action, Doc. 490-2, p. 28). It is not clear from the Second Amended Complaint if the Receiver is seeking the return of all commissions received by the Employees, or just those earned from the sale of CDs. The complaint is also vague as to how far back the Receiver is going in its commission claw-back.

Quarterly Bonuses

As further compensation, some of the Former Employees received bonuses if certain conditions were met. The Second Amended Complaint provides no further details about the terms of these agreements, the timing of when the bonuses were paid or how far back the Receiver is going with its claim for the bonus payments.

Branch Manager Compensation

A number of the Former Employees were paid for their administrative duties at the various Stanford offices. This includes "Managing Directors" who received quarterly compensation. (Doc. 118, p. 9.) These employees were paid for managing the branches and necessarily provided different services to Stanford. The formulas for their compensation involved many factors, none of which are detailed in the Second Amended Complaint. The terms of the agreements with the Managing Directors, which payments to them are allegedly subject to claw-backs, and how far back the Receiver is going is unclear from the pleadings.

Betrayed by A Hidden Scheme

The compensation described above was paid to the Former Employees for doing their jobs. There are no allegations in the complaint that the Former Employees believed they were furthering any type of fraud. Indeed, the Receiver has repeated in its pleadings that it has not accused the Former Employees of any wrongdoing. ("For the purposes of

this relief-defendant claim, it is not necessary that the Receiver plead or prove any wrongdoing." Doc. 118, p. 11; "By definition, relief defendants are accused of no wrongdoing." Doc. 441, p. 10.)[4]

The claims against the Former Employees, however, are predicated upon allegations of a fraud committed by others. This fraud was hidden from the employees when they worked at Stanford and, to a large degree, still remains hidden from them by the Receiver. For example, the complaint repeats such conclusions as "the Stanford fraud was a Ponzi scheme" and that "Stanford did no more than take money out of investors' pockets and put it into the hands of the Former Stanford Employees." Not a single detail about a single transfer, however, is addressed in the complaint. Given that the Receiver seeks to undo transactions valued at more than $200 million against hundreds of employees over an unspecified number of years, all based on the allegation that there was a Ponzi scheme, the details are important.

What little that has been provided indicates that this was not a Madoff-like Ponzi scheme in which the organizers do no more than pocket the investor funds.[5] Rather, the Receiver contends that there were actual investments made by SIB. According to the Receiver, about 9% (approximately $800 million) of SIB's portfolio was invested in cash and cash equivalents at the end of 2008. (SEC Action, Doc. 490-2, p. 18.) Even more than that was invested in investments with outside portfolio managers monitored by

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[4] The First Amended Complaint distinguished between "Relief Defendants" (Former Employees) and the "Stanford Defendants." Only the "Stanford Defendants" were accused of committing fraud. Although the Receiver has now abandoned its claims that the Former Employees are "Relief Defendants," it has not set forth any facts that the Former Employees committed fraud or had knowledge of fraud committed by others.

[5] "A Ponzi scheme is a fraudulent investment scheme where money from new investors is used to pay "profits" on the money contributed by earlier investors, ***without the operation of an actual revenue-producing business*** other than the raising of new funds by finding more investors." *S.E.C. v. Cook*, 2001 WL 256172 at fn 1 (N.D Tex. 2001) (emphasis added).

Stanford analysts. (Id.). The remaining 80% of the portfolio was invested in private equity investments, real estate and loans to Allen Stanford. (Doc. 118, p. 8.)

The unspecified fraud in this lawsuit appears to be something other than a "Ponzi scheme *ab initio*." The Receiver asserts that the Stanford Defendants "inflated the value of its investment portfolio" and made misrepresentations about the safety of the investments. (SEC Action, Doc. 490-2, pp. 10-13). The U.S. Government in its criminal case against Allen Stanford maintains that this is a simple disclosure case "about misrepresenting what the money was invested in." (Transcript of October 14, 2009 Hearing before Judge Hittner, pp. 26-27, attached as Appendix A.) Davis' plea agreement suggests that the false reporting about SIBL eventually led to a Ponzi scheme, although even Davis does not contend that it started out that way. ("This continued routine false reporting by Stanford, Davis, Lopez, Kuhrt and their conspirators . . . created an ever-widening hole between reported assets and actual liabilities, causing the creation of a massive Ponzi scheme whereby CD redemptions ***ultimately*** could only be accomplished with new infusions of investors funds." (*U.S. v. James Davis*, in the S.D.Tex, Cause No. 3:09-cv-00298-N, Doc 771, p. 44).

The Former Employees were deceived by senior management about the investment portfolio. Jim Davis' plea agreement, upon which the Receiver relies in this lawsuit, states that a few individuals conspired to give the Former Employees a false impression about the investments of SIBL. (Id. at p. 43). The Receiver maintains that "the poor performance of SIB's investment portfolio" created a hole in SIB's balance sheet. (SEC Action, Doc. 490-2, p. 12.) As a result, Jim Davis, Allen Stanford, Gil Lopez and Mark Kuhrt falsified the financial performance information that was

represented to the Former Employees. (Id.). Many of the Former Employees relied on this information and purchased SIBL CDs themselves.

It is possible that the alleged fraud did not take on the characteristics of a Ponzi scheme until years after the CD program began, perhaps even after the dramatic market losses of 2008. The statements of the Receiver and government suggest that bad or improper investments led to financial misrepresentations, the misrepresentations created a "hole" which, over time, gave rise to a Ponzi scheme. This sequence, unfortunately, is merely speculative because meaningful details about the alleged fraud and when it began are not found in the Second Amended Complaint. Because the Receiver has failed to plead with the required specificity, this Court should dismiss the Complaint. Additionally, the Court should dismiss the Complaint because all of the claims brought by the Receiver are subject to mandatory arbitration.

II.

THE RECIEVER FAILS TO MEET THE PLEADING STANDARDS OF RULE 8

The Receiver seeks to undo thousands of financial transactions involving the compensation earned by Former Employees over an unspecified period of time; yet basic questions surrounding the transfers such as (1) what transfers are at issue, (2) who made the transfers and (3) when the transfers were made need to be answered before this case proceeds.

The plaintiff must plead enough facts to state a claim to relief that is plausible on its face and his factual allegations must be enough to raise a right to relief above the speculative level, . . . on the assumption that all the allegations in the complaint are true (even if doubtful in fact). *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

A plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of a cause of action will not do. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007).

The Receiver's complaint fails to provide the grounds upon which he is entitled to relief against the Former Employees. He cannot merely label the case as a "massive Ponzi" without pleading the facts that support the treatment of this matter as a ponzi scheme; he cannot merely label compensation and assets belonging to or earned by Former Employees as "fraudulent transfers" and then base his unidentified claims for relief on such a conclusion.

The plaintiff must plead specific facts, not mere conclusory allegations to avoid dismissal. *Alexander v. Holden Business Forms, Inc.*, No. 4:08-CV-614-Y, 2009 U.S. Dist. WL 2176582, at *3, (N.D. Tex. July 20, 2009)(*citing Guidry v. Bank of LaPlace*, 954 F.2d 278, 281 (5th Cir. 1992).

As a threshold matter, the Complaint against defendants fails the requirements of Rule 8(a) because the receiver does not specify the law he seeks to apply against the Former Employee defendants

Allegations of fraud in securities cases may be brought under different theories of recovery. In this matter, the Receiver cautiously avoids referencing the theories under which he seeks relief, preferring instead to phrase his claims as being "under applicable law." *See* Receiver's Second Amended Complaint at ¶¶ 34, 55(b).

Claims made under "applicable law" deny Defendants of the necessary particularity to guide their defensive pleadings, strategy and discovery.

The only law mentioned by the Receiver in his complaint is that portion of the Texas Uniform Fraudulent Transfer Act, TEX.BUS&COM. CODE ANN. Chptr 24, that allows for the recovery of attorney's fees. *See* Receiver's Second Amended Complaint at ¶ 39. Section 24.013 permits a court to award costs and reasonable attorney's fees upon litigation of any proceeding under chapter 24. *See Id.* Strangely, the Receiver appears to hedge his own reference to this fragment by placing it at the end of his request for attorney's fees and costs "under applicable fraudulent transfer law" and citing the fragment as "***See, e.g.,*** TEX.BUS&COM. CODE ANN. §24.013 (Vernon 2009)(emphasis added).

Rather than shedding light on the law the Receiver seeks to apply against the Defendants, this reference to Chapter 24's attorney's fees provision is confusing. Defendants should not be required to speculate whether the Receiver's "See e.g." reference to the attorney's fees provision means he intends to pursue some unspecified remedy under Chapter 24, or whether he intends to pursue something else that has an attorney's fees provision like that of Section 24.013.

This cryptic reference to a derivative fees provision of a larger statute is not sufficient to give Defendants notice of what claims are sought against them, even when viewed in a light most favorable to the Receiver. Even if this reference to Section 24.013 hints at an intended application of other portions of Chapter 24, the Former Employees are left to speculate on what portions those might be. The defenses that may arise from allegations under one portion of Chapter 24 may not apply to other sections, leaving Defendants with nothing more than mere speculation as to what they should responsively plead, and whether sufficient factual basis has been pleaded in support.

The Receiver diverts attention from the omission of a particular theory of relief by using the labels of "Ponzi" and "fraudulent transfer" and combining these with conclusory statements that the Receivership is entitled to disgorge and control sums that the Receiver has determined by formulaic definition, rather than by particular factual pleading, is the property of the Receivership.

To the extent that particular statutory or common-law claims for relief are intended by the Receiver, they are not identified so that appropriate denials, admissions or affirmative defenses can be made in response.

The Receiver failed to make factual allegations sufficient to raise a right to relief for the underlying fraud upon which he bases his claims, and for the particulars of the transfers that he seeks to recover as "fraudulent transfers". For these reasons, Receiver complaints against the Former Employees should be dismissed for failure to comply with Rule 8(a)'s standard of pleading.

III.

12(b)(6) MOTION TO DISMISS

Federal Rule of Civil Procedure 12(b)(6) authorizes the dismissal of a complaint that fails to state a claim upon which relief can be granted. Relying upon the pleading requirements set forth in Federal Rules of Civil Procedure 8 and 9(b), the Receiver's Second Amended Complaint Against Former Stanford Employees should be dismissed pursuant to Rule 12(b)(6) on the basis that it fails to state a claim upon which relief can be granted.

A. The Complaint against the Former Stanford Employees Fails to meet Rule 9(b)'s Requirement for Particularity

Allegations of fraud form the basis of the Receiver's claims against the Former Employees. Even though he does not allege the Former Employees knew about the fraud. The alleged fraud is the predicate upon which the Receiver's claims are founded. The Former Employees are merely lumped into the Receiver's general conclusions of fraudulent activity and fraudulent transfers.

The Complaint does not provide Former Employees with notice of the dates or time periods for which Receiver alleges the Former Employees received fraudulent transfers upon which Receiver bases his case. Facts providing the who, what, when and where for these alleged participatory actions by Former Employees are not pleaded.

Moreover, Receiver carefully side-steps identifying the legal theory or theories upon which he relies to obtain relief against the Former Employees for their alleged roles in the fraudulent scheme. As such, his complaint fails the 9(b) standard for pleading of a fraud claim.

A heightened level of pleading is imposed for fraud claims: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 339 (5th Cir. 2008)(quoting FED.R.CIV.P. 9(b)).

> Although the requirement for particularity in pleading fraud does not lend itself to refinement, and it need not in order to make sense, nevertheless, directly put, the who, what, when and where must be laid out before access to the discovery process is granted.

Southland Securities Corp. v. Inspire Ins. Solutions, Inc., 365 F.3d 353, 362 (5th Cir. 2004); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 349 (5th Cir. 2002).

General allegations, which lump all defendants together failing to segregate the alleged wrongdoing of one from those of another cannot meet the requirements of Rule 9(b). *Tigue Investment Co., Ltd., v. Chase Bank of Texas, N.A.*, No. 3:03-CV-2490-N, 2004 U.S. Dist. WL 3170789 at *1 (N.D. Tex. Nov. 15, 2004).

Receiver's allegations against the Former Employees fail to provide this particularity. While the Receiver's index shows the names of Former Employees and the total dollar amount he wishes to convert to Receivership assets, this information is meaningless without the most basic pleading of the dates he alleges these sums were received by the Former Employees. Additionally, neither the complaint nor the attached index provides any particularity concerning the source, origination or underlying agreements of the sums shown in the chart (what and where). Defendants are left to speculate on whether they may properly assert limitations, advance contractual defenses, credits or offsets, or other defenses that cannot be assessed without basic notice of the Receiver's time frame (when), and basic facts relied upon by Receiver to answer the what and where elements of particularity.

Without this most basic information, the Receiver's allegations that the monetary sums he states for each Former Employee, constitute merely conclusory allegations. Receiver asks the Former Employees and the Court to assume that all income, compensation, loans and other consideration received by Former Employees for an undefined or unlimited period of time are fraudulent transfers subject to disgorgement and control by the Receivership under an unspecified legal theory.

Although allegations against defendants should be taken in a light most favorable to the Plaintiff, the Fifth Circuit has advised it will not strain to find inferences favorable

to the plaintiff. *Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 338 (5th Cir. 2008); *Southland,* 365 F.3d at 361. To avoid a dismissal for failure to state a claim, a plaintiff must plead specific facts, not mere conclusory allegations. *Dorsey* 540 F.3d at 338.

B. The Purpose of the Heightened Pleadings Standard is Fair Notice in Securities Fraud Claims

The heightened pleading standard of Rule 9(b) serves an important screening function in securities fraud suits: to provide defendants with fair notice of the plaintiff's claims, protect defendants from harm to their reputation and goodwill, reduce the number of strike suits, and prevent plaintiffs from filing baseless claims, then attemping to discover unknown wrongs. *Melder v. Morris* 27 F.3d 1097, 1100 (5th Cir. 1994); *Southland Securities Corp. v. Inspire Ins. Solutions, Inc.*, 365 F.3d 353, 362 (5th Cir. 2004). Fraud charges can seriously damage a defendant's reputation, even when the claim is ultimately defeated. *Tigue Investment Co., Ltd., v. Chase Bank of Texas, N.A.*, No. 3:03-CV-2490-N, 2004 U.S. Dist. WL 3170789 at *1 (N.D. Tex. Nov. 15, 2004)(citing *Norman v. Apache Corp*, 19 F.3d 1017, 1022 (5th Cir. 1994).

The importance of applying this standard is well-illustrated by the Receiver's pleadings. The Former Employees are entitled to fair notice to allow for a meaningful defense. In addition, these Former Employees should be protected from further harm to their reputations caused by broad allegations of fraud. The Receiver should be required to state his claims for relief consistent with 9(b)'s standard.

Both federal securities claims and state-law fraud claims are subject to the pleading requirements of Rule 9(b). *Dorsey v. Portfolio Equities, Inc.*, 549 F.3d 333, 338-339 (5th Cir. 2008).

Absent pleadings that give notice of the actions for relief sought, each Defendant remains in the dark on whether he has a right to demand heightened pleading standards for securities fraud allegations brought under federal statute, or whether he is entitled to affirmative defenses permitted by statute or common law.

The elements and defenses applicable to the various securities fraud claims differ. Defendants who face insufficient notice of the claims made against them are left to speculate on what defenses to allege or what discovery to request.

The *Dorsey* court cautioned against requiring defendants to make assumptions about the existence of elements necessary to state a claim made against them. "Rule 9(b) does not allow plaintiffs to force defendants –or the court—to make such assumptions." *Id.* at 340 (internal citation omitted).

C. Receiver's Failure to State a Theory of Relief further Supports Dismissal Under Rule 12(b)(6)

Federal case law overwhelmingly demonstrates that assessment of compliance with Rule 9(b) requires the complaint to provide notice of the specific statutory or common law claims brought against a defendant. Cases arising in the District Courts and dismissed under 12(b)(6) for failure to meet the standards for pleading fraud cases with particularity under Rule 9(b), are assessed by the Fifth Circuit based on the elements of the specific claim for relief. *See Tuchman v. DSC Communications,* 14 F.3d 1061, 1067-1068 (5th Cir. 1994)(noting that the particularity demanded by Rule 9(b) necessarily differs with the facts of each case.)

In *Tuchman,* the Fifth Circuit affirmed the district court's dismissal of plaintiff's federal securities fraud claims under section 10(b) of the Exchange Act along with Texas common law claims of fraud and after conducting an examination of whether plaintiff's

pleadings met 9(b)'s heightened pleading requirements for the precise elements required by each theory of relief. *See Id.* at 1067.

Other Fifth Circuit decisions in securities fraud cases reflect the necessity of 9(b) particularity as to the theories of relief sought, as a threshold issue to whether the complaint meets 9(b)'s requirements for the factual pleadings alleging the elements in support of such theory. The defendant and court must know from the theories pleaded, the elements to which the particularity standard applies.

Prior to dismissing under 12(b)(6) in an action alleging fraud in the sales of securities, the Fifth Circuit in *Williams v. WMX*, analyzed the individual elements of fraud required by the pleaded claims under both federal law and Texas common law fraud to determine whether the complaint sufficiently met the 9(b) standards for pleading, holding that "the requirement for particularity in pleading fraud does not lend itself to refinement, and it need not in order to make sense. Directly put, the who, what, when and where must be laid out before access to the discovery process is granted." *Williams v. WMX Technologies, Inc.* 112 F.3d 175, 177-78 (5th Cir. 1997), cert. denied, 118 S.Ct. 412 (1997). Stating that it applied the rule of 9(b) with force and without apology, the court wrote, "A complaint can be long-winded, even prolix, without pleading with particularity. Indeed such a garrulous style is not an uncommon mask for an absence of detail. The amended complaint here, although long, states little with particularity." *Id.* at 178.

The *Melder* plaintiffs alleged violations under specifically named federal statutes along with Section 27.01 of the Texas Business and Commerce Code, and state common law fraud and misrepresentation. *Melder v. Morris* 27 F.3d 1097, 1099 (5th Cir. 1994).

Because the pleadings provided the specific claims under which relief was sought, defendants were provided adequate notice of the elements to which the particularity standard applied, and the defenses that could be pleaded in response. The Fifth Circuit addressed the elements required of all securities fraud claims, and applied Rule 9(b) to an analysis of the plaintiffs' pleadings, finding that, "Instead of pleading with particularity, the plaintiffs offer only rote conclusions. . . ." *See Id.* at 1100, 1104. "This type of pleading fails to meet the requirements of Rule 9(b), and clearly implicates the kinds of policy concerns motivating the heightened standards in Rule 9(b)." *Id* at 1104. The Fifth Circuit affirmed the district court's dismissal under Rule 12(b)(6) for failure of particularity in the pleading. *Id.*

Affirming the district court's dismissal for failure to comply with Rules 9(b) and 12(b)(6), the Fifth Circuit conducted an analysis of the complaint's adherence to 9(b)'s particularity requirement for allegations of violations under the elements arising from the Texas Securities Act, codified at Tex.Rev.Civ. Stat. Ann. art. 581-33 (Vernon Supp. 2001). *See Herrmann Holdings Ltd. v. Lucent Techs, Inc.*, 302 F.3d 552, 561-64 (5th Cir. 2002). The court also rejected the sufficiency of the particularity of plaintiffs claims pleaded under Texas Business and Commerce Code §27.01(a), based upon an analysis of the required elements. *See Id.* at 564-565.

In *Abrams*, the Fifth Circuit affirmed the district court's 12(b)(6) dismissal of securities fraud claims brought under federal law. *Abrams v. Baker Hughes, Inc.*, 292 F.3d 424, 430 (5th Cir. 2002). Unlike the Former Employees in this case, the *Abrams* defendants were made aware of the theories of relief sought against them. Even so, the

court found that the plaintiff failed to meet the heightened pleading requirements of the PSLRA. *See Id.* at 430.

Recently, in *Dorsey*, the plaintiff alleged that the defendants violated various federal statutes in a securities fraud case. *See Dorsey v. Portfolio Equities, Inc.*, 540 F.3d 333, 339 (5th Cir. 2008). The district court applied the particularity standards under Rule 9(b) and PSLRA to the elements required by those theories of relief and found that plaintiff failed to specifically allege when purchases were made from which his alleged claims arose. *See Id.* at 340. The relevance of the dates was determinative to the claims against defendants upon application of the statute of repose. *Id.*

D. The Receiver's claims for Fraudulent Transfers should be dismissed because the Receiver has failed to state claim upon which relief may be granted.

Fifth Circuit precedent favors applying Rule 9(b) to fraudulent transfer actions. *Quilling v. Stark*, No. 3:05-CV-1976-L, 2006 U.S. Dist. WL 1683442 at *5 (N.D. Tex. June 19, 2006)(relying on *Bruswick Corp. v. Vineberg*, 370 F.2d 605, 610 (5th Cir. 1967). More recently, in *Alexander*, the court distinguished those cases that have concluded that Rule 9(b) does not apply to claims brought under state versions of the Uniform Fraudulent Transfers Act by finding that such decisions are based upon reasoning that some claims under the UFTA may be made without proof of the sort of common-law or actual fraud contemplated by Rule 9(b). *See Alexander v. Holden Business Forms, Inc.*, No. 4:08-CV-614-Y, 2009 U.S. Dist. WL 2176582, at *3, (N.D. Tex. July 20, 2009). Comparing the required elements for claims under different sections of TUFTA, the court found that allegations under some portions of the statute would require Rule 9(b) particularity, while others might not. *See Id.* at *3. The court also noted that the

particulars of a Texas common-law fraud case could be different than a claim brought under TUFTA. *Id.* at *4.[6]

While constructive fraud claims may require less particularity in pleading, defendants are still entitled to sufficient notice of the precise relief sought to prevent guessing about defenses, limitations and credit off-sets. The Receiver fails the requirements of Federal Rule of Civil Procedure 8 and 9(b) when he fails to give notice of the claims under which he brings his case. For these reasons, Receiver's complaints against the Former Employees should be dismissed.

E. The Receiver's claims for Unjust Enrichment should be dismissed because the Receiver has failed to state claim upon which relief may be granted.

As with the fraudulent transfer claim against the Former Employees, the Receiver does not state the applicable law for its claim of unjust enrichment.

In Texas, a plaintiff may recover under an unjust enrichment theory when the defendant "has obtained a benefit . . . by fraud, duress, or the taking of undue advantage." *Breckenridge Enterprises, Inc. v. Avio Alternatives, LLC*, No. 3:08-CV-1782-M, 2009 U.S. Dist. WL 1469808 at *10 (N.D. Tex. May 27, 2009) (*citing Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41-42 (Tex. 1992)).

In *Breckenridge*, the court found that where the unjust enrichment theory mirrored the plaintiff's fraud claims, which were dismissed for filing the particularity requirements of Rule 9(b), it would be "nonsensical to allow what is essentially a fraud claim to evade the particularity requirements through pleading under and equitable, rather than legal

[6] In the instant case, however, the deficiencies in the Receiver's complaint, including the failure to plead what, if any, provisions of the UFTA are involved, leave Former Employee Defendants and the Court speculating as to the elements of the of the Receiver's claims.

theory." Upon that basis, the court dismissed the unjustment enrichment claims against defendants. See *Breckenridge*, 2009 WL 1469808 at *10-11.

The Receiver's claim for unjust enrichment against the Former Employees must be dismissed because the Receiver has not plead facts that fairly notify the Former Employees of the applicable law, the facts supporting the assertion of the claim for unjust enrichment under the applicable law, nor the actions of the Former Employees that constituted fraud, duress, or taking advantage of Stanford. Receiver's complaint asserts unjust enrichment as an alternative to the assertions of fraud. For these reasons, The Receiver's Second Amended Complaint should be dismissed under Rule 12(b)(6) for failure to give each Former Employee notice to which he was entitled under Rule 9(b).

IV.

THE CLAIMS RAISED IN THE SECOND AMENDED COMPLAINT ARE SUBJECT TO MANDATORY ARBITRATION

A. Federal Law Favors Arbitration

"The Federal Arbitration Act (FAA) expresses a strong national policy favoring arbitration of disputes, and all doubts concerning the arbitrability of claims should be resolved in favor of arbitration." *Wash. Mut. Fin. Group, LLC v. Bailey*, 364 F.3d 260, 263 (5th Cir.2004) (quotations omitted); *E.E.O.C. v. Waffle House, Inc.*, 534 U.S. 279, 294, 122 S.Ct. 754, 151 L.Ed.2d 755 (2002); *Acosta v. Fair Isaac Corp.*, 2009 WL 3487833, *1 (N.D.Tex. 2009). The FAA requires courts to rigorously enforce agreements to arbitrate. *Brennan v. Aetna Life Ins. Annuity Co.*, 2001 WL 167954 (N.D. Tex. 2001), *citing Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987).

To determine whether the parties agreed to arbitrate a dispute, the district court considers: (1) whether there is a valid agreement to arbitrate between the parties; and (2) whether the dispute in question falls within the scope of the arbitration agreement. *Tittle v. Enron Corp.*, 463 F.3d 410, 418 (5th Cir.2006) (quoting *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir.1996)). When a contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "an order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986) (quoting *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960)).

B. The Parties Agreed to Arbitrate Disputes Between Them

The Fifth Circuit has held that arbitration agreements in employment applications are enforceable. *Ford v. Lehman Bros., Inc.*, 2007 WL 4437165, *3 (S.D. Tex. 2007). The agreement to arbitrate is formed when the employee signs the application and begins work. *See Hadnot v. Bay, Ltd.*, 344 F.3d 474, 477 (5th Cir.2003).

Employees of Stanford working in the securities industry, like the employees in *Lehman Bros.*, were required to sign an "Application for Security Industry Registration or Transfer," also known as a "Form U-4." The U-4 is a contract involving commerce and the arbitration provision is governed by federal arbitration law. *Kaddouri v. Merrill Lynch, Pierce, Fenner & Smith*, 2005 WL 283582, fn 5 (N.D. Tex. 2005), *citing Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 659 (5th Cir.1995) (U-4 form was governed by federal arbitration law).

The U-4 is an agreement to arbitrate any disputes that are required to be arbitrated under the rules of the SROs. Here, FINRA is the applicable current SRO. FINRA Rule 13200 requires arbitration of disputes that arise out of the business activities of a member or associated person and which is between the member and associated person.

The Fifth Circuit and other courts across the country have enforced the arbitration provisions in U-4 forms. *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir.1995); *see also Mouton v. Metro. Life Ins. Co.*, 147 F.3d 453 (5th Cir.1998); *Kidd v. Equitable Life Assurance Soc.*, 32 F.3d 516 (11th Cir.1994); *Williams v. Imhoff*, 203 F.3d 758 (10th Cir.2000); *Willis v. Dean Witter Reynolds, Inc.*, 948 F.2d 305 (6th Cir.1991).

Even Stanford Group Co., one of the entities that Janvey now controls, has moved to compel arbitration in the past against former financial advisors based on the language of the U-4 agreements and the FINRA rules. *In re Stanford Group Co.*, 273 S.W.3d 807 (Tex.App.[14th] 2008). In that matter, the Court of Appeals found that the dispute between Stanford and its former employees was subject to arbitration based on the FINRA rules regarding arbitration.

In addition, the claims of the Receiver regarding loans are subject to written agreements that contain arbitration clauses. Those clauses are binding upon the Receiver. Generally, a Receiver stands in the shoes of the entity in receivership and must follow binding arbitration agreements into which the entities in receivership entered. *See, e.g., Wuliger v. Manufacturers Life Ins. Co.*, 537 F3d 787 (6th Cir. 2009); *Javitch v. First Union Securities, Inc.*, 315 F.3d 619, (6th Cir. 2003); *U.S. Small Business Admin. v. Coqui Capital Mgmt.*, 2008 WL 4735234 (S.D.N.Y. 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"); *Capitol Life Ins. Co. v. Gallagher*, No. 94-1040, 1995 WL 66602, at *2 (10th Cir. Feb. 7, 1995) ("[the receiver] may be compelled to arbitrate because a receiver 'stands in the shoes' of the [receivership entity]"). Like the FINRA Rules and language of the Form U-4, the arbitration language in the loan agreements is broad and covers the claims that have been brought by the Receiver ("any controvery arising out of or relating to this Note . . . shall be submitted to and settled by arbitration").

C. Dismissal is Appropriate

The Court has no discretion but to compel arbitration of arbitrable claims. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985). Dismissal of this action is appropriate. The Fifth Circuit encourages district courts to dismiss cases with nothing but arbitrable issues. *Armstrong v. Associates Intern. Holdings Corp.*, 2007 WL 2114512, at *4 (5th Cir. 2007); *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir.1992).

CONCLUSION

Two things should be readily apparent from a review of the Receiver's Second Amended Complaint: (1) the pleading fails to set forth its allegations with the required specificity; and (2) the Former Employees are not proper Relief Defendants. The Court should dismiss all claims against Relief Defendants and require the Receiver to replead with particularity its alternative theories of recovery (fraudulent transfers and unjust enrichment).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that pursuant to the Federal Rules of Civil Procedure a true and correct copy of the above and foregoing document was served via ECF on counsel of record on this the 15th day of January, 2010.

/s/
Michael J. Stanley