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

RALPH S. JANVEY, IN HIS CAPACITY AS COURT-APPOINTED RECEIVER FOR THE STANFORD INTERNATIONAL BANK, LTD., ET AL.,	§	
Plaintiff,	§	CASE NO. 3:09-CV-0724-N
v.	§	
JAMES R. ALGUIRE, ET AL.,	§	
Defendants.	§	

RECEIVER'S RESPONSE TO CERTAIN FORMER STANFORD EMPLOYEES' MOTIONS TO COMPEL ARBITRATION AND TO DISMISS

BAKER BOTTS L.L.P.
Kevin M. Sadler
Texas Bar No. 17512450
kevin.sadler@bakerbotts.com
Robert I. Howell
Texas Bar No. 10107300
robert.howell@bakerbotts.com
David T. Arlington
Texas Bar No. 00790238
david.arlington@bakerbotts.com
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, Texas 78701-4039
(512) 322-2500
(512) 322-2501 (Facsimile)

Timothy S. Durst
Texas Bar No. 00786924
tim.durst@bakerbotts.com
2001 Ross Avenue
Dallas, Texas 75201
(214) 953-6500
(214) 953-6503 (Facsimile)

ATTORNEYS FOR RECEIVER RALPH S. JANVEY

TABLE OF CONTENTS

Table of Authorities ii

Summary 1

Factual Background 3

Arguments and Authorities 4

I. The Court should deny the Former Employees' Motions to Compel Arbitration. 4

A. The Receiver's claims against the Former Employees are not subject to arbitration agreements. 4

B. The Court should exercise its broad powers in receivership cases and deny the Former Employees' Motions to Compel Arbitration 8

II. The Court should not dismiss the Receiver's claims under Rule 9(b). 10

A. The heightened pleading standards of Rule 9(b) do not apply to the Receiver's claims. . 10

B. Even if Rule 9(b) did apply to the Receiver's claims, the Receiver has satisfied its pleading standards. 12

III. The Receiver has also satisfied the basic pleading requirements of Rule 8. 13

IV. Lundquist's personal jurisdiction, subject matter jurisdiction, and venue motions should be denied. 15

A. The Court has personal jurisdiction over Lundquist. 16

B. The Court has subject matter jurisdiction over Lundquist. 17

C. Venue is proper in this Court as to Lundquist. 19

V. Any motions to dismiss based upon relief-defendant claims are moot. 20

Conclusion & Prayer 20

TABLE OF AUTHORITIES

Page(s)

CASES

Am. Freedom Train Found. v. Spurney,
747 F.2d 1069 (1st Cir. 1984) 18

Court-Appointed Receiver for Lancer Mgmt. Group LLC v. 169838 Canada, Inc.,
No. 05-60235-CIV, 2008 WL 2262063 (S.D. Fla. May 30, 2008) 14

Cycle Sport, L.L.C. v. Dinli Metal Indus. Co., Ltd.,
Civil Action No. 3:07-CV-00253-O, 2008 WL 4791544 (N.D. Tex. Oct. 30, 2008) 5

Donell v. Kowell,
533 F.3d 762 (9th Cir. 2008) 18

Duncan v. Cessna Aircraft Co.,
665 S.W.2d 414 (Tex. 1984) 15

Eberhard v. Marcu,
530 F.3d 122 (2d Cir. 2008) 7

Eubanks v. Parker County Comm'rs Court,
44 F.3d 1004, 1995 WL 10513 (5th Cir. Jan. 3, 1995) 20

Fujisawa Pharm. Co., Ltd. v. Kapoor,
814 F. Supp. 720 (N.D. Ill. 1993) 12

G.E. Capital Commercial, Inc. v. Wright & Wright, Inc.
Civil Action No. 3:09-CV-572-L, 2009 WL 5173954 (N.D. Tex. Dec. 31, 2009) 10, 11, 14

Haile v. Henderson Nat'l Bank,
657 F.2d 816 (6th Cir. 1981) 16, 18, 19

Hodgson v. Kottke Assocs., LLC,
Civil Action No. 06-5040, 2007 WL 2234525 (E.D. Pa. Aug. 1, 2007) 6

In re Gandy,
299 F.3d 489 (5th Cir. 2002) 8

In re Sunrise Sec. Litig.,
793 F.Supp. 1306 (E.D. Pa. 1992) 12

In re Wiand,
2007 WL 963165 (M.D. Fla. Mar. 27, 2007) 6

Marion v. Benistar, Ltd.,
No. Civ.A. 03-4700, 2005 WL 563698 (E.D. Pa. Mar. 10, 2005).....6

Obermaier v. Arnett,
No. 2:02CV111FTM29DNF, 2002 WL 31654535 (M.D. Fla. Nov. 20, 2002) 6

P & P Mktg., Inc. v. Ditton,
746 F. Supp. 1354 (N.D. Ill. 1990).....12

Pearlman v. Alexis,
No. 09-20865-CIV, 2009 WL 3161830 (S.D. Fla. Sept. 25, 2009).....11

Prograph Int'l Inc. v. Barhydt,
928 F. Supp. 983 (N.D. Cal. 1996).....7

Quilling v. Cristell,
No. Civ.A. 304CV252, 2006 WL 316981 (W.D.N.C. Feb. 9, 2006) 6, 16

Quilling v. Grand St. Trust,
No. 3:04 CV 251, 2005 WL 1983879 (W.D.N.C. Aug. 12, 2005).....6

Quilling v. Schonsky,
247 F. App'x 583 (5th Cir. 2007).....12

Quilling v. Stark,
Civil Action No. 3:05-CV-1976-L, 2006 WL 1683442 (N.D. Tex. June 19, 2006) 16

Rosner v. Peregrine Fin. Ltd.,
No. 95 Civ. 10904(KTD), 1998 WL 249197 (S.D.N.Y. May 18, 1998).....8

Ross v. Health & Ret. Props. Trust,
703 N.E.2d 734 (Mass. App. Ct. 1998) 7

Scholes v. African Enter., Inc.,
838 F. Supp. 349 (N.D. Ill. 1993).....6

Scholes v. Lehmann,
56 F.3d 750 (7th Cir. 1995) 5, 7, 18, 19

SEC v. Am. Bd. of Trade, Inc.,
830 F.2d 431 (2d Cir. 1987).....8

SEC v. Bilzerian,
378 F.3d 1100 (D.C. Cir. 2004).....16

SEC v. Cook,
No. 3-01-CV-0480-R, 2001 WL 803791 (N.D. Tex. July 11, 2001).....16

SEC v. Elfindepan, S.A.,
No. 1:00CV00742, 2002 WL 31165146 (M.D.N.C. Aug. 30, 2002) 8

SEC v. First Pac. Bancorp,
142 F.3d 1186 (9th Cir. 1998) 8

SEC v. Great White Marine & Recreation, Inc.,
428 F.3d 553 (5th Cir. 2005) 8

Terry v. June,
432 F. Supp. 2d 635 (W.D. Va. 2006) 6

Terry v. June,
No. Civ.A. 303CV00052, 2003 WL 22125300 (W.D. Va. Sept. 12, 2003) 16

Terry v. Walker,
369 F. Supp. 2d 818 (W.D. Va. 2005) 16

U.S. ex rel. Johnson v. Shell Oil Co.,
183 F.R.D. 204 (E.D. Tex. 1998).....12

U.S. v. Corpus,
491 F.3d 205 (5th Cir. 2007) 5

Warfield v. Alaniz,
453 F. Supp. 2d 1118 (D. Ariz. 2006) 6

Warfield v. Arpe,
Civil Action No. 3:05-cv-1457-R, 2007 WL 549467 (N.D. Tex. Feb. 22, 2007) .....
.....6, 16, 17, 18

Warfield v. Byron,
436 F.3d 551 (5th Cir. 2006) 12

Webb v. Investacorp, Inc.,
89 F.3d 252 (5th Cir. 1996) 4

Wing ex rel. 4NExchange, L.L.C. v. Yager,
No. 103CV54DAK, 2003 WL 23354487 (D. Utah Nov. 7, 2003) 6

Wing v. Hammons,
No. 2:08-CV-00620, 2009 WL 1362389 (D. Utah May 14, 2009) 6

Wing v. Kendrick,
No. 2:08-CV-01002-DB, 2009 WL 1362383 (D. Utah May 14, 2009).....6

Wing v. Wharton,
No. 2:08-CV-00887-DB, 2009 WL 1392679 (D. Utah May 15, 2009).....5, 6

STATUTES

15 U.S.C. § 77v(a) 19

15 U.S.C. § 78aa 19, 20

28 U.S.C. § 754.....16, 17, 19

28 U.S.C. § 1692.....16

FED. R. CIV. P. 8.....3, 11, 13, 14, 15

FED. R. CIV. P. 9(b) 2, 10, 11, 12, 14

TEX. BUS. & COMM. CODE ANN. § 24.005 (Vernon 2009) 5, 10

TEX. BUS. & COMM. CODE ANN. § 24.006.....5

TEX. BUS. & COMM. CODE ANN. § 24.008.....5

OTHER AUTHORITIES

FINRA CODE OF ARBITRATION PROCEDURE FOR INDUSTRY DISPUTES § 13602.....9

FINRA § 13900.....9

FINRA § 13901.....9

FINRA § 13902.....9

FINRA § 13903.....9

FINRA § 13904(g) 9

RESTATEMENT (SECOND) CONFLICT OF LAWS § 145(2) (1971) 15

Receiver Ralph S. Janvey (the "Receiver") files this Response to Certain Former Stanford Employees' (the "Former Employees") Motions to Compel Arbitration and to Dismiss[1] and respectfully shows the Court as follows:

SUMMARY

The Court should deny the Former Employees' motions to compel arbitration and to dismiss or stay the case pending arbitration. The Former Employees premise their arbitration argument upon the faulty concept that there is a valid agreement to arbitrate that somehow binds the Receiver. There is no arbitration agreement either in fact or in law, however, between the Receiver and the Former Employees. Although prior to the Receivership SGC was a member of FINRA and some of the Former Employees may have signed documents containing arbitration provisions, the Receiver was not a party or a signatory to such agreements and is not himself a member of FINRA. Moreover, in asserting fraudulent-transfer and unjust-enrichment claims, the Receiver sues as or on behalf of creditors, and creditors are not bound by arbitration agreements between debtors and third parties.

Equitable considerations, given the Court's broad authority in receivership actions, likewise militate against compelling arbitration. Arbitration would lead to a fractured suit — possibly hundreds of separate arbitration actions. In addition to unnecessarily depleting the assets of the Estate, hundreds of separate arbitration actions would almost certainly lead to inconsistent decisions between the various panels on issues that are common to most or all Former Employees (*e.g.*, whether selling the CDs that are the backbone of the Ponzi scheme

[1] In the interest of judicial economy — and instead of filing multiple responses — the Receiver's Response applies to all of the following motions filed by the Former Employees: Docs. 136, 142, 144, 147, 192, 199-205, 210-211, 234-236, and 310. One of these former employees, David Lundquist, has also asserted counterclaims against the Receiver. *See* Docs. 147, 192. The Receiver will separately file motions in response to Lundquist's counterclaims, and this Response is not intended to act as a waiver of such motions.

constitutes reasonably equivalent value or whether knowledge of particular facts precludes the affirmative defense of good faith) and potentially inconsistent decisions between the panels and this Court. Finally, FINRA arbitrations are private proceedings into which the investing public has only limited insight. Given the impact that the Stanford fraud — and in particular, the results of the Receiver's claims — will have on the investing public, these claims should not be adjudicated behind closed doors.

The Former Employees also assert that the Receiver's claims should be dismissed pursuant to Federal Rule of Civil Procedure 9(b). The Court should likewise deny this motion, since it is well-established that the heightened pleading standards of Rule 9(b) do not apply to the claims the Receiver asserts; in fact, this Court so held in another case just over a month ago. But even if Rule 9(b) did apply to the Receiver's claims, the Receiver's Second Amended Complaint Against Former Stanford Employees (the "Complaint") more than satisfies the standard set forth in the Rule. In particular, the Receiver asserts very specific allegations about the fraud and sets forth the specific amounts alleged — even breaking down the amount into categories of CD Proceeds (*i.e.*, Loans, SIBL CD Commissions, SIBL Quarterly Bonuses, Performance Appreciation Rights Plan ("PARS") Payments, Branch Managing Director Quarterly Compensation, and Severance Payments). Further, Rule 9(b) is not to be applied blindly, and the Court must consider several important factors, including the complexity of the case and the number of transactions at issue. Considering these factors, Rule 9(b)'s standards would be less stringently applied to the Receiver's claims.

The Former Employees also move to dismiss the Receiver's claims under Rule 12(b)(6) for failure to comply with the basic pleading requirements of Rule 8. The Former Employees, however, fail to acknowledge that the Receiver has complied with both the word and

spirit of Rule 8: the Receiver has provided the grounds for the Court's jurisdiction, has stated state-law claims showing that he is entitled to relief, and has requested relief from the Court.

The Court should also deny the few outlying motions not asserted by all of the Former Employees. One of the Former Employees, David Lundquist, has filed motions based upon personal jurisdiction, subject matter jurisdiction, and venue. Because the Receiver has established all three as to Lundquist, his motions should be denied. Further, a few Former Employees continue to seek dismissal of the Receiver's Complaint based upon relief-defendant theories. Because the Receiver is no longer pursuing relief-defendant claims against the Former Employees, such motions should be dismissed as moot.

FACTUAL BACKGROUND

The Stanford Defendants orchestrated and operated a wide-ranging Ponzi scheme. In fact, Defendant James M. Davis has admitted that the Stanford fraud was a Ponzi scheme from the beginning. Davis Plea Agreement, Doc. 771 (Case No. 3:09-cv-00298-N) at ¶ 17(n) (Stanford, Davis, and other conspirators created a "massive Ponzi scheme"); Davis Tr. of Rearraignment, Doc. 807 (Case No. 3:09-cv-00298-N) at 16:16-17, 21:6-8, 21:15-17 (admitting the Stanford Ponzi fraud was a "massive Ponzi scheme ab initio"). As alleged in the Complaint, the Stanford Defendants transferred millions of dollars in CD Proceeds — comprising Loans, SIBL CD Commissions, SIBL Quarterly Bonuses, PARS Payments, Branch Managing Director Quarterly Compensation, and Severance Payments — to the Former Employees to further this wide-ranging Ponzi scheme.

These payments to the Former Employees were all closely tied to maintaining the Stanford Defendants' portfolio of CDs. Decl. of Karyl Van Tassel, Doc. 18 at ¶¶ 47-54. SIBL had one principal product line — certificates of deposit — and one principal source of funds —

funds from CD purchases. *Id.* at ¶ 9. The Receiver and his professionals have undertaken an extensive analysis of SIBL's bank accounts: in particular, the primary operating accounts and two money market accounts. *Id.* at ¶ 25. Substantially all of the funds deposited into each of these accounts were proceeds from the sale of SIBL CDs. *Id.* These same accounts were then the source of CD Proceeds paid out to the Former Employees. *Id.* at ¶¶ 50-54. The substantial majority of funds used to pay the CD Proceeds to the Former Employees was proceeds from the sale of SIBL CDs. *Id.* at ¶¶ 24, 49.

ARGUMENT & AUTHORITIES

I. The Court should deny the Former Employees' Motions to Compel Arbitration.

A. The Receiver's claims against the Former Employees are not subject to arbitration agreements.

No agreement to arbitrate exists between the Receiver and the Former Employees. Although some of the Former Employees signed promissory notes containing arbitration clauses and some of them signed Form U-4s that contained arbitration language, the Receiver was not — and is not — a signatory or party to those agreements. And although SGC was a member of FINRA, the Receiver himself is not a FINRA member and cannot be compelled to arbitrate his claims against the Former Employees under the FINRA rules.

When determining whether to compel arbitration, the Court must determine "whether there is a valid agreement to arbitrate *between the parties*; and . . . whether the dispute in question falls within the scope of that arbitration agreement." *Webb v. Investacorp, Inc.*, 89 F.3d 252, 258 (5th Cir. 1996) (emphasis added). The Court need not reach the second prong of this analysis here, as the Former Employees cannot show that there is a single valid agreement to arbitrate *between the Receiver and the Former Employees*.

The Former Employees emphasize that the Receiver "stands in the shoes" of SGC for the purpose of his claims against them and that his claims, therefore, are subject to arbitration under the FINRA rules, Form U-4, and the language of the promissory notes.[2] This argument alone, however, reveals the Former Employees' misunderstanding of the Receiver's claims and defeats their own motions. Contrary to the Former Employees' claim, the Receiver does not assert his claims on behalf of the *debtor* entities that made the fraudulent transfers to the Former Employees (such as SGC), but rather in his capacity as a *creditor or representative of creditors* of those debtor entities. Because the Receiver is not pursuing his claims as a debtor who agreed to arbitration, the Former Employees' reasoning simply has no merit.

"The Fraudulent Transfer Act provides a cause of action to creditors of debtors who fraudulently transfer assets under certain circumstances, as set out in the statute." *Cycle Sport, L.L.C. v. Dinli Metal Indus. Co., Ltd.*, Civil Action No. 3:07-CV-00253-O, 2008 WL 4791544, at *4 (N.D. Tex. Oct. 30, 2008); *see also* TEX. BUS. & COMM. CODE ANN. §§ 24.005-.006, 24.008 (Vernon 2009); *U.S. v. Corpus*, 491 F.3d 205, 210-11 (5th Cir. 2007) ("TUFTA creates a statutory cause of action through which a creditor may seek recourse for a fraudulent transfer.") (internal quotations omitted). Decades of case law clearly indicate that, when attempting to untangle the results of a Ponzi scheme, a receiver may assert fraudulent-transfer claims and has standing as a creditor to do so. *See Scholes v. Lehmann*, 56 F.3d 750, 753-54 (7th Cir. 1995) (holding that a receiver has standing to sue as a creditor under a fraudulent-transfer claim); *Wing v. Wharton*, No. 2:08-CV-00887-DB, 2009 WL 1392679, at *3-

[2] Some of the Former Employees also threaten undefined FINRA "penalties" against the Receiver for not submitting his claims to FINRA arbitration. Not only is the Receiver not bound to FINRA arbitration and, therefore, not subject to its penalty provisions, but he was following the Court's express direction to him: "[T]he Receiver is specifically directed and authorized to . . . [i]nstitute such actions or proceedings to impose a constructive trust, obtain possession, and/or recover judgment with respect to persons or entities who received assets or records traceable to the Receivership Estate. *All such actions shall be filed in this Court*." Am. Order Appointing Receiver, Doc. 157 (Case No. 3:09-cv-00298-N) at ¶5(c) (emphasis added).

4 (D. Utah May 15, 2009) (approving receiver's fraudulent-transfer pleading); *Wing v. Kendrick*, No. 2:08-CV-01002-DB, 2009 WL 1362383, at *2 (D. Utah May 14, 2009) (same); *Wing v. Hammons*, No. 2:08-CV-00620, 2009 WL 1362389, at *2-3 (D. Utah May 14, 2009) (holding that receiver was creditor and, therefore, had standing to bring fraudulent-transfer claim); *Hodgson v. Kottke Assocs., LLC*, Civil Action No. 06-5040, 2007 WL 2234525, at *7 (E.D. Pa. Aug. 1, 2007) (observing that receiver had standing to assert fraudulent-transfer claims); *In re Wiand*, 2007 WL 963165, at *2 (M.D. Fla. Mar. 27, 2007) (holding that receiver had standing to bring fraudulent-transfer claims); *Warfield v. Arpe*, Civil Action No. 3:05-cv-1457-R, 2007 WL 549467, at *7 (N.D. Tex. Feb. 22, 2007) (receiver may sue to recover fraudulently transferred funds); *Warfield v. Alaniz*, 453 F. Supp. 2d 1118, 1126-27 (D. Ariz. 2006) (receiver had standing to bring state-law claims for fraudulent transfers); *Terry v. June*, 432 F. Supp. 2d 635, 639-43 (W.D. Va. 2006) (granting partial summary judgment in favor of receiver on fraudulent-transfer claims); *Quilling v. Cristell*, No. Civ.A. 304CV252, 2006 WL 316981, at *6 (W.D.N.C. Feb. 9, 2006) (receiver has standing to bring fraudulent transfer claims); *Quilling v. Grand St. Trust*, No. 3:04 CV 251, 2005 WL 1983879, at *6 (W.D.N.C. Aug. 12, 2005) (same); *Marion v. Benistar, Ltd.*, No. Civ.A. 03-4700, 2005 WL 563698, at *1 (E.D. Pa. Mar. 10, 2005) (denying motion to dismiss receiver's fraudulent-transfer claim); *Wing ex rel. 4NExchange, L.L.C. v. Yager*, No. 103CV54DAK, 2003 WL 23354487, at *2-3 (D. Utah Nov. 7, 2003) (same); *Obermaier v. Arnett*, No. 2:02CV111FTM29DNF, 2002 WL 31654535, at *4 (M.D. Fla. Nov. 20, 2002) (receiver has standing to bring fraudulent-transfer claim); *Scholes v. African Enter., Inc.*, 838 F. Supp. 349, 355-56 (N.D. Ill. 1993) (same).

In the instant case, Ralph S. Janvey was appointed Receiver not only over debtor Receivership entities, but also over creditor Receivership entities. The Receiver is asserting his

claims against the Former Employees on behalf of creditor entities to recover the funds the debtor entities paid to the Former Employees in the form of CD Proceeds. Courts have addressed similar circumstances where, as here, a receiver was appointed over both debtor entities and creditor entities and have expressly endorsed the receiver's fraudulent-transfer claims. *See Scholes*, 56 F.3d at 754 (receiver appointed over both individual debtor and corporate creditors had standing to bring fraudulent-transfer claim on behalf of creditor corporations, which were "entitled to the return of the moneys"); *Eberhard v. Marcu*, 530 F.3d 122, 132-33 (2d Cir. 2008) (approving *Scholes* holding that receiver appointed over both debtor/transferor and creditor entities could assert fraudulent-transfer claims on behalf of creditor entities).

Although the Former Employees cite cases where receivers were compelled to arbitrate certain claims against defendants, not a single case they cite compelled a creditor — much less a receiver suing as a creditor — to arbitrate *fraudulent-transfer* claims against defendants absent an agreement signed by that creditor.[3] They cite no such cases because there are none. The Former Employees cannot cite any legal authority for the proposition that, pursuant to an arbitration provision that the Receiver never signed, the Receiver should be compelled to his arbitrate claims.

To the contrary, courts appropriately refuse to compel arbitration of fraudulent-transfer claims where the creditor did not sign an arbitration agreement. *See Ross v. Health & Ret. Props. Trust*, 703 N.E.2d 734, 739 (Mass. App. Ct. 1998) (affirming denial of

[3] The Receiver has located only one case where arbitration of a fraudulent-transfer claim was compelled, but the creditor himself (who was not a receiver) had actually signed the agreement to arbitrate, the plaintiff's status as a creditor depended upon the agreement with the arbitration provision, and the plaintiff did not object to arbitration. *See generally Prograph Int'l Inc. v. Barhydt*, 928 F. Supp. 983 (N.D. Cal. 1996). The instant case is distinguishable from *Prograph* because the Receiver has not signed an agreement to arbitrate; his standing to sue on behalf of creditor entities has no relation to any of the alleged arbitration provisions; and he opposes arbitration of his claims against the Former Employees.

motion to compel creditor's fraudulent-transfer claim where transferor — and not creditor — signed arbitration agreement).[4] And some courts have refused to compel arbitration of *any* claims by receivers who are nonsignatories to arbitration agreements. *See Rosner v. Peregrine Fin. Ltd.*, No. 95 Civ. 10904(KTD), 1998 WL 249197, at *8-9 (S.D.N.Y. May 18, 1998) (holding that receiver was nonsignatory to arbitration agreement and that none of the bases for binding nonsignatories to such agreements were present).

B. The Court should exercise its broad powers in receivership cases and deny the Former Employees' Motions to Compel Arbitration.

Furthermore, equitable considerations underscore the fact that arbitration should be denied in this case. The Court has expansive equitable powers over an equity receivership, and "[i]t is a recognized principle of law that the district court has broad powers and wide discretion to determine the appropriate relief in an equity receivership." *SEC v. Great White Marine & Recreation, Inc.*, 428 F.3d 553, 556 (5th Cir. 2005) (internal citation omitted). Likewise, "[t]he district court has broad equitable powers to fashion appropriate relief for violations of the federal securities laws" and "afford relief to defrauded investors." *SEC v. First Pac. Bancorp*, 142 F.3d 1186, 1193 (9th Cir. 1998); *SEC v. Elfindepan, S.A.*, No. 1:00CV00742, 2002 WL 31165146, at *6 (M.D.N.C. Aug. 30, 2002). The Court may "grant ancillary relief . . . where necessary and proper to effectuate the purposes of the securities laws." *SEC v. Am. Bd. of Trade, Inc.*, 830 F.2d 431, 438 (2d Cir. 1987) (internal quotations omitted).

The centralized resolution of the Receivership's claims and issues is vitally important, as the Court has so recognized in its order appointing the Receiver staying all litigation in any other forum *and directing the Receiver to file his claims in this Court*.

[4] The Receiver's ability to pursue fraudulent-transfer claims against the Former Employees and avoid arbitration is not unlike a bankruptcy trustee's ability to do so. In *In re Gandy*, the Fifth Circuit affirmed the district court's refusal to compel arbitration where the trustee alleged fraudulent-transfer claims under state law. 299 F.3d 489, 495-96 (5th Cir. 2002).

Compelling arbitration of the Receiver's claims against the Former Employees would result in piecemeal litigation and present a risk of inconsistent rulings on important questions of law, such as whether selling the fraudulent SIBL CDs can be reasonably equivalent value and whether the Former Employees knew or should have known facts that would preclude a showing of objective good faith.

Numerous arbitration actions would further deplete the assets of the Receivership Estate to the direct harm of the Estate's creditors and the thousands of defrauded investors who lost billions of dollars in the Stanford Ponzi scheme. FINRA arbitration is certainly not free, and it is subject to additional fees and costs. FINRA CODE OF ARBITRATION PROCEDURE FOR INDUSTRY DISPUTES § 13900 (filing fees up to $3,700); *id.* at § 13901 (surcharge up to $3,750); *id.* at § 13902 (hearing session fees up to $1,200); *id.* at § 13903 (prehearing process fee of $750 and hearing process fee up to $5,500). The Receivership Estate, and ultimately its creditors, would have to bear the unnecessary burdens of these expenses.

Furthermore, the Court should not compel such costly arbitration because FINRA arbitrations are private proceedings to which the public has only limited access. *See, e.g., id.* at § 13904(g) (an "explained decision" is only required when both parties request it, and even then, "[i]nclusion of legal authorities and damage calculations is not required"); *id.* at § 13602 (panel has discretion to determine who — other than the parties, their representatives, and expert witness — can attend the hearings, if anyone). The consequences of the Stanford Ponzi scheme and the outcome of the Receiver's claims should be addressed in the public court and not behind closed doors.

Because there is no valid agreement to arbitrate the Receiver's claims against the Former Employees and because equity demands that the claims be brought before this Court, the

Court should deny the Former Employees' motions to compel arbitration and to stay or dismiss the case pending arbitration.

II. The Court should not dismiss the Receiver's claims under Rule 9(b).

A. The heightened pleading standards of Rule 9(b) do not apply to the Receiver's claims.

The Former Employees argue that the Receiver must set forth the wrongdoings by each of the Former Employees and that he must comply with the heightened pleading requirements related to fraud claims as set forth in Federal Rule of Civil Procedure 9(b). These arguments are without merit.

To proceed with a fraudulent-transfer claim, the Receiver need only allege that the Stanford Defendants transferred CD Proceeds to the Former Employees with the intent to hinder, delay, or defraud the Stanford entities' creditors by placing their property beyond the reach of creditors of the Stanford entities. *See* TEX. BUS. & COMM. CODE ANN. § 24.005(a)(1); *see also* Receiver's Second Am. Complaint, Doc. 156 at ¶¶ 18-30 (alleging that the Stanford fraud was a massive Ponzi scheme *ab initio* and that the Former Employees received CD Proceeds from the scheme); Doc. 157 at 1-10 (listing, by category, the CD Proceeds the Former Employees received from the Stanford Defendants); Decl. of Karyl Van Tassel, Doc. 18 at ¶¶ 9, 24-25, 47-54 (describing how the Former Employees were highly motivated to sell the fraudulent CDs and that the payments they received were funded from the proceeds of the sales of the same fraudulent CDs).

The Northern District of Texas recently considered this very issue and found that Rule 9(b) does not apply to the types of claims that the Receiver asserts against the Former Employees. In *GE Capital Commercial, Inc. v. Wright & Wright, Inc.*, plaintiff GECC asserted a fraudulent-transfer claim against a defendant under the "actual fraud" prong of the Texas

fraudulent-transfer statute. Civil Action No. 3:09-CV-572-L, 2009 WL 5173954, at *10 (N.D. Tex. Dec. 31, 2009). Defendant PlainsCapital argued that GECC's fraudulent-transfer claim was the same as a fraud claim and, therefore, was subject to Rule 9(b). *Id.* The court disagreed with GECC and found that the fraudulent-transfer claims were, instead, subject to the basic pleading requirements of Rule 8. *Id.* The court stated:

> 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. *GE Capital Commercial* is on all fours with the instant case, and other courts have held similarly. *See, e.g.*, *Pearlman v. Alexi*s, No. 09-20865-CIV, 2009 WL 3161830, at *5 (S.D. Fla. Sept. 25, 2009) (holding that a fraudulent-transfer claim is different from a fraud claim and is not subject to Rule 9(b)). The Receiver has appropriately alleged that the Former Employees were transferees under the Texas fraudulent-transfer statute of the CD Proceeds in the amounts specifically listed in the Complaint's Appendix. Under the law of *GE Capital Commercial* and other cases like it, the Receiver has satisfied the pleading requirements of Rule 8 (*infra,* section III) and is *not* bound by the standards of Rule 9(b).

Applying Rule 9(b) to the Receiver's claims makes little sense because, unlike allegations of fraud, neither wrongdoing nor false representation are elements of the Receiver's claims against the Former Employees. The cases cited by the Former Employees are inapposite because they involved allegations of securities fraud and other claims that necessarily include

wrongdoing by the defendants. "Fraud" by the Former Employees is simply not an essential element of the Receiver's claims.[5]

"[T]ransfers made from a Ponzi scheme are presumptively made with intent to defraud, because a Ponzi scheme is, as a matter of law, insolvent from inception." *Quilling v. Schonsky*, 247 F. App'x 583, 586 (5th Cir. 2007); *see also Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006). The facts alleged by the Receiver establish that the Stanford Defendants ran a Ponzi scheme for several years across multiple continents and, to keep the scheme going, paid the Former Stanford Employees with CD Proceeds taken from unwitting SIBL CD investors in the amounts and categories listed in the Appendix to the Complaint. The Receiver is not required to plead anything more to establish the essential elements of his claim; the Court should, therefore, deny the Former Employees' motions to dismiss based on Rule 9(b).

B. Even if Rule 9(b) did apply to the Receiver's claims, the Receiver has satisfied its pleading standards.

Even if, contrary to the recent decision of this Court in *GE Capital Commercial*, Rule 9(b) did apply to the Receiver's claims, the Receiver's Complaint fully satisfies that Rule.[6]

First, the Receiver has identified by name all of the Former Employees who received transfers of CD Proceeds from the Stanford Defendants. Second, he has provided not just the total amount he seeks in recovery, but also the specific amount sought from each Former Employee. Moreover, the Receiver's Complaint breaks down the amount sought from each Former Employee into six categories corresponding to the form of CD Proceeds received by each employee — Loans, SIBL CD Commissions, SIBL Quarterly Bonuses, PARS Payments, Branch

[5] Evidence of fraud or wrongdoing by the Former Employees, however, would be relevant to the Former Employees' affirmative defense of objective good faith.

[6] 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).

Managing Director Quarterly Compensation, and Severance Payments — in the Appendix in support of the Complaint. Third, he has alleged — and proven — facts showing that the Stanford Defendants were operating a massive, global Ponzi scheme and that the Stanford Defendants transferred CD Proceeds from that fraud to the Employees.

Although the Former Employees complain that the Receiver has not pled facts to adequately notify them of the Receiver's claims against them, for the reasons set forth above, the Receiver need not allege any other facts or plead with any additional specificity to maintain his claims against the Former Employees. Surely the Former Employees are aware of the particular amounts of the CD Proceeds they received, the dates on which they received CD Proceeds, and from whom they received the CD Proceeds — precisely because they were the ones who actually received the CD Proceeds. The Receiver need not plead such details for the thousands of fraudulent-transfers at issue in this case, especially since the Former Employees are in possession of the very information that they seek.

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

The Former Employees also argue that the Complaint should be dismissed because the Receiver has failed to meet the basic pleading requirements of Federal Rule of Civil Procedure 8, which states, in relevant part:

> A pleading that states a claim for relief must contain: (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). On its face, the Receiver's Complaint shows that the Former Employees' Rule 8 argument is wholly without merit. In his Complaint, the Receiver provided the grounds

for the Court's jurisdiction (Doc. 156 at ¶¶ 12-16); included state-law claims showing that he is entitled to relief (*id.* at ¶¶ 31-39, 42); and requested such relief (*id.* at ¶¶ 7, 40-41, 43-44, 55).

In a recent Florida case quite similar to the instant one, a receiver sued several defendants under fraudulent-transfer and unjust-enrichment theories. *See 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). Like the Former Employees, the *Lancer* defendants argued that the receiver had not satisfied the pleading requirements of Rule 8, since the receiver had not alleged which contributions and redemptions were attributable to each defendant and in what capacity the defendants had received the transfers. *See id.* The Court not only held that the defendants' arguments were "misplaced" because the receiver had satisfied Rule 8, it also held that Rule 9(b) did not apply to the receiver's claims. *Id.* at *2-3. In particular, the court stated:

> Rule 8(a)'s pleading standard does not require the Receiver to allege the particular transfers which each of the [defendants] received, nor does it require the Receiver to allege the "capacity" . . . in which the [defendants] received the transfers. The Receiver's claims that the [defendants] received the transfers, the insolvency of the Funds, the inadequate capitalization of the Funds, and the lack of reasonably equivalent value given by the [defendants] in exchange for the transfers is enough specificity to allow the [defendants] to formulate an answer, as required by Rule 8(a).

Id. at *3; *see also GE Capital Commercial*, 2009 WL 5173954, at *10 (plaintiff satisfied Rule 8 where it was alleged that defendant was transferee under fraudulent-transfer law and that defendant received funds).

Here, the Receiver has done just that. He has alleged that the Former Employees received the transfers in the amounts listed in the Appendix in support of the Complaint; that the Stanford fraud was a Ponzi scheme from the beginning and, therefore, insolvent from the start; and that the burden is upon the Former Employees to show both reasonably equivalent value and

good faith. As a result, the Receiver's Complaint is specific enough for the Former Employees to answer the claims against them.

In addition, the Former Employees argue that the Complaint should be dismissed because the Receiver has not provided adequate notice of the state's law under which he is asserting the claims. On the contrary, the Receiver has stated in the Complaint that Texas law applies to his claims. *See* Doc. 156 at ¶ 39 (stating that attorney's fees and costs are proper under Texas fraudulent-transfer statutes).

Texas law applies because it bears the most significant relationship to the occurrences and the parties to this case. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984); *see also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 145(2) (1971) (describing the factors relevant to determining the most significant relationship). Among other reasons, Texas law applies because: (a) Stanford's principal place of business was in Texas; (b) Stanford Group Company, for which the majority of the Former Employees worked as financial advisors, is a Houston-based corporation; (c) the transfers of CD Proceeds to the Former Employees originated from banks in Texas (*see* Decl. of Karyl Van Tassel, Doc. 18 at 20-22); and (d) numerous Texas-based Former Employees are parties to the Receiver's suit.

For the foregoing reasons, the Receiver has satisfied the basic pleading requirements of Rule 8. As a result, the Court should deny the Former Employees' motions to dismiss that are predicated upon Rule 8.

IV. Lundquist's personal jurisdiction, subject matter jurisdiction, and venue motions should be denied.

One former employee, David Lundquist, has filed motions that none of the other former employees have filed, namely: a motion to dismiss for lack of personal jurisdiction; a

motion to dismiss for lack of subject matter jurisdiction; and a motion for change of venue. For the reasons stated below, the Court should deny all of Lundquist's motions.

A. The Court has personal jurisdiction over Lundquist.

A court acquires personal jurisdiction over a defendant in cases such as the instant one, so long as the receiver complies with federal receivership statutes 28 U.S.C. § 754 and § 1692. *Arpe*, 2007 WL 549467, at *10-12; *see also Quilling v. Stark*, Civil Action No. 3:05-CV-1976-L, 2006 WL 1683442, at *2-4 (N.D. Tex. June 19, 2006) (personal jurisdiction existed over fraudulent-transfer claims, and exercise of personal jurisdiction over fraudulent-transfer claims was "predicated" on sections 754 and 1692); *SEC v. Cook*, No. 3-01-CV-0480-R, 2001 WL 803791, at *2-3 (N.D. Tex. July 11, 2001) (section 754 filing was sufficient to establish personal jurisdiction). In addition to the Northern District of Texas, numerous other courts have held that a receiver may gain personal jurisdiction by using these receivership statutes. *See Terry v. Walker*, 369 F. Supp. 2d 818, 819-21 (W.D. Va. 2005) (receiver gained personal jurisdiction over defendants via section 754 filing, which was compatible with due process); *Cristell*, 2006 WL 316981, at *3-4 (holding that sections 754 and 1692 allowed exercise of personal jurisdiction over state-law claims); *SEC v. Bilzerian*, 378 F.3d 1100, 1104-06 (D.C. Cir. 2004) (section 754 filing was sufficient to establish personal jurisdiction); *Haile v. Henderson Nat'l Bank*, 657 F.2d 816, 822-26 (6th Cir. 1981), *cert. denied*, 455 U.S. 949 (service per section 1692 establishes personal jurisdiction when in compliance with section 754 and precludes minimum-contacts analysis); *Terry v. June*, No. Civ.A. 303CV00052, 2003 WL 22125300, at *4-5 (W.D. Va. Sept. 12, 2003) (section 754 is a "stepping stone" for the exercise of personal jurisdiction when read in combination with Rule 4 and section 1692).

Section 1692 authorizes service of process on people possessing receivership assets, so long as a receiver satisfies the requirements of section 754. *Arpe*, 2007 WL 549467, at

*10-12. Section 754 requires that a receiver file copies of the complaint and the receivership order in each district where assets are located within ten days of his appointment. *See* 28 U.S.C. § 754; *Arpe*, 2007 WL 549467 at *11.

Within ten days of his appointment, the Receiver filed the original Complaint and Order Appointing the Receiver in 29 United States district courts pursuant to section 754, giving this Court *in rem* and *in personam* jurisdiction in each district where the Complaint and Order have been filed. One of those districts — by Lundquist's own admission — was the District Court for the Middle District of North Carolina, where Lundquist resides. *See* Doc. 136 at 20 (Lundquist admits that "the United States District Court for the Middle District of North Carolina is one of the 29 districts where the Receiver filed the original Complaint and Order Appointing the Receiver"); Doc. 147 at 3, 17 (Lundquist admits that "the United States District Court for the Middle District of North Carolina . . . is one of the 26 United States district courts where the Receiver filed the original Complaint and Order Appointing the Receiver").

By filing these documents in the Middle District of North Carolina and serving Lundquist, the Receiver has obtained personal jurisdiction over the fraudulent-transfer and unjust-enrichment claims against Lundquist. Given the fact that the Receiver has complied with the requirements of section 754 — and given the admissions of Lundquist himself that the Receiver met those requirements — the Receiver has established that the Court has personal jurisdiction over Lundquist. As a result, the Court should deny Lundquist's motion to dismiss for lack of personal jurisdiction.

B. The Court has subject matter jurisdiction over Lundquist.

As the Court that appointed the Receiver, this Court has jurisdiction over any claim brought by the Receiver to execute his Receivership duties. The Court, therefore, has

subject matter jurisdiction over the Receiver's claims against Lundquist to recover Receivership assets.

A court that appoints a receiver has subject matter jurisdiction over the receiver's claims to recover estate assets because the claims are ancillary to the main action. *Arpe*, 2007 WL 549467 at *6-7 (ancillary jurisdiction establishes subject matter jurisdiction over receiver's claims to recover proceeds of Ponzi fraud); *see also Donell v. Kowell*, 533 F.3d 762, 769 (9th Cir. 2008) (subject matter jurisdiction over fraudulent-transfer claims); *Scholes*, 56 F.3d at 753 (subject matter jurisdiction over fraudulent-conveyance claims); *see also Am. Freedom Train Found. v. Spurney*, 747 F.2d 1069, 1073 (1st Cir. 1984) ("It is well established that a federal district court has subject matter jurisdiction in ancillary actions brought in the court where the receiver is appointed 'to accomplish the ends sought and directed by the suit in which the appointment was made.'") (internal citation omitted); *Haile*, 657 F.2d at 822 ("[T]he initial suit which results in the appointment of the receiver is the primary action and . . . any suit which the receiver thereafter brings in the appointment court in order to execute his duties is ancillary to the main suit. As such, the district court has ancillary subject matter jurisdiction of every such suit irrespective of diversity, amount in controversy or any other factor which would normally determine jurisdiction.").

Given the fact that the Receiver's claims against Lundquist seek to recover estate assets and are ancillary to the SEC enforcement action, the Receiver has definitively established subject matter jurisdiction as to Lundquist. Indeed, Lundquist himself admits that this Court has jurisdiction over this action. *See* Doc. 147 at 17 (Lundquist "admits that this Court has jurisdiction over this action" and that "the Court that appointed the Receiver has jurisdiction over any claim brought by the Receiver to execute his Receivership duties"); Doc. 192 at 3 (Lundquist

"admits that as the Court that appointed the Receiver, this Court has jurisdiction over any claim brought by the Receiver to execute his Receivership duties"). In light of the established law on this point, and given Lundquist's own jurisdictional admissions, the Court should dismiss Lundquist's motion to dismiss for lack of subject matter jurisdiction.

C. Venue is proper in this Court as to Lundquist.

Because venue is proper in this Court under 28 U.S.C. § 754 and under Section 22(a) of the Securities Act (15 U.S.C. § 77v(a)) and Section 27 of the Exchange Act (15 U.S.C. § 78aa), the Court should deny Lundquist's motion for change of venue.

Section 754 (discussed in detail *supra*) authorizes venue in the court that appointed the receiver. *Scholes*, 56 F.3d at 753. The *Scholes* case involved a Ponzi scheme, and the receiver sued several defendants via fraudulent-conveyance claims to recover estate assets. *Id.* The court held that the "laying of venue" in the appointing court was authorized by section 754, which "allows a receiver to sue in the district in which he was appointed to enforce claims anywhere in the country." *Id.* Like the *Scholes* receiver, the Receiver in the instant case has sued Lundquist under a fraudulent-transfer claim and has complied with the provisions of section 754. As a result, venue is proper in this Court, since section 754 authorizes the laying of venue here. The Court should, therefore, deny Lundquist's motion for change of venue.

In addition, because the Receiver has established ancillary subject matter jurisdiction over Lundquist, ancillary venue has also been established. *See Haile*, 657 F.2d at 822 n.6 ("[W]here jurisdiction is ancillary, the post-jurisdictional consideration of venue is ancillary as well. . . . We therefore reject [the] argument that the suit was properly dismissed since venue was improper[.]"). The Receiver's claims are ancillary to the SEC's enforcement suit under federal securities laws, which provide in relevant part: "Any suit or action to enforce any liability or duty created by this chapter or rules and regulations thereunder, or to enjoin any

violation of such chapter or rules and regulations, *may be brought in any such district or in the district wherein the defendant is found or is an inhabitant or transacts business*[.]" 15 U.S.C. 78aa (emphasis added). Like subject matter jurisdiction, venue is established by the very nature of the underlying enforcement suit, to which the Receiver's claims are ancillary. For the foregoing reasons, the Court should deny Lundquist's motion for change of venue, as this Court is the proper venue for the Receiver's claims against Lundquist.

V. Any motions to dismiss based upon relief-defendant claims are moot.

Some of the Former Employees base their motions to dismiss upon the Receiver's prior relief-defendant claims. *See, e.g.*, Docs. 144, 200. To the extent that any Former Employees move to dismiss the Receiver's Complaint because of his prior relief-defendant claims, the argument is moot. The Receiver is no longer pursuing those claims and has, instead, asserted fraudulent-transfer and unjust-enrichment claims against the Former Employees. *See* Doc. 156 at 5 (stating that the Receiver has dismissed the relief-defendant claims against the Former Employees); Doc. 300 at 1 (order stating that the Receiver is no longer asserting relief-defendant claims); *see also Eubanks v. Parker County Comm'rs Court*, 44 F.3d 1004, 1995 WL 10513, at *2 (5th Cir. Jan. 3, 1995) (stating that an amended complaint supersedes and replaces a prior complaint). For these reasons, the Court should deny as moot any such motions to dismiss.

CONCLUSION & PRAYER

For the foregoing reasons, the Receiver respectfully requests that the Court deny the Former Employees' motions to compel arbitration and to dismiss or stay the case pending arbitration; the Former Employees' motions to dismiss for failure to comply with Rule 9(b); the Former Employees' 12(b)(6) motions to dismiss for failure to comply with Rule 8; David Lundquist's motions to dismiss for lack of personal jurisdiction and subject matter jurisdiction; David Lundquist's motion for change of venue; and any Former Employee's motions to dismiss

relief-defendant claims. The Receiver also requests his attorney's fees and costs and any such and further relief to which he may be entitled.

Dated: February 16, 2010

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Kevin M. Sadler

Kevin M. Sadler
Texas Bar No. 17512450
kevin.sadler@bakerbotts.com
Robert I. Howell
Texas Bar No. 10107300
robert.howell@bakerbotts.com
David T. Arlington
Texas Bar No. 00790238
david.arlington@bakerbotts.com
1500 San Jacinto Center
98 San Jacinto Blvd.
Austin, Texas 78701-4039
(512) 322-2500
(512) 322-2501 (Facsimile)

Timothy S. Durst
Texas Bar No. 00786924
tim.durst@bakerbotts.com
2001 Ross Avenue
Dallas, Texas 75201
(214) 953-6500
(214) 953-6503 (Facsimile)

ATTORNEYS FOR RECEIVER RALPH S. JANVEY

CERTIFICATE OF SERVICE

On February 16, 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 John J. Little and all counsel and/or pro se parties of record electronically or by another means authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Kevin M. Sadler
Kevin M. Sadler