IN THE UNITED STATES DICTRICT 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.,	§	
	§	**Case No. 03:09-CV-0724-N**
Plaintiff,	§	
v.	§	
JAMES R. ALGUIRE, ET AL.,	§	
Relief Defendants	§	

SUPPLEMENTAL BRIEF IN SUPPORT OF MOTION TO DISMISS SECOND AMENDED COMPLAINT AGAINST CERTAIN FORMER STANFORD EMPLOYEES

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TO THE HONORABLE JUDGE OF SAID COURT:

COME NOW Defendants Alan Brookshire, James C. Chandley, David Braxton Gay, Gregory C. Gibson, John Grear, Jason Likens, Kale Olson, Timothy D. Rogers, Nick Sherrod, Susan Glynn and John Whitfield Wilks (hereafter the "Eleven Defendants") and file this supplemental brief in support of their Motion to Dismiss the Receiver's Second Amended Complaint Against Former Stanford Employees.

I. INTRODUCTION

The Eleven Defendants are innocent professionals who had the misfortune of agreeing to work for Stanford Group Company ("SGC"). The Eleven Defendants did not benefit from the alleged SGC fraud; they are victims. They have lost their jobs, lost clients, and most of them had their assets frozen for almost a year. Their reputations have been damaged and their lives have been turned upside down, yet they have themselves

done nothing wrong. They have suffered greatly simply because they were induced to join the wrong brokerage firm.

This supplemental response is intended to address issues raised in the "Receiver's Response to Certain Former Stanford Employees' Motions to Compel Arbitration and to Dismiss". The Receiver, in what it claims is in the interest of judicial economy, has elected not to directly respond to the arguments raised in the Motion to Dismiss from the Eleven Defendants but rather to file one response in which the Receiver asserts that he is responding to all arguments raised by all former financial advisors as though they are all the members of one class with identical interests. This step by the Receiver illustrates the basic root of the problem with respect to this Receiver's unauthorized and improper conduct in this case. All former employees are not equal and the claims and assertions against the former financial advisors are not the same.

A critical distinction for the Eleven Defendants is that the ONLY funds which the Receiver is seeking to recover are the monies paid to them in the form of forgivable promissory notes. In other words, the Receiver is not by his own admission, as to the Eleven Defendants, seeking to recover for SIBL CD Commissions, SIBL Quarterly Bonuses, PARS Payments, Branch Managing Director Quarterly Compensation, or Severance Payments. Yet the Receiver seeks to treat the Eleven Defendants in the same manner as former SGC employees who were active in the sale of the allegedly fraudulent CDs.

The distinctions do not stop with the limited recovery being sought against these Eleven Defendants. In their Motion to Dismiss, the Eleven Defendants set forth detailed Declarations that set forth the factual background to unequivocally show that the

Receiver's current claims lack merit as to the Eleven Defendants, yet the Receiver ignores these Declarations and continues to lump the Eleven Defendants in with in excess of 320 other former SGC employees. It is recognized that since this is a Motion to Dismiss that the factual allegations of Receiver in his complaint are to be taken as true by this Court but the failure of Receiver to consider and act upon the Declarations of these Eleven Defendants illustrates that the Receiver is not acting in good faith with respect to the positions he is taking.

II. FACTUAL BACKGROUND

The Receiver has revised his complaint against the former employees of SCG six times over the last eight months. Despite such numerous revisions the Receiver keeps lumping all defendants together with broad conclusory allegations. The only specificity provided is that the Receiver has now provided an Appendix which shows the amount of funds from each defendant which the Receiver is seeking to recover under each category of the Receiver's claims. It is this Appendix that shows that the only recovery sought against the Eleven Defendants is the forgivable loan monies paid to the Eleven Defendants in order to induce them to transfer their books of business from their prior employers to SCG.

This short cut method of pleading by the Receiver makes it necessary for the Court, in reviewing the complaint, to understand that all allegations concerning the sales of the allegedly fraudulent CDs, commissions earned on selling CDs, and bonuses paid related to the CDs are not applicable to the Eleven Defendants. Allegations as to the knowledge and actions of the "Stanford Defendants" (defined by the Receiver as the core Defendants who developed and benefited from the alleged Ponzi scheme) are not

attributable to the Eleven Defendants who never received commissions or other compensation from the sale of the subject CDs.

Where are the specific factual allegations as to the actions of these Eleven Defendants? What is found from the latest version of the Receiver's complaint is nothing but broad and conclusory allegations primarily against former employees who were active in selling and receiving commissions on the fraudulent CDs.

In a review of the Receiver's complaint, the court will not find, as to the Eleven Defendants: (i) any assertion by the Receiver that the Eleven Defendants had any knowledge of any Ponzi scheme, (ii) any assertion by the Receiver that the Eleven Defendants had any knowledge of any problems with the CDs being sold by others within SGC, (iii) any assertion by the Receiver that the Eleven Defendants were long time employees of SGC (iv) any denial by the Receiver of the fact that the Eleven Defendants were established brokers who had their own books of business that they brought from their former brokerage firms to SGC, (v) any assertion by the Receiver that the forgivable loans paid to the Eleven Defendants were not in keeping with industry standards, (vi) any assertion by the Receiver that books of accounts being transferred to SCG by the Eleven Defendants were not based on standard and accepted investment vehicles, (vii) any assertion by the Receiver that the Eleven Defendants would have changed the financial investments plans for any of their clients from the traditional plans then in place when the books of business were transferred, or (viii) any allegation by the Receiver that the books of business being transferred by the Eleven Defendants would not have been sufficient to pay back the forgivable loans and also to pay any salaries and/or commissions that would have been paid to the Eleven Defendants under their agreements with SGC.

To the contrary, the Eleven Defendants have all provided their Declarations that set forth specific assertions of uncontroverted fact that any claims by the Receiver based on fraudulent conveyance or unjust enrichment are without merit. These Declarations of the Eleven Defendants are included with the Eleven Defendants original Motion to Dismiss (Doc 144).

Given the Receiver's short cut method of pleading, this Court must hunt and peak to try to find facts that will appear to support the Receiver's claims as to the Eleven Defendants. It is respectfully submitted that the Receiver has failed to present such a case as to these Eleven Defendants.

III. SUMMARY OF RECEIVER'S ARGUMENTS

The Receiver has asserted that Motions to Dismiss based on a requirement to arbitrate claims should be denied. The Receiver's arguments are based on the following assertions:

(1) Court should look to "equitable considerations" in deciding whether to enforce the arbitration agreements for the former employees. Receiver asserts that arbitrations would result in "possibly hundreds of separate arbitration actions", inconsistent decisions might result between panels, and arbitration could result in additional expenses.

(2) Receiver asserts that even though SGC may have agreed to arbitration that he, as Receiver, never agreed to arbitrate and that he is not bound by the prior contractual commitments of SGC.

Receiver further asserts that Motions to Dismiss based on Rule 12(b)(6) for failure to state a claim should be denied in that he asserts that he has provided the

necessary factual allegations to set forth claims under fraudulent conveyance and unjust enrichment.

There are other arguments which Receiver addressed that were made by other former employees and such other arguments will not be addressed in this supplemental response but will be left by the former employees who first raised such arguments.

IV. "EQUITABLE CONSIDERATIONS" - ARBITRATION

As noted above, one of the arguments by the Receiver is that this Court should not compel arbitration based on equitable considerations. Receiver asserts that arbitrations would result in "possibly hundreds of separate arbitration actions", inconsistent decisions might result between panels, and arbitration could result in additional expenses.

Contrary to the Receiver's assertions all equities are with the Eleven Defendants.

Background on Agreement for Arbitration

The Eleven Defendants were experienced brokers[1] who had established books of business. These Eleven Defendants were courted by numerous brokerage firms to leave their current employment and to bring their books of business (See paragraph 5 of Declarations). Unfortunately, the Eleven Defendants made the ill fated decision to go to work for SGC. Ten of the Eleven Defendants were employed by SGC for less than four months prior to Receiver decisions to shut down SGC and fire all of its employees (See paragraph 3 of Declarations). The Eleven Defendants were not recruited to be a sales force for the tainted CDs. They provided full service brokerage services to their clients.

[1] Ten of the Eleven Defendants were financial advisors working for other brokerage firms prior to going to work for SGC with extensive experience and a sizable book of existing business. (See paragraphs 3 and 5 of Declarations). Susan Glynn was not a financial advisor but worked for the team of Gregory C. Gibson and Timothy D. Rogers as a registered sales assistant.

The forgivable loans which the Eleven Defendants received were tied to the trailing twelve months commissions and fees which they had earned prior to their departure from their previous employers to work for SGC. (See paragraph 16 of Declarations).

Prior to their employment by SGC, the Eleven Defendants had approximately **$850 million** in assets under management. During the last twelve months at their prior brokerage firms these assets generated commissions and fees for the Eleven Defendants of approximately **$8,300,000.** These assets were invested in traditional investments such as stocks, bonds, mutual funds, and government securities. (See paragraph 9 of Declarations)

The Eleven Defendants' clients transferred approximately **$475 million** to brokerage accounts at SGC and Stanford Trust Company ("STC") prior to their termination on February 16, 2009. These accounts were valued at approximately **$440 million** on the day the Receiver closed SGC and STC. These clients paid total commissions and fees to SGC and STC of approximately **$1,325,000** between July, 2007 and February, 2009. (See paragraph 10 of Declarations)

Based upon the assets of the clients the Eleven Defendants brought to SGC, the Eleven Defendants estimate that their clients would have produced approximately **$4.4 million** of revenue annually to SGC had the firm remained in business. This estimate assumes no increase in the value of existing assets and no new assets coming in to their clients' accounts. (See paragraph 11 of Declarations)

To induce the Eleven Defendants to leave their current employment and join SGC, SGC presented up-front monies in the form of forgivable promissory notes. These

forgivable loans were all memorialized in a written note entitled "Stanford Group Company Promissory Note Forgivable Loan" (the "Forgivable Loans") copies of which are attached to the Declarations of the Eleven Defendants. The Forgivable Loans all contain an agreement to arbitrate "...any claims arising out of or relating to this Note..." by binding arbitration according to "...the constitution, by-laws, rules and regulations of the Financial Industry Regulatory Authority (FINRA) in the local area of the principal office." (See Forgivable Loan attached to Declarations of the Eleven Defendants).

Thus, as to any claims arising out of or relating to the Forgivable Note, SGC agreed to binding arbitration by FINRA in North Carolina (being the principal office where the Eleven Defendants worked). In addition, the Eleven Defendants were all required to sign the standard Form U-4 Uniform Application for Securities Industry Regulation or Transfer, which form was submitted to FINRA by SGC in order to obtain the securities licenses for the Eleven Defendants. Such U-4 contained the following language:

> "I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the SROs indicated in Section 4 (SRO REGISTRATION) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction."(Emphasis Added)

The FINRA arbitration rules (Rule 13200) provide that "...a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among: Members; Members and Associated Persons; or Associated Persons. SGC is a Member of FINRA and the Eleven Defendants as registered financial advisors are Associated Persons" (Emphasis Added).

Thus, SGC and the Eleven Defendants agreed in the forgivable loan agreements, the U-4, and by the FINRA rules to arbitrate disputes.

Equities Favor Arbitration

The parties having agreed to arbitrate the Receiver is trying to take away this arm's length negotiated right based on "equitable" principals. The Receiver, who has had tens of millions of dollars available to proceed with the very expensive costs of litigation seeks to deprive the Eleven Brokers of their rights to a less expensive forum in which to resolve the current disputes. The Receiver apparently believes that the litigation costs alone will be sufficient to drive certain former SGC employees to their knees thereby resulting in a forced resolution. Arbitration, on the other hands, would put the Eleven Defendants in a less expensive forum by which to resolve the disputes. Afterall, what is inequitable about having the parties litigate in the forum which was contractually chosen?

Further, the Receiver simply ignores the law which states a policy favoring the arbitration of claims. There is a federal policy favoring arbitration, and "ambiguities as to the scope of the arbitration clause itself [are to be] resolved in favor of arbitration. *See, e.g., Washington Mut. Finance Group, LLC v. Bailey,* 364 F.3d 260, 263 (C.A.5 (Miss) 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); *BellSouth Corp. v. Forsee*, 265 Ga. App. 589, 590 (595 S.E.2d 99) (2004) (FAA establishes that, as a matter of federal law, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration, whether problem at hand is construction of contract language itself, or allegation of waiver, delay, or like defense to arbitrability).

Arbitration clauses are to be broadly construed and any doubts concerning the scope of arbitrable issues must be resolved in favor of arbitration. *See Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067(C.A.5 (Tex) 1998), ("[C]ourts distinguish 'narrow' arbitration clauses that only require arbitration of disputes arising out of' the contract from broad arbitration clauses governing disputes that 'relate to' or 'are connected with' the contract"). Of course, although this reach is broad, it is not unbounded. *Pennzoil* recognized that a dispute need only "'touch' matters covered by" the arbitration agreement to be arbitrable. *Id.* at 1068 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 624 n.13, 105 S. Ct. 3346, 87 L. Ed. 2d 444 (1985)); *see also Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983); *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 225-226, 96 L. Ed. 2d 185, 107 S. Ct. 2332 (1987).

The Receiver complains of potential conflicting decisions, but ignores the fact that each of the former SGC employees has different facts that must be addressed. Such specific facts may result in different decisions, although not necessarily "inconsistent" decisions. Each SGC employee is entitled to present his or her own case and there is no equity in the Receiver attempting to lump the Eleven Defendants who only received forgivable loan monies through written promissory notes with former SGC employees who sold the allegedly tainted CDs, were paid commissions on such sales, and perhaps could even be shown to have had knowledge (either through their position with the company or otherwise) that something was not proper with respect to such CD sales.

Equities and the law clearly favor and demand that the Eleven Defendants be permitted to arbitrate his or her claims.

V. RECEIVER IS BOUND BY AGREEMENT OF SGC TO ARBITRATE

The Receiver has done all in his power to seek to avoid his obligation to arbitrate the claims related to the Eleven Defendants. The Receiver has not brought a claim in contract against the Eleven Defendants based on the terms of the promissory note because he knows it is an absolute certainty that if he sues on the promissory notes he must abide by all terms including the obligation to arbitrate. Therefore, even though the amount being sought by Receiver is covered under the negotiated arm's length transaction between the parties, the Receiver seeks instead to bring actions for alleged fraudulent transfer and unjust enrichment.

This Court should not permit the Receiver to create causes of action for the sole purpose of avoiding the contractual requirements to arbitrate all claims between the parties. Note that in *Gregory v. Electro-Mechanical Corp.*, 83 F.3d 382 (C.A.11 (Ala) 1996), the Eleventh Circuit addressed a provision in a stock purchase agreement which provided for arbitration of all disputes "arising hereunder." The court held the arbitration clause required arbitration not only of the contract claims, but of all claims asserted in the Plaintiff's complaint — including fraud, fraudulent inducement, deceit, misrepresentation, conversion, breach of good faith and fair dealing, and outrage — because all the tort claims were "disputes that originate[d] out of or ha[d] a connection with th[e] underlying agreement." *Id.* At 383.

"[A] plaintiff may not avoid an otherwise valid arbitration provision merely by casting its complaint in tort. The touchstone of arbitrability in such situations is the relationship of the tort alleged to the subject matter of the arbitration clause." *see also Kroll v. Doctor's Assocs.*, 3 F.3d 1167, 1170 (C.A.7 (Wis) 1993). *Acevedo Maldonado v.*

PPG Indus., 514 F.2d 614, 616 (C.A.1 (Puerto Rico) 1975) ("The contracts provide for arbitration of `any controversy or claim arising out of or relating to this Agreement or the breach thereof'. Broad language of this nature covers contract-generated or contract-related disputes between the parties however labeled: it is immaterial whether claims are in contract or in tort[.]"). Simply put, the arbitration agreements at issue are broad enough in scope to cover all claims asserted by the Receiver.

If SGC had wanted to exclude certain types of issues from arbitration then it had a duty to do so explicitly. See *Ivax Corporation v Braun of America, Inc.* 286 F.3d 1309, 1316 (C.A.11 (Fla) 2002) ("We have held, however, that the FAA creates a presumption in favor of arbitrability; so, parties must clearly express their intent to exclude categories of claims from their arbitration agreement [cites excluded]. Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"). There is a strong national policy in favor of arbitration. *Dobbins v.Hawk's Enters.*, 198 F.3d 715, 717 (C.A.8 (Ark)1999). As a consequence, doubts about whether an arbitration clause should be construed to cover a particular dispute are generally resolved in favor of arbitration. *Telectronics Pacing Systems, Inc. v. Guidant Corp.*, 143 F.3d 428, 430 (C.A.8 (Minn) 1998). Broadly worded arbitration clauses such as the ones at issue here are generally construed to cover tort suits arising from the same set of operative facts covered by a contract between the parties to the agreement.

The Receiver asserts, however, that since he did not sign the agreements to arbitrate with the Eleven Defendants that he is not bound even though he has been appointed by the Court to represent the interests of SGC. The Receiver seeks to separate the directive that he act on behalf SGC and assert that in the current action against the

Eleven Defendants he is representing the creditors of SGC. By asserting that he is representing the creditors of SGC, the Receiver then argues that since the creditors did not agree to arbitration he does have agree to arbitrate.

What the Receiver does not do is to cite this Court to any specific authority that is directly on point to the position he taking. The Receiver is trying to convince this Court to create new law.

The Receiver makes no mention of the Sixth Circuit case of *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 627 (C.A.6 (Ohio) 2003) which contains a detailed analysis of a Receiver's obligation to arbitrate claims for the business entities that the Receiver represents. The *Javitch* Court, at page 625, held as follows:

> "Receiver of two business entities who was bringing claims on behalf of those entities was bound to arbitration agreements entered into by those entities to the same extent that the receivership entities would have been absent the appointment of the receiver."
>
> . . .
>
> "Receiver generally acquires no greater rights in property than the debtor had and, except as to liens in existence at the time of the appointment, the receiver holds the property for the benefit of general creditors under the direction of the court."
>
> . . .
>
> "Because they stand in the shoes of the entity in receivership, receivers have been found to lack standing to bring suit unless the receivership entity could have brought the same action. *See, e.g., Goodman v. F.C.C.*, 182 F.3d 987, 991-92 (D.C. Cir. 1999) (receiver did not have standing to sue on behalf of customers and creditors of entity in receivership); *Scholes v. Lehmann*, 56 F.3d 750, 753-55 (7th Cir. 1995) (receiver for corporation could sue for diversion of assets as fraudulent conveyances by controlling shareholder)."

The Receiver in Javitch was obligated to arbitrate even though the claims set forth were for negligence, negligent supervision, breach of fiduciary duty, fraud, conspiracy to defraud, RICO Act violations, aiding and abetting violations of securities laws, conversion and money had and received.

Further, the order by which the Receiver in *Javitch* was directed to act set forth the objective to "preserve and increase the estate for the benefit of all the creditors, investors, owners and parties to this case". As such, the *Javitch* Receiver asserted to the Court that he was not bound by agreement to arbitrate because he was bringing the litigation on behalf of the creditors. The Sixth Circuit did not accept such a distinction on representation and the *Javitch* Receiver was ordered to arbitrate all such claims.

The Sixth Circuit again addressed this issue in *Moran v. Svete*, 2010 WL 653541, (C.A.6 (Ohio) 2010). In this case the *Moran* Receiver likely dealt with an alleged fraudulent scheme and had asserted sixteen separate causes, which included fraudulent transfer, unjust enrichment and constructive trust. The defendant, who was allegedly actively involved in the fraudulent scheme asserted the right to have the claims arbitrated. The Receiver challenged whether the agreement containing the arbitration provision was in fact part of the fraudulent scheme so as to make the arbitration clause unenforceable. The Court noted that allegations of fraudulent schemes are no longer sufficient to overcome the strong federal policy in favor of arbitration. *Id* page 6. The Sixth Circuit reversed the district court decision and compelled arbitration and remanded for further inquiry as to whether there was in fact an agreement to arbitrate and if so what was the scope of such agreement to arbitrate.

While the Receiver has the legal right to act for the benefit of SGC's creditors, the Receiver does not succeed to causes of action vested personally in the creditors. As such, the Receiver still acts in his capacity as the representative of SGC and is bound by the arm's length transactions negotiated in good faith between SGC and the Eleven

Defendants. See *Javitch* pg 625; *In re Huff*, 109 B.R. 506 (Bkrtcy.S.D.Fla 1989); *Steinberg v. Alpha Fifth Group*, 2008 WL 906270, *4 and 5 (S.D.Fla. 2008).

The Receiver is seeking to disgorge payments made to the Eleven Defendants pursuant to written forgivable promissory notes from SGC arising from their agreement to move their substantial books of business to SGC. The Eleven Defendants fully performed but the Receiver is now attempting to ignore such performance and to ignore the arbitration requirements contained within such promissory notes, the arbitrations requirements set forth by the U-4 agreement and the arbitration requirements imposed by FINRA rules. This Court should not permit the Receiver to ignore the Eleven Defendants' good faith negotiated arbitration agreements and continue to allow the Eleven Defendants to be unfairly targeted in a tangled lawsuit to which their sole mistake was in being induced by SGC accept employment.

VI. DISMISSAL IS APPROPRIATE BASED ON RULE 12(B)(6) FOR FAILURE TO STATE A CLAIM

Despite the Receivers assertions to the contrary the current claims by the Receiver fail to state a claim and should be dismissed. The current claims against the Eleven Defendants are for unjust enrichment and fraudulent conveyance.

Under either claim, the Receiver must plead enough facts to state a claim to relief that is plausible on its face and the factual allegations must be enough to raise a right to relief above a speculative level. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). The Receivers 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 suffice. *Id.*

As noted hereafter, Receiver has not met the requirements for pleadings under Rule 8 which in turn justifies dismissal under Rule 12(b)(6).

Unjust Enrichment

Under the law of North Carolina, in the presence of a valid contract which covers the dispute, Courts look to the contract itself to resolve the claims and claims may not be permitted based on equity principles such as a quasicontract claim of unjust enrichment.[2] *Vanwyk Textile Systems, B.V. v. Zimmer Machinery America, Inc.* 994 F.Supp. 350, 388 (W.D.N.C.,1997);

Even if no contract had existed which covered the current dispute, a claim for "unjust enrichment" fails under the facts alleged by Receiver. The Receiver fails to allege that the Eleven Defendants acted to induce or solicit SGC's actions. "Absent such inducement or solicitation, Defendants are simply not liable for unjust enrichment, even if they did benefit from [SGC's] actions. Where a person has officiously conferred a benefit upon another, the other is enriched, but is not considered unjustly enriched." *Fireman's Fund Ins. Co. v. Safeco Ins. Co. of America,* 2007 WL 4233317, * 2 -3 (W.D.N.C., 2007).

Fraudulent Conveyance

An excellent analysis of a very similar case involving an allegation of fraudulent conveyance arising from commissions paid to brokers who by their work helped continue a Ponzi scheme can be found in the case of *In re Churchill Mortg. Inv. Corp.* 256 B.R.

[2] Although North Carolina law governs the claims of unjust enrichment and fraudulent transfer, Texas Courts have also held that where there is a valid contract covering the dispute, the contract claim shall control over a claim based on unjust enrichment. *First Union Nat. Bank v. Richmont Capital Partners I, L.P.* 168 S.W.3d 917, 930 -932 (Tex.App.-Dallas, 2005).

664, 681 (Bkrtcy.S.D.N.Y.,2000). In the *Churchill* case, the Trustee did not, as in our current proceeding, assert that any of the Brokers had knowledge of the Ponzi scheme, or that the Brokers' own activities were fraudulent, unlawful or wrongful in any respect. Rather, the Trustee's claims were that the Ponzi scheme was fueled and perpetuated by the Brokers' activities in soliciting investors and in originating business. The Brokers in the *Churchill* action likewise filed a motion to dismiss which was granted by the Court.

The *Churchill* Court noted that, in considering motions to dismiss, it must accept as true the factual allegations of the complaint, this does not mean that every statement in a complaint must be accepted as true. "The allegations of a complaint must be well pleaded and thus the court need not accept sweeping and unwarranted averments of fact." *Churchill* court at page 673 citing *Perniciaro v. Natale (In re Natale),* 136 B.R. 344, 348 (Bankr.E.D.N.Y.1992). The *Churchill* court, at page 674, noted that the complaint contained "...conclusory allegations that the Debtors received less than reasonably equivalent value [or fair consideration] in exchange for such Commission Statements" but noted that at the hearing the Trustee had acknowledged that the commission payments received were not disproportionate to commissions that would have been paid for such services in the marketplace.

This Court need not proceed with such an exercise as to the Eleven Defendants. The Eleven Defendants did not even receive any commissions from the sale of the allegedly tainted CDs. Rather, the Eleven Defendants were paid monies in the form of written forgivable notes in exchange for the transfers of their very large books of business. The Receiver makes no allegations that the amounts paid to the Eleven Defendants were not in keeping with what was common in the marketplace. The Eleven

Defendants, however, have averred in their Declarations that the amounts received were available to them from other brokerage firms (see Declarations para 6).

The *Churchill* court noted at page 676 that with respect to a claim for a fraudulent conveyance that the Trustee "cannot recover property conveyed to a transferee for value who acted in good faith". This determination was made by the Court under both the bankruptcy fraudulent conveyance section and the parallel state law provision on fraudulent conveyance. *Churchill* Court held at page 676 that:

> "Thus, even a trustee who is able to show that a debtor made a transfer with the intent to defraud, hinder or delay will be unable to recover against a transferee who takes for 'value and in good faith' under the Bankruptcy Code, or for 'fair consideration and without knowledge' under the Debtor & Creditor law".

The *Churchill* court then analyzed the value issue as to the Brokers' activities and noted that the District Court decision in The District Court decision in *In re Universal Clearing House,*60 B.R. 985 (D.Utah 1986) cogently rebutted the Trustee's position and set forth the following quote:

> "The bankruptcy court reasoned that appellants gave no value because the services that they performed were actually detrimental in that each contract they sold increased the debtors' insolvency. The fact that the services appellants performed increased the debtors' insolvency does not preclude a determination that the appellants gave value. By definition, a Ponzi scheme is driven further into insolvency with each transaction. Therefore, by the trustee's reasoning, no one who in any way dealt with, worked for, or provided services to the debtors could prevent avoidance of any transfers they received. The debtors' landlord, salaried employees, accountants and attorneys, and utility companies that provided services to the debtors all assisted the debtors in the furtherance of their fraudulent scheme. In spite of this fact, we do not think that the goods and services that these persons and entities provided were without value or that transfers to them could be set aside as fraudulent conveyances. We see no material distinction between such persons or entities and appellants. All were necessary to the success of the debtors' scheme."

The Brokers in *Churchill*, as the Eleven Defendants in this case, looked solely to their services performed as the basis for the consideration paid to them which payment was consistent with what the marketplace would expect for similar services. As such, the *Churchill* Court found that equivalent value had been given by the Brokers and thereby granted the Motions to Dismiss. This Court should do likewise.

This the 16th day of March, 2010.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, I electronically filed the foregoing Supplemental Brief in Support of Motion to Dismiss Complaint Against Certain Former Stanford Employees with the clerk of the court for the U. S. District Court, Northern District of Texas, using the electronic case filing system of the Court.

s/ Robert L. Wright
Robert L. Wright