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.	§	CASE NO. 3:09-CV-0724-N
JAMES R. ALGUIRE, ET AL., *Defendants*.	§	

RECEIVER'S REPLY IN SUPPORT OF HIS APPLICATION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION, AND IN THE ALTERNATIVE, WRIT OF ATTACHMENT, CONCERNING ACCOUNTS OF FORMER STANFORD EMPLOYEES [DOC. 392]

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The only conclusion that can reasonably be drawn from the record is that the Receiver will prevail on his fraudulent-transfer claims against the former Stanford employees subject to the Receiver's Application (the "Accountholders").[1] The assets the Receiver seeks to enjoin (or attach) have a value that is less than or equal to the amount of payments Stanford made to the Accountholders for helping grow the Stanford Ponzi scheme by selling SIBL CDs. Under controlling Fifth Circuit law, these payments were made with intent to defraud creditors. Further, not a single one of the 117 Accountholders has offered an affidavit or any other evidence supporting an affirmative defense of reasonably equivalent value and good faith. This is not surprising, given the obvious warning signs about SIBL CDs that even caused one Accountholder to ask, "[I]s this place a ticking time bomb?" and caused another to observe, "'Oh the web we weave[.]' Let's hope [that] sgc is not doing something underhanded."[2] The Receiver has shown far more than a probability of success with respect to his fraudulent-transfer claims, and the Texas fraudulent-transfer statute entitles the Receiver to an injunction and a writ of attachment to prevent the dissipation of the assets in the Accounts.[3]

ARGUMENT & AUTHORITIES

I. The Receiver will succeed on the merits of his claims.

The Receiver's *prima facie* case of fraudulent transfer is unassailable, and the Accountholders cannot establish the affirmative defense of good faith and reasonably equivalent value. The transfers underlying the Receiver's claims were payments from, and in furtherance of, an insolvent Ponzi scheme and are, therefore, fraudulent transfers as a matter of law.

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[1] The accounts subject to the Receiver's Application (the "Accounts") and the Accountholders are listed in Exhibit 2 (Appx. 16-21) to the Application [Doc. 392].

[2] *See* Ex. 1, Decl. of Karyl Van Tassel ("KVT Decl.") at ¶ 60, Appx. 29.

[3] Counsel for the Receiver has conferred with the SEC, and the SEC supports the Receiver's Application for an injunction and attachment.

That the SIBL CD program was a Ponzi scheme is beyond question. James Davis, the CFO of SGC and a SIBL officer, pleaded guilty to charges that he conspired with Allen Stanford and others in running a Ponzi scheme, which by itself is conclusive evidence that the SIBL CD program was a Ponzi scheme.[4] Further, Davis admitted that the SIBL CD program was a "massive Ponzi scheme whereby CD redemptions ultimately could only be accomplished with new infusions of investor funds."[5] The Receiver and his forensic accounting team have independently confirmed this fact. *See* KVT Decl. at ¶¶ 8-25, Appx. 4-11.

The payments at issue were all made in exchange for the Accountholders' assistance in helping Stanford sell fraudulent SIBL CDs. Accordingly, the payments were made with intent to defraud. *See Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006) ("The Receiver's proof that [the debtor] operated as a Ponzi scheme established the fraudulent intent behind transfers made by [the debtor]."). As a result, the Accountholders can only avoid liability by proving *both* that they accepted the transfers in good faith *and* provided reasonably equivalent value. The Accountholders, however, have not submitted *any* evidence as to *either* prong.[6]

In fact, the record before the Court makes clear that the Accountholders *cannot* possibly establish either prong of this affirmative defense. First, services in furtherance of a Ponzi scheme (*i.e.*, selling fraudulent CDs) are not reasonably equivalent value as a matter of

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4 In fraudulent-transfer suits to recover payments made by Ponzi schemes, guilty pleas are competent summary judgment evidence for the existence of a Ponzi scheme. *See In re Slatkin*, 525 F.3d 805, 811-12 (9th Cir. 2008) (holding that "the plea agreement [which conceded that he and the firm had been involved in a Ponzi scheme] is admissible under Federal Rule of Evidence 807, and … the bankruptcy court did not, therefore, abuse its discretion when it considered the plea agreement in granting summary judgment."); *Armstrong v. Collins*, Nos. 01 Civ. 2437(PAC), 02 Civ. 2796(PAC), 02 Civ. 3620(PAC), 2010 WL 1141158, at *24 (S.D.N.Y. Mar. 24, 2010) ("Yagalla's testimony that he ran a Ponzi scheme, the fact he pled guilty to conduct amounting to a Ponzi scheme, that he did not contest the SEC's allegations that he ran a Ponzi scheme, and Fleisher's conclusion that Yagalla indeed ran a Ponzi scheme, lead to the inevitable conclusion that Yagalla did, in fact, run a Ponzi scheme…"); *In re Manhattan Inv. Fund Ltd.*, 397 B.R. 1, 12 (S.D.N.Y. 2007) ("There is ample support in the record for this characterization. . . . [T]he criminal information to which Berger pled guilty set forth [the facts about the fraud].")

5 [No. 09-298, Doc. 771 at 46, ¶17(n).]

6 The Court advised the Accountholders that this was the appropriate time to submit such evidence. [*See* Doc. 395 at 2 (ordering Defendants to submit responses and "any supporting affidavits" by May 10, 2010).]

law. *See Warfield*, 436 F.3d at 558-60 (Ponzi scheme broker could not provide reasonably equivalent value by marketing the fraudulent product).

Second, the Accountholders cannot establish objective good faith, as required by TUFTA. *See Warfield*, 436 F.3d at 559-60 (relevant inquiry is what transferee "objectively knew or should have known"). There were countless "red flags" of which the Accountholders were aware that should have either put the Accountholders on notice of the Stanford fraud or that should have prompted an investigation that would have revealed the fraud, including that: (1) the consistently high reported returns on the SIBL CDs and the underlying portfolio were too good to be true; (2) the exorbitant compensation paid to SGC and the financial advisors for selling the SIBL CDs, which was 150 times greater than the compensation typically paid for the sale of U.S. Bank CDs, was clearly not economically sustainable; (3) very little specific information was available to the financial advisors about how SIBL invested funds from the sale of CDs; (4) the available information concerning the SIBL investments was suspicious;[7] (5) the CDs were being sold by a bank in Antigua and were not protected by FDIC or other similar insurance; (6) SIBL used only a small Antiguan firm to purportedly audit the bank's financials; (7) the SEC was investigating SIBL and raising questions about the SIBL investment portfolio at least as early as 2004; and (8) significant concerns and questions were raised by financial advisors, customers and others.[8] *See* KVT Decl. at ¶¶ 29-60, Appx. 13-29. Despite these warning signs and despite the FINRA rule requiring financial advisors to have "reasonable grounds for believing that [an

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[7] Such suspicious information included inconsistencies between the bank's purported investment philosophy and its investment allocation and returns, the extraordinarily consistent above-market returns on SIBL's investments, the obvious vulnerability of SIBL's financial viability to very slight market fluctuations, and the small group of people who managed the investment portfolio and who lacked any significant experience in portfolio management. *See* KVT Decl. at ¶¶ 29-33, 44-50, Appx. 13-16, 21-25.

[8] For example, Stanford's former Director of Corporate Communications filed a lawsuit against Stanford in 2006 alleging that Stanford "was operating a 'Ponzi' or pyramid scheme, taking new money to its offshore bank, laundering the money and using the money to finance its growing brokerage business, which did not have any profits of its own, and to attract clients with artificially high yields on certificates of deposits". *See* Ex. 2, Amended Complaint in *De Maria v. Stanford Fin. Group, Co., et al.*, No. 06-05417 (Fla. Cir. Ct. Apr. 18, 2006), Appx. 182-87.

investment] recommendation is suitable for [the] customer . . ." (FINRA Conduct Rule 2310(a)), it appears that few, if any, of the financial advisors adequately investigated the CDs before selling them to SGC customers. Under these factual circumstances, none of which are disputed by the Accountholders, the Accountholders will be unable to establish good faith.

II. The TUFTA entitles the Receiver to both an injunction and a writ of attachment to prevent dissipation of the Accountholders' assets.

The Accountholders argue that the Receiver has offered no evidence that their assets will be dissipated without an injunction or attachment. [*See* Doc. 417 at 25-26.] To the contrary, the evidence that the payments to the Accountholders were fraudulent transfers is evidence enough that the payments may be put beyond the Receiver's reach. When an asset has already been transferred with intent to defraud creditors once, there is a heightened risk that it will be transferred again or otherwise removed from the creditors' reach. *See, e.g., Seib v. Am. Sav. & Loan Ass'n of Brazoria County*, No. 05-89-01231-CV, 1991 WL 218642, at *4 (Tex. App.—Dallas Oct. 25, 1991, no writ) (where "there is a prior history of fraudulent conveyances, it is necessary to preserve the status quo of the subject matter of the suit pending a final trial of the case on its merits"). This is especially true here, where the transferees were an integral part of the fraudulent scheme and cannot establish that they received the payments in good faith.

Further, the TUFTA expressly provides that a plaintiff may obtain an "injunction against further disposition . . . of the asset transferred or of other property" or an "attachment," TEX. BUS. & COM. CODE §§ 24.008(a)(2)-(3), which effectively creates a statutory presumption that potential judgments in UFTA cases need to be secured by an injunction or an attachment to prevent dissipation of assets.[9] *See Star Creations Inv. Co., Ltd. v. Alan Amron Dev., Inc.*, No. CIV. A. 95-4328, 1995 WL 495126, at *19 (E.D. Pa. Aug. 18, 1995) (the UFTA "expressly

[9] All the Accountholders' irreparable-harm cases are non-UFTA cases and do not address this presumption.

recognize[s] the appropriateness of injunctive relief to prevent further dissipation and transfers of fraudulently conveyed property"); *see also Marauder Corp. v. Beall*, 301 S.W.3d 817, 820 (Tex. App.—Dallas 2009, no pet.) ("When an applicant relies upon a statutory source for injunctive relief, the statute's express language supersedes the common law injunctive relief elements such as imminent harm or irreparable injury and lack of an adequate remedy at law."); *cf. Bascom/Magnotta, Inc. v. Magnotta*, No. X04CV044000302S, 2006 WL 3491301, at *2-3 (Conn. Super. Ct. Nov. 13, 2006) (identical provision of Connecticut's UFTA "clearly prescribed" remedy of injunctive relief in fraudulent-transfer cases, noting that irreparable harm "*perhaps may* be considered," and enjoining further disposition by transferee based on finding "*some prospect* of irreparable harm") (emphasis added). If this were not true and plaintiffs were required to make a detailed individualized showing of the likelihood that assets would be dissipated, the TUFTA's statutory injunction and attachment provisions would add nothing to the injunction and attachment statutes already present in Chapters 61 and 65 of the Civil Practice and Remedies Code. *See Hunter v. Fort Worth Capital Corp.*, 620 S.W.2d 547, 551 (Tex. 1981) (the Legislature is presumed not to have done a useless act). The TUFTA's statutory attachment and injunction provisions clearly evidence the legislature's intent that plaintiffs be able to obtain injunctions quickly to effect the purpose of the TUFTA. *See Biliouris v. Sundance Res., Inc.*, 559 F. Supp. 2d 733, 739 (N.D. Tex. 2008) (UFTA was "enacted to provide swift, effective, and uniform remedies" and "should be construed broadly to effect [its] purpose").

Further, requiring individualized proof that each of the 117 Accountholders will remove assets from the Court's and the Receiver's reach is not only impractical, but is simply unnecessary under the circumstances, where the Accountholders received the funds as part of a fraudulent scheme in which they actively participated.[10] The only case cited by Accountholders for the proposition that individualized proof regarding dissipation of assets is required was *Newby v. Enron*, but that was a securities class action—not a UFTA case like this one. *See Newby v. Enron Corp.*, 188 F. Supp. 2d 684, 693 (S.D. Tex. 2002).

Finally, although the possibility of a monetary judgment usually supports a finding of an adequate remedy at law, courts have found a party's legal remedy to be inadequate where the potential dissipation of assets will render the judgment unrecoverable.[11] The cases cited by the Accountholders, which only address the general rule, are not to the contrary.

III. The requested attachment and injunction are distinct remedies, and both are available in TUFTA cases.

Contrary to Defendants' argument [*see* Doc. 413 at 6, 12-14], the statutory injunction requested by the Receiver is not equivalent to a writ of attachment. The two remedies are distinct, both practically and legally. The TUFTA expressly entitles plaintiffs to both an "injunction against further disposition" and an "attachment." Texas courts routinely grant such injunctions in TUFTA cases without analyzing them as attachments. *See, e.g., Tel. Equip. Network, Inc. v. TA/Westchase Place, Ltd.*, 80 S.W.3d 601, 611 (Tex. App.—Houston [1st Dist.] 2002, no pet.) (affirming grant of temporary injunction against TUFTA transferee); *Seib*, 1991

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[10] Nor is the risk that the assets will be dissipated beyond the Court's jurisdiction too "speculative" to support a TUFTA injunction. The Accountholders cite *Aon Re* for the idea that "speculative" risk of irreparable harm cannot support an injunction. *See Aon Re, Inc. v. TIG Ins. Co*., No. 3:09-CV-0300, 2009 WL 3075584, at *2 (N.D. Tex. Sept. 28, 2009) (not discussing the issue directly, but citing *Hunt v. Bankers Trust Co*., 646 F. Supp. 59, 65 (N.D. Tex. 1986) (holding plaintiff's argument that, if certain foreclosures occurred, the government of the Netherlands might decide to seize plaintiff's oil concessions, as "speculation" insufficient to support an injunction preventing the foreclosures). This kind of "speculation" is far from what we have in this case, where $60 million has already disappeared since January 2010, and the remaining $24 million will inevitably follow absent intervention from the Court. If the Accountholders did not intend to either spend or otherwise dissipate these assets, there would be no reason for them to oppose the Receiver's request.

[11] *See, e.g., CFTC v. M25 Invs*., Inc., No. 3-09-cv-1831, 2009 WL 3740627, at *1 (N.D. Tex. Sept. 29, 2009) (enjoining asset dissipation by Defendants to prevent "irreparable damage to the Court's ability to grant effective final relief . . . in the form of monetary redress"); *Gatlin v. GXG, Inc*., No. 05-93-01852-CV, 1994 WL 137233, at *8 (Tex. App.—Dallas Apr. 19, 1994, no writ) (legal remedy inadequate when "there is a danger that a defendant's funds will be reduced or diverted pending trial"); *Loye v. Travelhost, Inc*., 156 S.W.3d 615, 621 (Tex. App.—Dallas 2004, no pet.) (no adequate remedy at law where defendant incapable of responding in damages).

WL 218642, at *4 (same); *Tanguy v. Laux*, 259 S.W.3d 851, 858 (Tex. App.—Houston [1st Dist.] 2008, no pet.) (same).[12] Moreover, the injunction does not involve a "seizure" or "lien" upon the Accountholders' property, as does an attachment.

Further, the Accountholders' argument that attachments are unavailable in TUFTA cases [*see* Doc. 413 at 15-16] is mystifying, given that the TUFTA expressly permits courts to issue attachments in TUFTA cases. *See* TEX. BUS. & COM. CODE § 24.008(a)(2). The principle of Texas case law cited by the Accountholders, which provides that attachments are not generally available for unliquidated claims based in tort *absent an authorizing statute*, simply has no application to this case, given that an "authorizing statute" is present. *See Hochstadder v. Sam,* 73 Tex. 315, 316, 11 S.W. 408, 408 (1889); *Sweatt v. Grogan*, 25 F. Supp. 585, 585-56 (N.D. Tex. 1938). Moreover, a fraudulent-transfer claim is not a tort, but is a statutory claim that, unlike most tort claims, involves liquidated damages.

IV. The Receiver has correctly pleaded the amounts of his claims.

The Receiver has accurately calculated and correctly pleaded the amounts of the fraudulent transfers the Accountholders received. For purposes of this injunction, the Court need only consider the funds paid to the Accountholders for growing the Ponzi scheme by selling SIBL CDs,[13] which are the only amounts the Receiver seeks to enjoin (or attach) through the Application. In any event, none of the Accountholders' specific arguments regarding so-called "overstatement" of claims [*see* Doc. 413 at 22-23; Doc. 417 at 18-19] has merit:

[12] The Accountholders cite only one case in support of their argument that the injunction is really an attachment, a non-UFTA case involving antitrust, DTPA and RICO claims. *See In re Fredeman*, 843 F.2d 821, 822 (5th Cir. 1988) (holding that injunction prohibiting defendants from transferring or dissipating "virtually any of their assets" without Court approval was not authorized by RICO or the Texas antitrust or DTPA statutes and could not stand on "general equitable principles" absent an authorizing statute).

[13] Specifically, the Court need only consider the payments identified by the Receiver as (1) "SIBL CD Commissions," (2) "SIBL Quarterly Bonuses," and (3) "Branch Managing Director Quarterly Compensation," each of which was money the Accountholders received relating to the sale of SIBL CDs.

- Paying taxes is not an affirmative defense or a set off to the Receiver's fraudulent-transfer claims. *See Donell v. Kowell*, 533 F.3d 762, 779 (9th Cir. 2008) (denying offset of income tax transferee paid in relation to transfers from Ponzi scheme).

- The Accountholders are not entitled to offset any alleged claims against the Receiver (*e.g.*, unpaid expense reimbursement or commissions, or claims on their personal CD investments), which should be resolved through the claims process. The Receiver is asserting fraudulent-transfer claims as a creditor or on behalf of creditors, against whom the Accountholders do not have any claims to offset.[14]

- None of the Receiver's claims are time-barred because the Receiver has the benefit of a statutory discovery rule.[15]

V. The IRAs are subject to injunction and, in the alternative, attachment.

Under certain circumstances, the Texas Property Code may protect individual retirement accounts ("IRAs") from attachment, execution, and seizure to satisfy debts. *See* TEX. PROP. CODE § 42.0021(a). However, this protection does not apply if either (1) the funds and assets in the IRAs represent the proceeds of fraudulent transfers received from a Ponzi scheme by those paid to grow the scheme or (2) the IRAs are not held in Texas. Thus, the Property Code does not protect the Accountholders' IRAs. And even if the protection did apply to a given IRA, the protection does not prohibit the Court from enjoining the dissipation of assets in the IRA pending resolution of the Receiver's claims against the Accountholders.[16]

The Property Code does not protect assets in which transferees have no legal rights—such as proceeds of fraudulent transfers received from a Ponzi scheme—from being

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[14] For the same reason, the Accountholders are not entitled to offset for alleged damages from the inability to "manage accounts" during the period since the Receivership began. Moreover, the Receiver cannot be held liable for actions taken pursuant to this Court's orders. *See* Restatement (Second) of Torts § 266 (1965) ("One is privileged to commit acts which would otherwise be a trespass to a chattel or a conversion when he acts pursuant to a court order which is valid or fair on its face.")).

[15] *See* TEX. BUS. & COMM. CODE § 24.010(a)(1) (allowing claims brought within one year after claimant reasonably could have discovered fraudulent transfers); *Wing v. Kendrick*, No. 2:08-CV-01002-DB, 2009 WL 1362383, at *3 (D. Utah May 14, 2009) (applying UFTA discovery rule to receiver). Even if the statutory discovery rule did not apply to the Receiver's claims against the Accountholders, the Receiver has fraudulent-transfer claims sufficient to justify the injunction (or attachment) requested, even if only transfers within the four-year period count towards the value of the Receiver's claims.

[16] But the non-IRA accounts remain subject to injunction and attachment, even in the unlikely event that the Court concludes the IRAs are not subject to those remedies under the circumstances.

recovered by the Ponzi scheme's creditors simply because those funds were transferred into an IRA account. *See Jones v. Am. Airlines, Inc.*, 131 S.W.3d 261, 270 (Tex. App.—Fort Worth 2004, no pet.) ("Because an exemption is a right given by law to a debtor to retain a portion of his or her property free from the claims of creditors," the defendant could not "claim as exempt the portion of benefits to which she [had] no legal right.") (quotation omitted).

Further, if the Receiver prevails on the merits of his claims, he may be able to recover from the IRAs based upon the law of the state where the IRAs are located. *See Bergman v. Bergman*, 888 S.W.2d 580, 585 (Tex. App.—El Paso 1994, no writ) ("the state where the property is located will have the dominant interest in determining whether the property is exempt") (citing RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 132 cmt. a (1971)). Pershing, LLC (the custodian for the IRA accounts), for example, is located in New Jersey, where the IRA exemption does not protect transfers made in violation of the UFTA or other state or federal law. *See* N.J. STAT. ANN. § 25:2-1(b)(1) (2001); *Gilchinsky v. Nat'l Westminster Bank N.J.*, 732 A.2d 482, 492 (N.J. 1999) ("[T]he [New Jersey] Legislature did not intend to allow debtors to funnel money into a New Jersey IRA to thwart the judgments of sister states.").

VI. The Accountholders evidentiary objections are meritless.

The rules of evidence are substantially relaxed at the preliminary injunction stage, and thus the Accountholders' evidentiary objections (primarily hearsay objections) are irrelevant. *See Sierra Club, Lone Star Chapter v. FDIC*, 992 F.2d 545, 551 (5th Cir. 1993) ("at the preliminary injunction stage, the procedures in the district court are less formal, and the district court may rely on otherwise inadmissible evidence, including hearsay evidence"); *Heideman v. South Salt Lake City*, 348 F.3d 1182, 1188 (10th Cir. 2003) ("A hearing for preliminary injunction is generally a restricted proceeding, often conducted under pressured time constraints, on limited evidence and expedited briefing schedules. The Federal Rules of Evidence do not apply to preliminary injunction hearings."). Moreover, the disputed evidence goes almost exclusively to the Accountholders' inability to establish the affirmative defense of good faith and reasonably equivalent value, upon which the Accountholders bear the burden (yet have offered no evidence of their own). Even if the Court disregards all such evidence, the Receiver still has established a substantial likelihood of success on the merits on his claims.

VII. The Receiver's claims are not subject to arbitration.

As set forth in detail in the Receiver's prior briefing, the Receiver's claims against the Accountholders are not subject to arbitration.[17] The Accountholders have not shown that there is a single valid agreement to arbitrate between the Receiver and any Accountholder. The Receiver has standing as a creditor or on behalf of creditors to pursue fraudulent-transfer claims against Accountholders.[18] The Court should, therefore, deny any motion to compel arbitration.[19]

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17 *See* Receiver's Response to Certain Former Stanford Employees' Motions to Compel Arbitration and to Dismiss [Doc. 316 at 10-16], incorporated herein by reference.

18 The Accountholders argue that the Receiver's claims fail because he has not identified the "creditor" on whose behalf he asserts his fraudulent-transfer claims. [*See* Doc. 413 at 19-20.] But there is no such requirement in the law, which uniformly recognizes a receiver's standing to pursue fraudulent-transfer claims on behalf of creditors generally without identifying any particular creditor. The Receiver incorporates herein his prior briefing on this issue, [Doc. 400-1] at 8-12, which establishes the Receiver's standing to pursue fraudulent-transfer claims. *See, e.g.*, *McCandless v. Furlaud*, 296 U.S. 140, 159, 56 S.Ct. 41, 47 (1935); *SEC v. Cook*, 2001 WL 256172, at *2 (N.D. Tex. Mar. 8, 2001).

19 The Court should also deny any motions to dismiss the Receiver's claims under Rule 8 or Rule 9(b). [*See* Doc. 413 at 18-19.] Only Rule 8 applies to the Receiver's claims; Rule 9(b) does not. *See GE Capital Commercial, Inc. v. Wright & Wright, Inc*., No. 3:09-CV-572-L, 2009 WL 5173954, at *10 (N.D. Tex. Dec. 31, 2009). In any event, the Receiver has met the requirements of both Rules. [*See* Doc. 316 at 16-21, incorporated herein by reference.]

Dated: May 24, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

On May 24, 2010, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the court. I hereby certify that I have served the Court-appointed Examiner, all counsel and/or pro se parties of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Kevin M. Sadler
Kevin M. Sadler