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. 03:09-CV-0724-N**
v.	§	
JAMES R. ALGUIRE, et al.	§	
Relief Defendants.	§	

PATRICIO ATKINSON'S MOTION TO COMPEL ARBITRATION OR, IN THE ALTERNATIVE, TO DISMISS SECOND AMENDED COMPLAINT AND BRIEF IN SUPPORT

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ATTORNEYS FOR DEFENDANT
PATRICIO ATKINSON

TO THE HONORABLE JUDGE OF SAID COURT

COMES NOW putative Relief Defendant Patricio Atkinson ("Mr. Atkinson"), and files this Brief in Support of Motion to Dismiss (the "Motion") Second Amended Complaint (the "Complaint").[1] In support of the Motion, Mr. Atkinson respectfully states as follows:

I.
PRELIMINARY STATEMENT

Mr. Atkinson is a former employee of Stanford Financial Group Company ("Stanford") who, along with 320 former employees of various Stanford entities, has been sued by the Receiver for no apparent reason other than he is a former employee of Stanford. The Receiver does not allege that Mr. Atkinson had knowledge of or was complicit in any wrongful acts of Stanford. He alleges merely that Mr. Atkinson received funds from Stanford. Mr. Atkinson, meanwhile, did nothing more than act within the scope of his employment a company that misrepresented to him what the company was doing in the operation of its business.

Mr. Atkinson left his position in the human resources department of Stanford in November of 2007 – more than a year prior to the revelations that resulted in the appointment of the Receiver. Mr. Atkinson left his employment pursuant to a Separation Agreement and Waiver of Rights (the "Severance Agreement"), whereby he agreed to non-competition and non-solicitation provisions in exchange for, among other consideration, the monetary amounts the Receiver seeks to recover.

Mr. Atkinson's separation agreement with Stanford also contains an enforceable arbitration clause that is binding on the Receiver and enforceable by the Court under the Federal

[1] Mr. Atkinson was served only with the First Amended Complaint, which asserts a claim against Mr. Atkinson as a "relief defendant." The Receiver dropped this claim in his Second Amended Complaint in light of the Fifth Circuit's decision in *Janvey v. Adams*, 588 F.3d 831, 834 (5th Cir. 2009). To the extent this claim survives against Mr. Atkinson, it should be dismissed in light of *Janvey*.

Arbitration Act and applicable case law. Accordingly, this matter should be dismissed or stayed pending arbitration.

In the alternative, the Complaint should be dismissed for failure to state a claim. The Supreme Court has ordered that placeholder Complaints cannot withstand a motion to dismiss. A plaintiff must give a defendant notice of the claim and the grounds therefore through well-pleaded factual allegations that give rise to an inference of a plausible right to relief. The Supreme Court's standard is not lowered for the Receiver, nor for the causes of action alleged by the Receiver.

The Receiver fails to provide *any* factual grounds – let alone *well-pleaded* factual grounds – for the causes of action alleged in the Complaint. Instead, these claims are plead with nothing more than conclusory recitations of the bare elements of the claim. These "facts" do not raise *any* inference – let alone a *plausible* inference – that the Receiver is entitled to relief for the claims alleged.

II.
FACTUAL BACKGROUND

Along with this Motion, a Declaration from Mr. Atkinson ("Atkinson Decl.") has been filed and is incorporated herein by reference:

1. Mr. Akinson, at all times relevant to this case, has resided and been domiciled in the State of Florida. (Atkinson Decl. ¶ 2, App. at 2.)

2. Mr. Atkinson did not receive any interest, principal, commission or other payment in connection with the purchase and sale of CD's issued by Stanford International Bank, Ltd. Mr. Atkinson was in no way complicit in, and had absolutely no knowledge of, any improper activity relating to the issuance or sale of CDs by Stanford International Bank, Ltd. and/or any of its related entities. (Atkinson Decl. ¶ 3, App. at 2.)

3. On or about November 16, 2007, Mr. Atkinson terminated his employment pursuant to a Severance Agreement entered into with Stanford. (*See generally* Severance Agreement, App. at 4-10, which is incorporated herein by reference). The Severance Agreement provides that Stanford pay to Mr. Atkinson $300,000.00 in exchange for, among other things, a promise not to solicit employees of Stanford or to accept employment with a competitor of Stanford for a period of 18 months after the effective date of the agreement. (*See* Severance Agreement, p. 1 and § 5, App. at 4, 6-7.) The Severance Agreement contained an arbitration provision, whereby the parties agreed that "any and all controversies, claims, and differences arising out of or relating to [the Severance Agreement] … would be settled by binding arbitration … in accordance with the then existing rules of the American Arbitration Association ('AAA'), by one arbitrator." (*See* Severance Agreement, § 12, App. at 9-10.)

4. Mr. Atkinson fully performed his obligations under the Severance Agreement in all material respects. (Atkinson Decl. ¶ 5, App. at 3.)

III.
ARGUMENT AND AUTHORITIES

A. The Receiver is Bound by the Agreement of Stanford to Arbitrate.

Under the Federal Arbitration Act ("FAA"), arbitration clauses are generally valid, irrevocable, and enforceable. *See* 9 U.S.C. § 2. The Supreme Court has articulated a strong policy favoring arbitration under the FAA. *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24-25, 111 S. Ct. 1647 (1991). Arbitration clauses are to be broadly construed and any doubts regarding the scope of such clauses must be resolved in favor of arbitration. *See Pennzoil Exploration & Prod. Co. v. Ramco Energy Ltd.*, 139 F.3d 1061, 1067 (5th Cir. 1998). A dispute need only "touch" matters covered by the arbitration agreement to be arbitrable. *Id.* at 168.

On a motion to compel arbitration, the Court's inquiry is limited to two issues: (1) whether there is a valid agreement to arbitrate, and (2) whether the dispute is within the scope of the agreement. *See Pennzoil Exploration & Prod. Co.*, 139 F.3d at 1067. A receiver "is bound to the arbitration agreements to the same extent that the receivership entities would have been absent the appointment of the receiver." *Javitch v. First Union Securities Inc.*, 315 F.3d 619, 627 (6th Cir. 2003); *see also Capitol Life Ins. Co. v. Gallagher*, No. 94-1040, 1995 WL 66602, at *2 (10th Cir. Feb. 7, 1995) ("[the receiver] may be compelled to arbitrate because a receiver 'stands in the shoes' of the [receivership entity]"); *U.S. Small Bus. Admin. v. Coqui Capital Mgmt., LLC*, No. No. 08 Civ. 0978(LTS)(THK), 2008 WL 4735234, at *2 (S.D. N.Y. Oct. 27, 2008) ("[A] receiver's ability to litigate claims in federal court is limited by any valid agreement, previously executed by the receivership entity, that mandates arbitration."); *Moran v. U.S. Bank, N.A.*, No. 3:06-cv-050, 2007 WL 1023447, at *7 (S.D. Ohio Jan. 4, 2007) (applying arbitration agreement to receiver); *Phillips v. Lincoln Nat'l Health & Cas. Ins. Co.*, 774 F. Supp. 1297, 1299 (D. Colo. 1991).

There is no dispute that Stanford and Mr. Atkinson, pursuant to the Severance Agreement agreed to arbitrate any and all disputes in arbitration. (*See* Severance Agreement § 12, App. at 9-10.) Once the court determines there is a valid agreement to arbitrate, it "must pay careful attention to the strong federal policy favoring arbitration and must resolve all ambiguities in favor of arbitration." *Banc One Acceptance Corp. v. Hill*, 367 F.3d 426, 429 (5th Cir. 2004). There are no statutory or policy reasons for finding the Receiver's claims are nonarbitrable. Accordingly, the Court should compel arbitration of all claims against Mr. Atkinson. Additionally, the Court should exercise its discretion and dismiss the Receiver's suit because there is no need for the Court to retain jurisdiction. *Alford v. Dean Witter Reynolds, Inc.*, 975

F.2d 1161, 1164 (5th Cir. 1992). At a minimum, the Court should stay the case pending arbitration. *See* 9 U.S.C. § 3.

B. In the Alternative, the Receiver has Failed to State a Claim Upon Which Relief Can be Granted.

The Receiver's claims should be dismissed, in the alternative, for failure to state a claim under FED. R. CIV. P. 9(b) and 12(b)(6).

1. The Motion to Dismiss Standard.

The realities of modern complex litigation make proceeding past the pleading stage and into discovery exceedingly expensive. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 554, 558 (2007). Accordingly, in 2007, and again in May 2009, the Supreme Court set forth a new, more stringent, pleading standard that a plaintiff must meet in order to survive a motion to dismiss. *See Twombly*, 550 U.S. at 555; *Ashcroft v. Iqbal*, --- U.S. ---, --- 129 S.Ct. 1937 (May 18, 2009).

Twombly and *Iqbal* acknowledge that the notice pleading standard of Federal Rule of Civil Procedure 8(a)(2) requires "a short and plain statement of the claim showing that the pleader is entitled to relief." *See* FED. R. CIV. P. 8(a)(2) ("Rule 8(a)"). The purpose of Rule 8(a) is to give the defendant fair notice of (1) what the claim is; and (2) the grounds upon which such claim rests. *See Twombly*, 550 U.S. at 555 (plaintiff must provide *the grounds* of his entitlement to relief, rather than a mere blanket assertion of entitlement to relief).

Labels, conclusions, and formulaic recitations of the elements of a cause of action do not satisfy Rule 8(a)'s notice pleading standard. *See id.* Rather, to survive a challenge under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim, the complaint must allege "sufficient factual matter, accepted as true, to state a claim that is plausible on its face." *Iqbal*, 129 S.Ct. at 1949; FED. R. CIV. P. 12(b)(6) ("Rule 12(b)(6)").

Thus, there are two components to the Court's analysis of the sufficiency of a pleading. First, the Court considers whether there is sufficient factual matter supporting each claim for relief (the "well-pleaded standard"). Second, the Court determines whether these facts are sufficient to state a claim that is plausible on its face (the "plausibility standard").

In determining whether a complaint meets the well-pleaded standard, the Court should accept well-pleaded facts as true for purposes of a motion to dismiss. However, the Court cannot accept "threadbare recitals of a cause of action's elements, supported by mere conclusory statements." *Iqbal*, 129 S.Ct. at 1940.

The plausibility standard requires more than a sheer possibility that a defendant has acted unlawfully. *See Iqbal*, 129 S.Ct. at 1949. Rather, plausibility requires the plaintiff to plead sufficient factual content to allow the court to draw a reasonable inference that the defendant is liable for the misconduct alleged. *Id.* at 1949. Facts that are merely consistent with liability stop "short of the line between possibility and plausibility of entitlement to relief." *Id.* (citations omitted).

2. The *Twombly* and *Iqbal* Standards Are Not Lowered for Bankruptcy Claims or for the Receiver.

There are only a few cases analyzing complaints under both *Twombly* and *Iqbal*. However, it is clear that a complaint asserting claims for avoidance under the bankruptcy code must meet the Supreme Court's well-pleaded and plausibility standards. *See, e.g., Caremerica, Inc. v. Ber Care, Inc.*, 409 B.R. 737 (Bankr. E.D.N.C. 2009); *In re McLaughlin*, 415 B.R. 23, 27 (Bankr. D. N.H. 2009), *rev'd on other grounds on reconsideration*, 2009 WL 4722236 (Bankr. D. N.H. 2009).

Furthermore, the motion to dismiss standard is not lowered or relaxed for receivers, trustees, examiners, or other bankruptcy constituents suing on behalf of the estate. *See*

Caremerica, 409 B.R. at 754; *Gordon v. Elite Consulting Group L.L.C.*, No. 09-cv-10772, 2009 WL 4042911, at *6-*9 (E.D. Mich. Nov. 19, 2009)(applying the new standard to claims brought by a receiver); *Pearlman v. Alexis*, No. 09-20865-cv, 2009 WL 3161830, *2 (S.D. Fla. Sept. 25, 2009)(same). In *Caremerica*, the trustee, when faced with dismissal of insufficiently plead preference and fraudulent transfer actions, argued that the new pleading requirements imposed an undue burden on the trustee to supplement each element of its cause of action with factual support. *Id.* at 754. The court held that while the *Twombly* and *Iqbal* standards made it more difficult for the trustee to plead Bankruptcy Code claims, "the trustee is certainly more likely to have access to this information than the antitrust plaintiffs in *Twombly* or the Pakistani detainee in *Iqbal*. If these claimants were held to a heightened pleading standard, so too can a trustee in bankruptcy." *Id.*

To survive a motion to dismiss, the Complaint must have well-pleaded factual allegations supporting a plausible – and not just possible – inference that the plaintiff is entitle to recover for each stated claim for relief. As shown below, the Complaint fails to meet this standard and should be dismissed pursuant to Rule 12(b)(6).

3. The Receiver Fails to Meet the Pleading Standards of Rule 9(b).

All claims that "sound in fraud" must satisfy the requirements of Federal Rule of Civil Procedure 9(b). Here, the Receiver asserts a claim for fraudulent transfer, alleging that the "Stanford Defendants" made transfers "with the actual intent to hinder, delay, or defraud creditors." Sec. Amend. Compl. at ¶ 34-35. The Receiver also asserts an unjust enrichment claim. Both of these claims are subject to the heightened pleading requirements of Rule 9(b). *Quilling v. Stark*, 3:05-CV-1976-L, 2006 WL 1683442, at *5 (N.D. Tex. June 19, 2006) (applying Rule 9(b) to fraudulent transfer claims); *Eastern Poultry Distributors, Inc. v. Yarto*

Puez, Civ.A. 3:00-CV-1578-M, 2001 WL 34664163 (N.D. Tex. Dec. 3, 2001) (same); *Breckenridge Enterprises, Inc. v. Avio Alternatives, LLC*, 3:08-CV-1782-M, 2009 WL 1469808, *10 (N.D. Tex. May 27, 2009) (dismissing unjust enrichment claim under Rule 9(b) because "it would be nonsensical to allow what is essentially a fraud claim to evade the particularity requirements through pleading under an equitable, rather than legal, theory").

A plaintiff, in order to satisfy Rule 9(b), must plead "who, what, when, and where" with specificity. *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 178 (5th Cir. 1997), *cert. denied*, 522 U.S. 966 (1997). The Fifth Circuit has emphasized that Rule 9(b) should be applied stringently, and that all complaints failing to meet its requirements should be dismissed for failure to state a claim. As the *Williams* court noted, "we apply [Rule 9(b)] with force, without apology." *Williams*, 112 F.3d at 178. Moreover, these stringent pleading requirements must be met with respect to *each defendant*. General allegations that lump all defendants together, rather than separately setting forth the alleged wrongdoings of each named defendant, do not satisfy Rule 9(b). *See In re URCARCO Sec. Lit.*, 148 F.R.D. 561, 566 (N.D. Tex. 1993), *aff'd sub nom.*, *Melder v. Morris*, 27 F.3d 1097 (5th Cir. 1994).

Here, the Receiver utterly fails to meet this standard, proffering a Complaint that is unclear and confusing. He has sued 300+ different former employees without making any attempt to state an individual claim against any of them. Lumping together more than 300 former Stanford employees without once specifying any individualized facts, the Receiver asserts that they received, at unspecified times and from unspecified "Stanford Defendants," what the Receiver characterizes as "CD Proceeds." *See generally*, Complaint. Furthermore, he has provided no information regarding the time, form or method, source, or payee of any of the

challenged transfers. The Complaint therefore fails to state a claim. *See Caremerica, Inc.*, 409 B.R. at 750.

The Receiver's unjust enrichment claim also fails to satisfy Rule 9(b). To recover for unjust enrichment, a plaintiff must show that the defendant obtained a benefit from another by fraud, duress, or the taking of an undue advantage. *Heldenfels Bros., Inc. v. City of Corpus Christi*, 832 S.W.2d 39, 41 (Tex. 1992). The Receiver's complaint contains no facts supporting an inference that Mr. Atkinson obtained any benefit by fraud, duress or the taking of undue advantage.

The Receiver has not even bothered to identify the legal grounds on which he seeks relief from Mr. Atkinson. The Receiver's complaint appears to allege a fraudulent transfer claim. But does not even identify which state's fraudulent transfer laws apply. State fraudulent transfer statutes vary widely, particularly in the length of statute of limitations, the standards for establishing a good faith defense, and other defenses that could be critical to the Mr. Atkinson's ability to defend against the Receiver's claims. The Receiver's failure to identify the fraudulent transfer laws upon which his claims are based denies Mr. Atkinson the adequate notice needed to properly defend himself against the Receiver's claims.

In short, the Receiver's group pleading and conclusory allegations are wholly insufficient under Rule 9(b), and the Complaint should be dismissed for failure to state a claim.

4. The Complaint Fails to Meet the Pleading Standards of Rule 8.

The Receiver's bare, unsupported allegations are neither well-pleaded, nor plausible. For the reasons discussed above,[2] the Receiver's placeholder complaint fails to provide "fair notice

[2] *See* Section 3, *supra*.

of what the claim is and the grounds upon which it rests." The Receiver's complaint, therefore, should be dismissed on this additional basis.

5. Unjust enrichment and disgorgement are not independent causes of action.

Furthermore, unjust enrichment and disgorgement are equitable remedies – not independent causes of action. *R.M. Dudley Constr. Co. v. Dawson*, 258 S.W.3d 694, 703 (Tex. App. – Waco 2008, pet. denied)("Unjust enrichment, itself, is not an independent cause of action."); *Argyle ISD ex rel. Bd. of Trustees v. Wolf*, 234 S.W.3d 229, 246 (Tex. App. – Fort Worth 2007, no pet.)(same); *Meridien Hotels, Inc. v. LHO Financing Partnership I, L.P.*, 255 S.W.3d 807, 821 (Tex. App. – Dallas 2008, no pet.)(disgorgement is a remedy applied to breaches of fiduciary duty); *see also In re Wiand*, Nos. 8:05-cv-1856-T-27MSS, et al., 2007 WL 963162 (M.D. Fla. Jan. 12, 2007) ("[T]he Receiver's disgorgement claim must fail as a matter of law because disgorgement is not an independent cause of action."). The Complaint should be dismissed for failure to state a claim because it pleads unjust enrichment and disgorgement with no underlying cause(s) of action to support such claims.

IV.
PRAYER FOR RELIEF

For the reasons set forth herein, the Complaint should be dismissed in its entirety, without leave to amend. Mr. Atkinson respectfully seeks such relief, and all further and other relief, at law or in equity, to which the Court deems him justly entitled.

DATE: February 5, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on February 5, 2010, a true and correct copy of the foregoing document was submitted to the Clerk of the Court of the U.S. District Court, Northern District of Texas, using the CM/ECF system, and was served upon all counsel that have appeared in this case through this Court's electronic filing system.

/s/ Matthew D. Rinaldi
Matthew D. Rinaldi