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INTERACTIVE BROKERS LLC and KEVIN MICHAEL FISCHER, Plaintiffs, -v.- RICHARD W. BARRY, as Receiver for Osiris Fund Limited Partnership, Defendant.	SUPERIOR COURT OF NEW JERSEY CHANCERY DIVISION HUDSON COUNTY DOCKET NO.: HUD-C-36-18 CIVIL ACTION **ORDER GRANTING CROSS-MOTION TO COMPEL ARBITRATION PURSUANT TO 9 U.S.C. §4 AND DISMISSING THE CASE**

THIS MATTER having been opened to the Court by the filing of a Verified Complaint and Order to Show Cause by MARINO, TORTORELLA & BOYLE, P.C., attorneys for Plaintiffs Interactive Brokers LLC and Kevin Michael Fischer ("Plaintiffs"), and being opposed by and upon the Cross-Motion to Compel Arbitration and Dismissing the Case ("Cross-Motion") filed by HALM LAW GROUP, A Limited Liability Company, and LAX & NEVILLE LLP (*pro hac vice* admission pending), attorneys for Defendant Richard W. Barry, as Receiver for Osiris Fund Limited Partnership; and the Court having considered the various motion papers and any opposition thereto, and for good cause shown:

IT IS on this 16th day of May 2018; ORDERED and ADJUDGED that:

1. The Order to Show Cause is hereby denied in full.

2. The Cross-Motion is hereby granted and the parties are compelled to continue with the pending FINRA Arbitration.

3. This case is hereby dismissed with prejudice.

4. A copy of this Order shall be served by counsel for Defendant within seven (7) days of its' receipt.

Hon. Barry P. Sarkisian, P.J. Ch.

✓ Opposed

_____ Unopposed

STATEMENT OF REASONS

Caption: Interactive Brokers, LLC and Kevin Michael Fischer v. Richard W. Barry, as Receiver for Osiris Fund Limited Partnership

Docket No.: C-36-18

Oral Argument: May 11, 2018

Introduction

Presently before the Court is Plaintiffs' order to show cause and Verified Complaint filed on March 22, 2018 seeking injunctive relief restraining court-appointed Receiver, Richard W. Barry ("Receiver") from pursuing claims brought against Plaintiffs in a pending Financial Industry Regulatory Authority ("FINRA") Arbitration proceeding captioned Barry v. Interactive Brokers, LLC, et al. No. 18-00023. Plaintiffs, in their Complaint, also seek declaratory relief that the Receiver, in filing its Statement of Claim in that arbitration action overstepped the scope of authority granted to him by the Court in its August 22, 2012 Order, **under docket number C-125-12**, appointing him as Receiver. In the instant application, Plaintiff seeks preliminary injunctive relief restraining the Receiver from pursuing that arbitration action. Plaintiffs sought the same relief as temporary restraints in their original application for which the Court held a hearing on March 22, 2018 and which the parties ultimately consented to pending the return date of this order to show cause. Defendant, in opposition to this order to show cause filed a cross-motion on April 24, 2018 to compel arbitration and dismissing the case with prejudice.

The brunt of Plaintiffs' argument here is that the Receiver went beyond the powers granted to him by the Court in bringing this arbitration action. Defendant, Receiver, contends that he did not overstep the authority granted to him by the Court and that Plaintiffs are obligated, pursuant to the Federal Arbitration Act to continue arbitration pursuant to the parties written arbitration agreement. The New Jersey Bureau of Securities, after being granted leave by the Court, filed an ***amicus curiae*** brief with certifications in support of the Receiver's position and expounding upon the affect a Court-order limiting the power of a Receiver might have on the public interest.

For the reasons set forth herein, the Court **denies** the relief sought by Plaintiffs in their order to show cause and **grants** Defendant's cross-motion to compel arbitration and dismiss this case with prejudice.

Facts

Parties

Plaintiff, Interactive Brokers, LLC is a broker-dealer and FINRA member firm. Plaintiff, Kevin Michael Fischer, is a FINRA registered employee of Interactive as the head of Interactive's block trading desk.

Defendant, Richard W. Barry, is the Court-appointed receiver over the Osiris Fund, pursuant to an order entered by the Hon. Hector R. Velazquez on August 22, 2012. That order was entered as part of an enforcement proceeding under docket no. C-125-12 against Peter Zuck, and 22 other defendants and relief defendants by the New Jersey Bureau of Securities.

From April 2009 to December 2011, Interactive Brokers, LLC retained the Osiris Fund as a customer pursuant to a Customer Agreement. Interactive provided the trading platform upon which Peter Zuch and the Osiris Defendants defrauded their investors out of millions of dollars.

C-125-12

On August 7, 2012, the New Jersey Attorney General filed an action under Docket No. C-125-12 on behalf of the New Jersey Bureau of Securities against Peter Zuck, Osiris Fund Limited Partnership ("Osiris Fund"), Osiris Partners LLC, among other individuals/entity defendants (together "Osiris Defendants")alleging violations of the antifraud and registration provisions of the New Jersey Uniform Securities Law, N.J.S.A. 49:3-47 to -83. The Verified Complaint in that action alleged that Peter Zuck and the Osiris entities illegally raised approximately $12 million from the sale of unregistered limited partnership interests in the Osiris Fund to seventy-six different investors. See Chiesa v. Zuck, et al., C-125-12 (Compl. Exh. 3). On August 22, 2012, the Hon. Hector R. Velazquez entered an order granting preliminary injunctive relief freezing the defendants' assets and appointing Richard W. Barry as Receiver to immediately take possession and title to all of the real and personal property of the defendants…

> Including, but not limited to **causes of action** and all such assets obtained in the future, and undertake all actions necessary or appropriate to maintain the optimal value of these assets, including the liquidation of any such assets

(Compl. Exh. 1, ¶ 5(A)) (emphasis added).

That appointment order went on to specify that the Richard W. Barry would have

> full statutory powers just as a receiver would, to perform the receiver's duties, including the powers delineated in N.J.S.A. 49:3-69 (c) and (d) and Title 14 of the New Jersey Statutes, Corporation, General, including but not limited to, those set forth at N.J.S.A. 14A:14-1 et seq. or so far as the provisions therof are applicable

(Id. at ¶ 5(G)).
The Receiver would also have power to

> Toll the statute of limitations and/or the statute of repose retroactive to the date upon which this action is commenced by Plaintiffs for purposes of preserving the estate's rights, through the receiver, to prosecute actions to void preferential transfers, to seek to set aside fraudulent transfers, and encumbrances pursuant to N.J.S.A. 14:A14-4 and N.J.S.A. 25:2-20 et seq., among other actions

(Id. at ¶ 5(J)).

On May 9, 2014, the Court entered Summary Judgment and Final Judgment by Default in favor of the New Jersey Bureau of Securities, ordering, among other relief, over $7.6 million in restitution damages for the benefit of the defrauded investors. (Compl. Exh. 4). That case was closed in its *entninirety* by administrative order on May 23, 2014.

On September 18, 2017, the Court entered an order administratively reopening the case, permitting Mr. Barry to retain Lax & Neville, LLP to represent the Receiver in FINRA arbitration proceedings and then administratively closed the case. (Cert. of Richard W. Barry, Exh. E).

Interactive's Relationship with Osiris Fund

As set forth above, Osiris Fund was a customer of Interactive's from 2009 to 2012, during which time the fraud committed by Peter Zuch and the other Osiris defendants occurred. Governing Interactive and Osiris Fund's relationship was a Customer Agreement, which provided for mandatory arbitration:

> [Osiris Fund] agrees that any controversy, dispute, claim, or grievance between IB ["Interactive Broker"], any IB affiliate or any of their shareholders, officers, directors, employees, associates, or agents, on the one hand and [Osiris Fund] or, if applicable [Osiris Fund's] shareholders, officers, directors employees, associates or agents on the other hand, arising out of, or relating to, this Agreement, or any account(s) established hereunder in which securities may be traded; any transactions therein; any transactions between IB and [Osiris Fund]; any provision of the Customer Agreement or any other agreement between IB and [Osiris Fund]; or any breach of such transactions or agreements, shall be resolved by arbitration, in accordance with the rules then prevailing of any one of the following: (a) The American Arbitration Association; (b) The Financial Industry Regulatory Authority; or (c) any other exchange of which IB is a member, as the true-claimant-in-interest may elect.

(Receiver Cert., Exh. C, at ¶ 33)

FINRA Arbitration Proceedings

On December 30, 2017, Richard W. Barry, as Receiver, initiated the FINRA Arbitration proceedings by filing a Statement of Claim (Compl. Exh. 2) against Interactive Brokers, LLC and their employee Kevin Michael Fischer (together "Interactive").

Although Interactive was never a named party in C-125-12, the Receiver brought its Statement of Claim in FINRA Arbitration proceedings based on Interactive's alleged conduct[1] in

[1] As set forth in that Statement of Claim, the Receiver brought the FINRA action against Plaintiffs for claims relating to Interactive's role and participation in the Ponzi scheme orchestrated by Peter Zuck through his Osiris Fund accounts on

connection with brokerage accounts it maintained for the Osiris fund. That Statement of Claim sets forth seven causes of action for: (1) negligence and/or failure to supervise; (2) breach of implied/express contract, implied duty of good faith and fair dealing and industry rules; (3) aiding and abetting breach of fiduciary duty; (4) aiding and abetting common law fraud; (5) unsuitability; (6) fraudulent conveyance' and (7) unjust enrichment.

Instant Action/OTSC

On March 22, 2018 Plaintiffs filed the instant action for declaratory and injunctive relief and in conjunction with the same made application to preliminarily stay the FINRA Arbitration proceedings pending the outcome of a resolution on their claims. On March 22, 2018, the Court held a telephonic conference with counsel in which the Court noted that Defendant, Receiver had previously consented to extend Plaintiffs' deadline for responding the Statement of Claims in that arbitration proceeding pending the filing of the instant action and inquired whether counsel would continue the same pending the return date of the order to show cause. Counsel consented to extend that deadline pending the return date for Plaintiffs' order to show cause thus obviating the need for the Court to grant the temporary restraints Plaintiffs initially sought in that application, which the Court struck from the order to show cause. In opposition to this application, Defendant filed a cross-motion to compel arbitration and dismiss Plaintiff's action with prejudice.

Parties' Contentions

Plaintiffs here contend that the Court should grant them preliminary injunctive relief because their claims are based on well-settled law and that they have a reasonable probability of success on the merits. Plaintiffs essentially claim that the arbitration claims brought by the Receiver in the FINRA proceeding exceed, or are an abuse of, the Receiver's limited authority. More specifically, Plaintiffs claim that (1) the claims are asserted in the name of Osiris Fund investors, not merely in the name of the defendants to C-125-12; (2) the fraudulent conveyance claim can only be brought in the name of the Osiris Fund creditors, on whose behalf, the Receiver is not authorized to act; (3) that the statute of limitations has run on such fraudulent conveyance claims; and (3) **that any claim asserted in the name of Osiris Fund is void by virtue of the *in pari delicto* doctrine,[2] a common law maxim under which the court will refuse to indulge a dispute where the wrong of both parties is equal.**[3] Plaintiffs contend that they will suffer irreparable injury if forced to arbitrate these allegedly improper claims.

Defendant in opposition to this action first asserts that Plaintiffs are bound by the Federal Arbitration Act to engage in arbitration with FINRA. Defendant contends that Interactive and Osiris Fund have a valid, written, arbitration agreement that compels Plaintiffs to arbitrate this

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Interactive's trading platform. The Receiver contends that Interactive provided support to Zuck in exchange for commissions, regardless of the fact that Interactive knew or should have known of Zuck's fraudulent conduct and scheme to defraud Osiris Fund Investors. The Receiver contends that Fischer went above and beyond his normal role as a trade desk employee by actively assisting Zuck in implementing his fraud.

[2] Short for the full Latin phrase *"in pari delicto potior est condition."*

[3] See Bondi v. Citigroup, Inc., 423 N.J. Super. 377 (App. Div. 2011).

dispute before FINRA. Moreover, Defendant asserts, that as registered FINRA members, Plaintiffs are required by FINRA rules to arbitrate disputes with its customer. Defendant contends that pursuant to the written agreement and FINRA regulatory guidelines, their motion to compel arbitration should be granted with the merits of the controversy to be determined by the arbitrator. Defendant asserts that Plaintiffs argument with regard to the Receiver's authority to bring claims on behalf of the receivership estate are frivolous and are beyond the scope of the Court's review under the Federal Arbitration Act. They contend that the Court cannot look to the merits of these claims, but must only make the threshold determination as to whether a dispute is subject to arbitration or not.

Alternatively, Defendant contends that Plaintiff's claims are (1) wrong on the facts, (2) wrong on the law, and (3) an inappropriate investigation into the merits of an affirmative defense that cannot be raised against a receiver under New Jersey law. First, the Receiver points out that it did not assert any claims in the name of the investors of Osiris Fund, and that merely describing those investors in the Statement of Claim does not exceed the scope of its authority to bring claims belonging to Osiris Fund itself. Second, Defendant argues that, pursuant to paragraph 5(g) of the August 22, 2018 Appointment Order, the Receiver was given authority to bring claims to set aside fraudulent transfers and that the statute of limitations on any such action would be tolled retroactive to the date upon which the C-125-12 action was commenced. Lastly, Defendant asserts that Plaintiffs' affirmative defense of *in pari delicto*, which provides that a plaintiff may not assert a claim against a defendant if the plaintiff bears equal fault for the claim, is obviously beyond the scope of the Court's review for abirtrability, but is also unavailing against receivers who are appointed to take charge of an entities' assets after the wrongdoer has been removed. For these reasons Defendant claims that its motion to compel arbitration should be granted and Plaintiffs' action be dismissed with prejudice.

The New Jersey Bureau of Securities, in its *amicus curiae* brief, joins Defendant's position that Plaintiffs' are required to submit to arbitration and that the Receiver did not act outside the scope of his Court-appointed and statutory powers. This *amicus* brief points out the public interest implications of Plaintiffs' application in that, if the Court curtailed the Receiver's powers here, it might have deleterious effects on the power of future receivers to recover assets on behalf of defrauded investors in securities fraud actions.

Discussion

The seminal case in determining whether preliminary injunctive relief should be granted is Crowe v. DeGioia, 90 N.J. 126, 447 A.2d 173 (1982). Under Crowe, the movant bears the burden of demonstrating that: (1) irreparable harm is likely if the relief is denied; (2) the applicable underlying law is well settled; (3) the material facts are not substantially disputed and there exists a reasonable probability of ultimate success on the merits; and (4) the balance of the hardship to the parties favors the issuance of the requested relief. Id. at 132-34. Each of these factors must be clearly and convincingly demonstrated. Waste Mgmt. of N.J., Inc. v. Union Cnty. Utilities Auth., 399 N.J. Super. 508, 520 (App. Div. 2008).

Although all four factors must weigh in favor of injunctive relief, courts may take a less rigid view in consideration of the factors where the interlocutory relief sought is designed to preserve the status quo. McKenzie v. Corzine, 396 N.J. Super. 405, 414 (App. Div. 2007); see also Rinaldo v. RLR Inv., LLC, 387 N.J. Super. 387, 396 (App. Div. 2006). By the same token, in some cases, such as when the public interest is greatly affected, a court may withhold relief despite a substantial showing of irreparable injury to the applicant.

Here, the Court finds that Plaintiffs are unlikely to succeed on the merits of their claim when there exists a written agreement compelling them to arbitrate with Osiris Fund. Moreover, the Court finds that Plaintiffs will not suffer any irreparable harm by being compelled to arbitrate in accordance with an agreement that Interactive drafted in entering into a customer/broker relationship with Osiris Funct. The cases cited by Plaintiffs indicating that those who are compelled to arbitrate will suffer irreparable harm only find such harm where that arbitration was not required by any law or agreement and was instead imposed upon a party denying them of their day in court. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc., 427 N.J. Super. 45, 63 (App. Div. 2012). Here, for the reasons set forth below, the Court finds that Plaintiffs are compelled to arbitrate and will not suffer irreparable for being forced to do so.

This Court has the power, not only to appoint receivers, see Eelman v. Johnson Products Co., 103 N.J. Eq. 294, 296 (E. & A. 1928), but in accordance with N.J.S.A. 14A:14-18, any aggrieved party of the receiver's actions shall be entitled to a review of the receiver's actions in a summary manner in the Superior Court. See also Silverman v. Kolker, 149 N.J. Super. 162, 166 (Ch. 1977) (as an officer of the court, the receiver operates subject to the court's control).

Here, the Receiver's powers as set forth in the August 22, 2012 Appointment Order granted the Receiver power to bring all causes of action on behalf of Osiris Fund. More specifically, that order gave the Receiver power to "take into possession and take title to all of the real and personal property" held by Osiris Fund "including, but not limited to, causes of action and all such assets obtained in the future and undertake all actions necessary or appropriate to maintain optimal value." That Appointment Order provided that the Receiver would have all statutory powers delineated in N.J.S.A. 49:3-69(c) and (d) (providing in action brought on behalf of the New Jersey Bureau of Securities, the Court may appoint a receiver "with power to sue for, collect, receive and take into possession all the goods and chattels, rights and credits, moneys and effects ... derived by means of any practice constituting a violation of this act."). As set forth in that Appointment Order, the Receiver also has all powers set forth in N.J.S.A. 14A:14-1 et seq. (See N.J.S.A. 14A:14-5 (setting forth powers of receiver to institute and defend actions on behalf of the corporation)). Pursuant to these powers, the Court finds that it was within the Receiver's scope of power to bring a cause of action on behalf of Osiris Fund.

While the Appointment Order did not specifically mention arbitration proceedings, it is clear from the Customer Agreement between the parties that any claim arising out of Interactive and Osiris Fund's customer/broker relationship would be subject to the mandatory arbitration. The question then presented before the Court is whether those claims brought by the Receiver are arbitable within the applicable statutes and rules governing these parties.

Both the federal as well as state legislatures have adopted a public policy favoring arbitration as a means of resolving disputes. In 1925, Congress enacted the Federal Arbitration Act ("FAA"), also known as the United States Arbitration Act "to abrogate the then-existing common law rule disfavoring arbitration agreements 'and to place arbitration agreements upon the same footring as other contracts.'" Martindale v. Sandvik, Inc., 173 N.J. 76, 84 (2002) (citing Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 24 (1991). Section 2 of the FAA provides that

> [a] written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

The Supreme Court of the United States has held that the substantive provisions of the FAA apply whether the question of arbitrability is raised in federal or state court. Southland Corp. v. Keating, 465 U.S. 1, 10 (1984).

New Jersey has long recognized that agreements to arbitrate, as a matter of public policy, are afforded a favored status "as a means of settling disputes that otherwise would be litigated in a court." Badiali v. N.J. Mfrs. Ins. Grp. 220 N.J. 544, 556 (2015). Given the strong public policy in favor of arbitration agreements, courts construe arbitration agreements liberally in favor of arbitration. See Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001) ("Because of the favored status afforded to arbitration, '[a]n agreement to arbitrate should be read liberally in favor of arbitration.'"). See also Yale Materials Handling Corp. v. White Storage & Retrieval Sys., Inc., 240 N.J. Super. 370, 375 (App.Div.1990) (reiterating that "New Jersey law [is] consonant with federal law which liberally enforces arbitration agreements").

New Jersey codified its endorsement of this policy in N.J.S.A. 2A:23B-1 to -32. See N.J.S.A. 2A:233B-6(a) ("[a]n agreement contained in a record to submit to arbitration any existing or subsequent controversy arising between the parties to the agreement is valid, enforceable, and irrevocable except on a ground that exists at law or in equity for the revocation of a contract.").

Moreover, Interactive as a FINRA member, and Fischer as a FINRA affiliated person, is obligated to engage with its customer in arbitration in accordance with FINRA Rule 12200, which provides

> Parties must arbitrate a dispute under the Code if:
> - Arbitration under the Code is either:
> (1) Required by written agreement, or
> (2) Requested by the customer
> - The dispute is between a customer and a member or associated person or a member; and

- The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance agency.

While the Court generally prefers arbitration as a means of resolving dispute, that preference "is not without limits." Hirsch v. Amper Financial Services, LLC, 215 N.J. 174, 187 (2013) (citing Garfinkel v. Morristown Obstetrics & Gynecology Assocs., P.A., 168 N.J. 124, 132 (2001). See N.J.S.A. 2A:23B-6(b) ("The court shall decide whether an agreement to arbitrate exists . . . .").

> After finding the existence of an arbitration clause, a court then must evaluate whether the particular claims at issue fall within the clause's scope. A court must look to the language of the arbitration clause to establish its boundaries. See Garfinkel, supra, 168 N.J. at 132, 773 A.2d 665. Importantly, "a court may not rewrite a contract to broaden the scope of arbitration." Ibid. (internal quotation marks omitted).

Hirsch, supra, 215 N.J. at 188.

The arbitration clause set forth in the Customer Agreement, drafted by Interactive, and signed by both parties is broad and covers "any controversy, dispute, claim or grievance ... arising out of, or relating to this Agreement, or any account(s) established thereunder in which securities may be traded [and] any transactions therein. . . .". The claims set forth in the Receiver's Statement of Claims obviously arise from controversies, disputes, claims and other grievances relating to the parties customer/broker relationship and, to the extent that they are brought within the scope of the Receiver's authority are arbitable in accordance with this agreement.

The crux of Plaintiff's cause of action here is based on its construal of the Receiver's Statement of Claim as one filed on behalf of the Osiris Fund investors and not Osiris Fund itself, thus Plaintiffs contend that these claims are beyond the scope of the Receiver's power. The Court does not find that the Receiver's Statement of Claim sets forth any cause of action outside the powers granted to him in the August 22, 2012 Appointment Order.

The Court finds that the Receiver's claims, as set forth in its Statement of Claim, are brought on behalf of the Osiris Fund and not any third-party claimant. Plaintiffs point out several cases recognizing the principle that a receiver may not exceed the scope of his authority by bringing claims on behalf of investors when those investors fall outside the scope of that receiver's appointment. See e.g. Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cantone Research, Inc. 427 N.J. Super. 45 (App. Div. 2012) (affirming the trial judge's determination that investors who brought suit against a security broker-dealer were not entitled to arbitration where no written arbitration agreement existed between those parties). At oral argument, Plaintiffs' counsel relied heavily on the unpublished case from the Northern District of Illinois, Interactive Brokers, LLC v. Duran 2009 U.S. Dist. LEXIS 11552, 2009 WL 393827, in which a court found that groups of investors could not sustain a claim against Interactive Brokers where those investors were customers of Interactive's customer. The court in Duran found that Interactive's customer agreement, which contains the same mandatory arbitration language as the customer agreement Interactive signed with Osiris Fund, did not bind Interactive to arbitrate claims brought by third-party investors of Interactive's customer.

Here, the Court finds that the claims set forth in the Receiver's Statement of Claim are brought on behalf of Osiris Fund itself, not Osiris Fund's investors. Accordingly, the Court finds the above-cited cases by Plaintiff inapplicable and will enforce the mandatory arbitration provision in the Customer Agreement. Plaintiffs argument that the investors are the true party-in-interest upon whose behalf the Receiver brings its claims is based on certain language cherry-picked from the Statement of Claim in which the Receiver indicates that Osiris Fund's claims are brought on behalf of the investors or that the investors will ultimately benefit from the damages which the Receiver seeks to recover. Based on this language, Plaintiffs want the Court to look past the fact that Osiris Fund is the only named responded and conclude that the Receiver is actually bringing claims on behalf of the investors. The fact that the Receiver sets forth the damages incurred by Osiris Fund's investors and indicates that the investors will ultimately recover damages claimed by Osiris Fund does not mean that the investors are the real claimants or that the Receiver is acting outside the scope of the authority granted to him by the Court. See Scholes v. Lehman, 56 F.3d 750, 753-544 (7th Cir. 1995) ("[t]hat the return would benefit the limited partners is just to say that anything that helps a corporation helps those who have claims against its assets.").

The basis for the Receiver's claim here is that Interactive was involved in, and benefited from, Peter Zuch's scheme to defraud investors through the use of the Osiris Fund. A Receiver's action to recover funds on behalf of the receivership entity does not go beyond the scope of his appointment merely because the benefit of that recovery will eventually pass to the individual investors. The Court thus finds that the Receiver here, acting on behalf of the Osiris Fund has authority pursuant to the August 22, 2012 Appointment Order to recover damages suffered by Osiris Fund.

Having found that the Receiver is acting on behalf of Osiris Fund, the entity it was authorized to bring actions on behalf of, and having found that Osiris Fund is obligated to bring all claims against Interactive through arbitration, the Court finds the remainder of Plaintiff's claims to be outside the scope of this Court's review and within the purview of the FINRA arbitrator.

More specifically, Plaintiffs contend that the affirmative defense of *in peri delicto*, bars the Receiver from entering into arbitration, this defense goes to the merits of the Receiver's arbitration claims and is not appropriately heard before this Court. There is a recognized exception to the *in pari delicto* doctrine where the wrongs of an individual in the corporation will not be imputed to the corporation itself, if the wrongdoer acted solely to his own benefit and adverse to the interest of the corporation. See Bondi v. Citigroup, Inc. 423 N.J. Super. 377 (App. Div. 2011) (finding that this adverse interest exception did not apply, where corrupt corporate insiders undertook various fraudulent acts to benefit the corporation and its shareholders). Other courts have held that, in the circumstance where a receiver is appointed to act on behalf of a corporation and where the corporate wrongdoer has been removed "the defense of *in pari delicto* loses its sting." Scholes v. Lehmann 56 F.3d 750 (7th Cir. 1995). See also FDIC v. O'Melveny & Meyers, 61 F.3d 17, 18, (9th Cir. 1995) ("defenses based on a party's unclean hands or inequitable conduct do not generally apply against that party's receiver."). The determination of whether this doctrine applies in the instant action will require a factual inquiry that will go to the merits of the Receiver's underlying claims. This is something the Court cannot do here in accordance with the parties' Customer Agreement. Accordingly, this determination will have to be made by the FINRA arbitrator.

The Court, having found the Receiver's claims to be arbitable will also refrain from delving into the merits of the fraudulent conveyance claim or make a determination as to whether that claim

might have been brought outside of the applicable statute of limitations. See Howsam v. Dean Witter Reynolds, Inc. 537 U.S. 79, 85 (2002). These are determinations better left to the arbitrator and outside of this Court's narrow scope of review.

Given that the substance of Plaintiffs' application is based on arguments going to their likelihood of success on the merits of their claims, the Court will not entertain such arguments that our outside of its limited scope of review as to whether the Receiver's claims are subject to arbitration. The Court here (1) finds that these claims are arbitrable, (2) will not stay the FINRA Arbitration proceedings and (3) denies Plaintiff's application for preliminary injunctive relief. Having reached this conclusion, the Court cannot either entertain the relief sought in Plaintiff's complaint as to declaratory judgment that the Receiver overstepped the bounds of the authority granted to him in the August 22, 2012 appointment order. Accordingly, the Court **grants** the Reciever's motion to compel arbitration, **denies** Plaintiff's application in its entirety and dismisses this action with prejudice.