

WEINKE; JEFF BLAKE; JOHN DiMEGLIO; §
 DAVID TUCKFIELD; MICHAEL COUR; §
 BRIAN WHITNEY; CALEB §
 CUNNINGHAM; RICHARD FINLAYSON; §
 WILLIAM (PAT) TEDROW; MIKE §
 BERRY; and FIDELITY BROKERAGE §
 SERVICES LLC, §
 §
 Defendants. §

DEFENDANTS’ NOTICE OF REMOVAL

Pursuant to 28 U.S.C. §§ 1441(a) and 1442(a), Defendants Ty Detmer, Koy Detmer, Chris Weinke, Michael Cour, Brian Whitney and the other defendants who join in and consent to this removal as reflected in Exhibits 3 & 4 (“Removing Defendants”), hereby remove to this Court the proceeding styled *Ryan Shapiro, et al. v. Triton Financial LLC, et al.*, bearing Cause No. D-1-GN-09-004226, on the docket of the 98th Judicial District Court of Travis County, Texas (hereinafter, “Action”).¹ As discussed below, removal of this Action is proper pursuant to 28 U.S.C. §§ 1441(a) and 1442(a).

I. RELEVANT BACKGROUND

1. The Petition. On December 31, 2009, Plaintiffs Ryan Shapiro and Debra Price, individually, and as representatives of all others similarly situated (“Plaintiffs”) filed their Second Amended Petition (the “Petition”) in the district court of Travis County, which is in the Western District of Texas, Austin Division.² The Petition is filed against: (a) Triton Financial LLP, Triton Acquisition LP d/b/a Triton Insurance, LP, both of which are in receivership along

¹ Removing Defendants specifically hereby preserve and do not waive rights to arbitration or any and all applicable defenses, including, without limitation, any defenses contained in Rule 12 of the Federal Rules of Civil Procedure. See *City of Clarksdale v. BellSouth Telecomm.*, 428 F.3d 206, 214 n.15 (5th Cir. 2005) (“A defendant’s removal to federal court does not waive its right to object to service of process.”).

² A true and correct copy of the Petition is attached hereto as part of “Exhibit 1.” Also included in Exhibit 1 are copies of all other process, pleadings, and orders filed in the 98th Judicial District Court of Travis County, Texas, as is required by 28 U.S.C. § 1446, including the Original Petition filed on December 14, 2009, and the First Amended Petition filed on December 22, 2009.

with numerous related entities (collectively, “Triton”) in this Court before the Honorable Judge James R. Nowlin (the “Receivership Court”); and (b) former employees of Triton including certain of the Removing Defendants. (See Pet. (Ex. 1) ¶¶ 4-31)

2. Significant to this Notice of Removal, the Petition requests, among other things, a constructive trust over the assets of Triton and rescission of investments made individually by Plaintiffs from Triton (*see id.* ¶¶ 72, 73, 80), and does so based on claims of breach of fiduciary duty that belong to the Receiver. (*See id.* ¶¶ 63-68)

3. Service of Process on Certain Defendants. Triton Holdings, LP, Triton Acquisition, LP, TVest Group, LLC, and Kurt Barton were served with a copy of Plaintiff’s Original Petition and citation on December 15, 2009; Triton Financial LLC was served with a copy of Plaintiff’s Original Petition and citation on December 16, 2009; Brian Whitney, Michael Cour, Koy Detmer, Caleb Cunningham, and Richard Finlayson were served with a copy of the Petition and citation on January 4, 2010; David Tuckfield was served with a copy of the Petition and citation on January 6, 2010; Ty Detmer and Mike Berry were served with a copy of the Petition and citation on January 8, 2010; and Chris Weinke was served with a copy of the Petition and citation on January 12, 2010.³

II. BASIS FOR REMOVAL

4. Original Jurisdiction. This Court has original jurisdiction over this Action pursuant to 28 U.S.C. § 1441(a), which provides that “any civil action brought in a State court of which the district courts of the United States have original jurisdiction, may be removed by the defendant or the defendants, to the district court of the United States for the district and division

³ Based on a review of the state court’s file, all other named defendants have not been served.

embracing the place where such action is pending.” Additionally, jurisdiction is appropriate under 28 U.S.C. § 1442(a) for an action against a court appointed receiver.⁴

5. Under both 28 U.S.C. § 1441(a) and 28 U.S.C. § 1442(a), this Court has original jurisdiction over this Action pursuant to the Agreed Order Appointing Receiver (“Receivership Order”) in the action styled *Securities and Exchange Commission v. Triton Financial, LLC, et al.*, Case No. A:09-CA-924-JN (the “SEC Action”), pending before the Receivership Court. The Receivership Order provides that the Court in the Western District of Texas “shall retain jurisdiction of this action for all purposes” over the entities in receivership. (Receivership Ord. § II, a true and correct copy of which is attached hereto as “Exhibit 2.”) The Receivership Court has ordered the receiver (the “Receiver”) to locate and take control of all Receivership Estate property, assets, and records. Accordingly, the Receivership Court has exclusive jurisdiction over the disputes that are the subject of Plaintiffs’ Petition because the Petition asserts claims belonging to the Receiver and requests, *inter alia*, a constructive trust over the Receivership assets.

6. Paragraph 8 of the Receivership Order required Plaintiffs to obtain permission from the Receivership Court prior to filing the Petition:

[T]o the extent judgment creditors or other claimants seek to prosecute an action or proceeding against the Defendants or Receivership Entities, or to satisfy a judgment or claim from Receivership Assets, they will do so only with the prior permission of this Court....

(*Id.* ¶ 8)

⁴ 28 U.S.C. § 1442(a) provides in pertinent part that “[a] civil action ... in a State court against any of the following may be removed by them to the district court of the United States ... (1) ... any officer (or any person acting under that officer) of the United States ... sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress [...] ... (3) Any officer of the courts of the United States, for any act under color of office or in the performance of his duties....”

7. Paragraph 5 of the Receivership Order also makes clear that any claims brought relating to Receivership Assets must be brought in this Court. Specifically, all persons who receive actual notice of this Order, “are enjoined from in any way interfering with the operation of the Receivership or in any way disturbing the Receivership Assets and Receivership Records from filing or prosecuting any actions or proceedings which involve the Receiver or which affect the Receivership Assets and Receivership Records . . . except with the prior permission of this Court. *Any actions so authorized to determine disputes relating to Receivership Assets and Receivership Records shall be filed in this court.*” (*Id.* ¶ 5 (emphasis added).) Accordingly, the Receivership Court has exclusive jurisdiction over the disputes that are the subject of Plaintiffs’ Petition because the Petition seeks, *inter alia*, Receivership Assets, names as defendants the Receivership Entities and its former employees, and prosecutes claims owned by the Receiver.

8. Here, Plaintiffs have not pleaded that they sought or obtained leave from the Receivership Court or the Receiver to file their Petition outside of the Receivership Court, and thus are without right to do so. The Plaintiffs maintain an action for constructive trust against the Receivership Assets even after the Court has ordered the Receiver to take and control those assets, interfering with the Receiver’s enforcement of the Court’s Order. Further, the claims Plaintiffs assert in their Petition are claims for breach of fiduciary duty that may only be asserted by the Receivership Entities, and are thus owned by the Receiver.⁵ *See Scholes v. Stone, McGuire & Benjamin*, 821 F. Supp. 533, 536 (N.D. Ill. 1993).⁶ The Petition likewise violates the

⁵ Defendants deny that any such claims have any legal or factual merit.

⁶ Furthermore, some authority suggests that the Receiver may not be limited to representing not only the claims of the entities in receivership, but may also represent the interests of their creditors, although that authority is not settled. *See Warfield v. Alaniz*, 453 F. Supp. 2d 1118, 1126-27 (D. Ariz. 2006); *cf. Sec. & Exch. Comm’n v. Cook*, 2001 WL 256172, at *2 (N.D. Tex. Mar. 8, 2001) (unpublished); *Craft v. Sunwest Bank of Albuquerque, N.A.*, 84 F. Supp. 2d 1226, 1231 (D. N.M. 1999).

terms of the Receivership Order, and, based on the request by Plaintiffs for distribution of part of the Receivership Estate—over which the Receiver has been directed to have complete and exclusive control—the face of the “well-pleaded complaint” implicates a federal question of which the Receivership Court has exclusive jurisdiction. *See* Wright & Miller, Federal Practice and Procedure, § 2985 (“[A]ll rights to the property in question must be adjusted by the appointing court for as long as it has jurisdiction, which is until the receivership is terminated.”) (emphasis added) (citing *Penn Gen. Cas. Co. v. Pa.*, 294 U.S. 189, 195 (1935)); *Barnette v. Wells Fargo Nev. Nat’l Bank*, 270 U.S. 438, 441 (1926) (holding removal proper under predecessor to 28 U.S.C. § 1442 for suit to recover funds and land in hands of federally appointed receiver).⁷

III. THE NOTICE OF REMOVAL IS PROCEDURALLY PROPER

9. Venue. This case is removed from the 98th Judicial District Court of Travis County, Texas, which is in the United States District Court for the Western District of Texas, Austin Division.

10. Removal is Timely. Triton Holdings, LP, Triton Acquisition, LP, TVest Group, LLC, and Kurt Barton were the first served in this matter, which occurred on December 15, 2009. Thirty (30) days have not expired since service of the Petition was made on this first-

⁷ Currently this Court represents the only court with *in rem* jurisdiction over the Receivership Entities and their Assets. Any further attempt by Plaintiffs to seek jurisdiction in another court is improper. *See Gaskin v. Hand*, 560 F. Supp. 930, 931 (S.D. Tex. 1983) (finding that state court that appointed receiver after identical federal suit requesting same was “without jurisdiction” and stating that “[a] suit applying for the appointment of a receiver is an action *in rem*, which comes under the exclusive jurisdiction of the first court assuming jurisdiction over its property”). Additionally, removal pursuant to 28 U.S.C. § 1442 is asserted in this case because of the nature of the suit alleged against the Receiver, the effect on the Receivership Assets, the effect on the Receiver in carrying out the Court’s order, and the defenses provided in the Court’s order. *See Barnette*, 270 U.S. at 441; *Wisconsin v. Schaffer*, 565 F.2d 961, 964 (7th Cir. 1977) (holding removal proper under 28 U.S.C. § 1442 to raise a defense arising out of official duties). Removing Defendants are not suggesting removal is appropriate merely because a Receiver has been appointed and is present in this case. *Cf. Gay v. Ruff*, 292 U.S. 25, 40 (1934).

served defendant, much less since removal later became necessary. Accordingly, the Notice of Removal is timely under 28 U.S.C. § 1446(b).⁸

11. The Receiver Supports this Removal. The Receiver joins in this Notice of Removal and believes that exclusive jurisdiction over this action lies in the Receivership Court. (See “Exhibit 3”) Consequently, removal is appropriate pursuant to 28 U.S.C. § 1442(a) regardless of the consent of any other defendants. See *Fowler v. S. Bell Tel. & Telegraph Co.*, 343 F.2d 150, 152 (5th Cir. 1965) (holding under 28 U.S.C. § 1442, an officer of the court’s removal is sufficient for all defendants); cf. *Med. Dev. Intern. v. Calif. Dept. of Corr. & Rehab.*, 585 F.3d 1211, 1216 (9th Cir. 2009) (holding “[a] receiver is an officer of the courts of the United States” for purposes of 28 U.S.C. § 1442).

12. Improperly Joined Defendants Are Irrelevant to Removal. Additionally, all other Defendants named in this action have been improperly joined and thus are not required to consent to removal under 28 U.S.C. § 1441(a). See *Jerrigan v. Ashland Oil Inc.*, 989 F.2d 812, 815 (5th Cir. 1993) (application of consent requirement in cases alleging improper or fraudulent joinder of parties would be “nonsensical.”). A party is improperly or fraudulently joined when, among other things, there is absolutely no possibility that the plaintiff will be able to establish a cause of action against such party in state court. *Griggs v. State Farm Lloyds*, 181 F.3d 694, 699 (5th Cir. 1999). To defeat an allegation of improper joinder, the plaintiff must have a reasonable, and not merely theoretical, possibility of recovering from the defendant

⁸ Under 28 U.S.C. § 1446(b), “[t]he notice of removal of a civil action or proceeding shall be filed within thirty days after receipt by the defendant, through service or otherwise, of a copy of the initial pleading setting forth the claim for relief upon which such action or proceeding is based.” 28 U.S.C. § 1446(b); see also *Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S. 344, 350-356 (1999) (holding that deadlines for removal are not triggered until defendant has been served and has received copy of petition); *Getty Oil Corp. v. Ins. Co. of N. Am.*, 841 F.2d 1254, 1263 (5th Cir. 1988) (holding that all served defendants must join in removal no later than thirty days from day on which first defendant was served). In this case, the earliest date that the thirty day removal period could have begun was the date the SEC Action was filed, December 22, 2009. 28 U.S.C. § 1446(b). In any event, removal is timely under any calculation.

alleged to have been improperly joined. *Ross v. CitiFinancial, Inc.*, 344 F.3d 458, 462 (5th Cir. 2003). Here, Plaintiffs cannot recover anything from the named Defendants because the Receivership Order expressly enjoins suits arising from the allegations in the SEC Action in any forum other than the Receivership Court and the Receiver owns the claims Plaintiffs assert. (Receivership Ord. (Ex. 2) ¶¶ 5, 8.)

13. Numerous Improperly Joined Defendants Also Join in this Removal. Plaintiffs cannot recover on their claims against the named defendants because exclusive jurisdiction exists in the Receivership Court. Nevertheless, Kurt Barton, Caleb Cunningham, and Mike Berry join this Notice of Removal. (See "Exhibit 4" (attaching true and correct copies of written consents).)⁹

14. Process and Papers. In accordance with 28 U.S.C. § 1446, copies of all process, pleadings, and orders filed in the 98th Judicial District Court of Travis County, Texas, are attached to this Notice of Removal as "Exhibit 1."

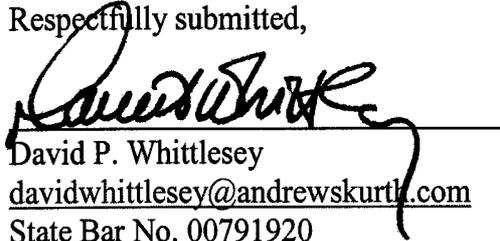
IV. CONCLUSION AND REQUESTED RELIEF

For the reasons described above, Plaintiffs' claims are properly removable under 28 U.S.C. § 1441(a) and § 1442(a). Consequently, Removing Defendants respectfully request that this Court remove this action from the 98th Judicial District Court of Travis County, Texas, to the United States District Court for the Western District of Texas and proceed with this matter as if it had been originally filed herein. Removing Defendants further request any such other relief to which they may be justly entitled.

⁹ For those defendants who have been served but whose written consents are not attached, their consents are not required for removal because they are improperly joined, but nevertheless they may still join separately within the removal period should they choose to do so.

Dated: January 13, 2010.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that, on January 13, 2010, a true and correct copy of the foregoing Defendants' Notice of Removal was served on the following counsel of record in the manner shown below:

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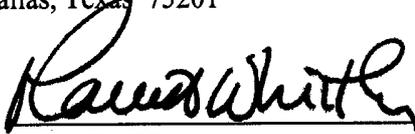
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