**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

IN RE: LIFE FUND 5.1, LLC, *et al*., Debtors,	)	Chapter 11 Case No. 09-32672 (Jointly Administered)
Jeff J. Marwil, solely as Trustee of LIFE FUND 5.1, LLC, *et al*., Plaintiff, v. BRENT ONCALE; RUSSELL MAKERT; ADLEY ABDULWAHAB, a/k/a ADLEY WAHAB; CHRISTIAN ALLMENDINGER; A&O LIFE FUNDS, LP; A&O LIFE FUNDS MANAGEMENT, LLC; and SHEPHERD CAPITAL MANAGEMENT, LLC, Defendants.	)	Hon. A. Benjamin Goldgar Adversary No.: 10-00042

**TRUSTEE'S BRIEF IN OPPOSITION TO
DEFENDANTS CHRISTIAN ALLMENDINGER'S AND BRENT ONCALE'S MOTIONS
TO DISMISS AND MOTION FOR MORE DEFINITE STATEMENT**

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Dated: April 12, 2010

I. PRELIMINARY STATEMENT

1. Jeff Marwil, not individually, but solely as the trustee (the "Trustee") to the chapter 11 estates of the above-captioned debtors (the "Debtors")[1] submits the following Objection to Christian Allmendinger's Motion to Dismiss and Brent Oncale's (collectively "Defendants") Motion to Dismiss and Motion for a More Definite Statement (the "Motions"). Defendants' Motions should each be denied because the complaint (the "Complaint") filed by former trustee Patrick M. Collins satisfies the federal notice pleading requirements, Federal Rule of Civil Procedure 8(a) and the heightened pleading requirements of Rule 9(b).[2] See Fed. R. Civ. P. 8(a), 9(b). Moreover, the Complaint more than meets the "relaxed" Rule 9(b) standard that courts afford to complaints in bankruptcy cases.

2. The focus of any Rule 9(b) inquiry should be whether, given the nature and facts of the case and circumstances of the parties, the pleading is sufficiently particular to advise the defendants of the conduct of which the plaintiff has complained. It need not set forth, in journalistic detail, every bad act of each defendant. The Trustee's Complaint exceeds this standard. The Complaint alleges that Defendants, as insiders of the Debtors, engaged in a scheme to loot funds from the Debtors for their own personal and/or other improper use. The Trustee alleged facts specifying certain of each Defendant's actions and other details. For example, the Trustee has identified the specific dates and amounts of transfers of approximately

[1]Creditors elected Jeff Marwil as trustee, and the court approved the election on March 8, 2010. Mr. Marwil thus has replaced Patrick M. Collins as trustee of the bankruptcy estates of Life Fund 5.1., LLC (Case No. 09-32672); Life Fund 5.2, LLC (Case No. 09-32674); A&O Life Fund, LLC (Case No. 09-32678); Houston Tanglewood Partners, LLC (Case No. 09-32676); A&O Resource Management, Ltd. (Case No. 09-32677); A&O Bonded Life Assets, LLC (Case No. 09-32679); and A&O Bonded Life Settlement, LLC (Case No. 09-32681) (collectively, the "Debtors")

[2]Unless otherwise specified, each reference to a "Rule" or "Rules" is to the Federal Rules of Civil Procedure, as made applicable to this adversary proceeding in accordance with the Federal Rules of Bankruptcy Procedure.

$38 million of the Debtors' property, and identified the non-debtor accounts to which these transfers were made. The Complaint also sets forth the dates and amounts of at least $1.5 million transferred to the personal accounts of Defendants and the other insider defendants, and provides specific details regarding transfers to each Defendant's personal accounts. The fact that the Complaint sometimes refers to Allmendinger and Oncale, along with their partner Wahab, collectively as the "Principals," is not a basis for dismissal under the Federal Rules of Civil Procedure. Plaintiffs need not plead with Rule 9(b) particularity where, as here, the defendants are corporate insiders and the plaintiff is a bankruptcy Trustee who must allege fraud based on second-hand knowledge from books and records, which Defendants left in disarray.

II. STATEMENT OF FACTS

3. On January 7, 2010, former trustee Collins filed the Complaint seeking to avoid and recover fraudulent conveyances from the Debtors to several defendants including Defendants Allmendinger and Oncale, pursuant to sections 548 and 550 of the Bankruptcy Code and the Illinois Uniform Fraudulent Transfer Act and/or the Texas Uniform Fraudulent Transfer Act.[3] The Complaint also sought recovery from various individuals, including Defendants Allmendinger and Oncale, two former owners of Debtors, who the Trustee alleges were involved in or facilitated the looting of and misapplication of Debtors' funds in or about late 2007 and 2008, in breach of their fiduciary duties and other applicable law.

4. On March 10, 2008, Defendant Allmendinger filed his Motion to Dismiss, claiming that the Complaint failed to satisfy Rules 12(b)(6) and 9(b). On March 12, 2010, Defendant Oncale belatedly filed his Motion to Dismiss and Motion for More Definite Statement alleging the same. Jeff Marwil, solely in his capacity as Trustee, states the following in support of his opposition.

[3] 740 ILCS 160/1 *et seq.*; Tex. Bus. & Com. Code §§ 24.001 *et seq*.

III. ARGUMENT

A. Federal Notice Pleading Standards and Relaxed Application of Rule 9(b) Apply to Evaluate the Sufficiency of the Trustee's Complaint.

5. It is well recognized that the Rules mandate notice pleading in federal courts, and the United States Seventh Circuit Court of Appeals has made it clear that notice pleading remains the standard in federal courts today.[4] A Rule 12(b)(6) motion to dismiss tests the sufficiency of the complaint rather than the merits of the case.[5] Thus, all well-pleaded allegations of a complaint are assumed true and read in the light most favorable to the plaintiff.[6]

6. Although Rule 9(b) imposes heightened pleading standards for fraud allegations, it must be read in harmony with the basic federal notice pleading context and Rule 8(a), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief.[7] In Rule 9(b) inquiries, courts focus particularly on whether, given the nature and facts of the case and circumstances of the parties, the pleading in question is sufficiently particular to satisfy Rule 9(b)'s purposes, including giving defendants notice to the conduct complained of so that they may prepare a defense.[8] Moreover, courts generally evaluate averments of fraud in the bankruptcy context more liberally than in other civil actions because in bankruptcy cases,

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[4] See, e.g., Doss v. Clearwater Tile Co., 551 F.3d 634, 639 (7th Cir. 2007)(stating that Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007), a recent Supreme Court case that addressed pleading standards, "did not signal an end to notice pleading in federal courts").

[5] Paloian v. Greenfield, 349 B.R. 171, 177 (Bankr. N.D. Ill. 2008) (quoting Gibson v. City of Chicago, 910 F.2d 1510, 1520 (7th Cir. 1990)).

[6] Paloian v. Greenfield, 349 B.R. at 177. A plaintiff need only plead facts sufficient to show that recovery is plausible. Zamora v. Jacobs, 403 B.R. 565, 573 (Bankr. N.D. Ill. 2009).

[7] Wieboldt Stores, Inc. v. Schottenstein, 94 B.R. 488, 498 (Bankr. N.D. Ill. 1988).

[8] Wieboldt Stores, Inc. 94 B.R. at 498.

trustees often must allege fraud based on second-hand knowledge.[9] The Complaint here easily satisfies Rule 9(b)'s standard.

B. This Court Should Deny Defendants' Motions Because the Trustee Has Pled Each Count With Sufficient Particularity to Give Defendants Notice of the Conduct Complained of, as Required by Rule 9(b).

7. Defendants' Rule 9(b) arguments fail as to the Trustee's Illinois and Texas breach of fiduciary duty claims and the Texas Uniform Fraudulent Transfers Acts ("TUFTA") claims because these claims are not subject to Rule 9(b). See Cement-Lock v. Gas Technology Institute, No. 05 C 0018, 2005 WL 2420374, at *17 (N.D. Ill. Sept. 30, 2005) (declining to apply requirements of Rule 9(b) to claims of breaches of fiduciary duty based upon self-dealing, non-arm's length deals, and misappropriation of plaintiff's funds); Airport Boulevard Apartments, Ltd. v. NE 40 Partners, Limited Partnership, 411 B.R. 352, 363 (Bankr. S.D. Tex. 2009) (stating that 9(b) does not apply to breach of fiduciary duty claims to the extent that those claims are predicated on acts separate from alleged fraudulent acts); Alexander v. Holden Bus. Forms, Inc., No. 4:08-CV-614-Y, 2009 WL 1406242 (N.D. Tex. May 20, 2009) (agreeing with plaintiff's argument that 9(b) does not apply to constructive fraud under the TUFTA because such claims do not require allegations similar to common-law fraud as contemplated by Rule 9(b)); Airport Boulevard Apartments, Ltd., 411 B.R. at 365 n.9 (noting that federal courts in Texas have generally restricted applicability to claims of intentional conduct). Even if this Court rules that the fiduciary duty and constructive fraud claims are subject to Rule 9(b), the Complaint is more than sufficient.

8. Contrary to Defendants' contentions, Rule 9(b)'s heightened pleading standard does not require a plaintiff to plead each fraudulent detail, so long as the circumstances

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[9] Wieboldt Stores, Inc., 94 B.R. 488 at 498. Seidel v. Byron, No. 05 C 6698, 2008 WL 4411541 at *2 (N.D. Ill. Sept. 26, 2008); Rave Commc'n., Inc. v. Entm't. Equities, Inc., 138 B.R. 390, 395-96 (Bankr. S.D.N.Y. 1992).

constituting fraud have been set forth adequately enough to satisfy the purposes of the Rule; particularly the purpose of informing a defendant of the acts of which plaintiff complains so that he can prepare an effective response and defense.[10] In Wieboldt, the court denied the defendant's Rule 9(b) motion to dismiss counts under section 548(a)(1) of the Bankruptcy Code because the plaintiff had adequately described the specific injury it sought to redress, described the legal theories upon which it based its claims, and included enough information in its complaint to advise each defendant or group of defendants of the claims made against them. Wieboldt Stores, Inc., 94 B.R. at 498.

9. Similar to the complaint in Weiboldt, the Complaint here has more than met the Rule 9(b) standard. First, the Complaint describes the specific injury for which the Trustee seeks redress and identifies the Trustee's legal theories. As to the fraudulent transfer claims, the Complaint specifically identifies the transfers made and the date ranges and specific dates of those transfers. (See, e.g., Compl. ¶¶ 33-37, 42, 55-56, 63, 64, 109, 118) (alleging date ranges and specific dates, dollar amounts of transfers, and accounts to which funds were transferred). With regard to the breach of fiduciary duty claim, the Complaint clearly identifies the legal theory and describes the specific injury it seeks to redress by, among other things: a) describing the roles of each Defendant in the alleged fraud; b) alleging misuse of corporate assets, self-dealing, mismanagement, corporate waste, and other breaches of fiduciary duties; and c) providing specific examples of such conduct. (See, e.g., Compl. ¶¶ 21, 37, 38).

[10] See New Century Bank, N.A. v. Carmell, Bankruptcy No. 09 B 05547, Adversary No. 09 A 00659, 2010 WL 26442 at *6-11 (Bankr. N.D. Ill. Jan. 5, 2010) (denying defendant's motion to dismiss where the plaintiff's allegations were sufficiently pled to give notice of a plausible claim under the relevant section of the Bankruptcy Code, and reasoning that plaintiffs are not required to plead the who, what, when, and where aspects of the fraud with "exact details . . . as a journalist would hope to relate them to the general public"); see also Wieboldt Stores Inc. v. Schottenstein, 94 B.R. 488, 498 (Bankr. N.D. Ill. 1988); Unlimited v. Amway Corp., 419 B.R. 314, 327 (Bankr. S.D. Tex. 2009).

10. Second, the Complaint includes information sufficient to advise the Defendants individually and as part of the group of insiders of the claims made against them. The Complaint identifies all of the relevant parties as part of the group of insiders. (See, e.g., Compl. ¶¶ 1-14, 32). Moreover, the 173-paragraph Complaint contains numerous paragraphs outlining the Defendants' fraudulent scheme and their specific actions taken at specific times in furtherance thereof. (See, e.g., Compl. ¶ 3) (alleging that the "purported sale [of the Debtors] was only one part of a larger series of insider transactions through which the Defendants caused over $38 million dollars to be transferred from accounts of the Debtors into the accounts of A&O Life Funds LP, a non-debtor affiliate . . . and were transferred directly to the A&O Principals for their own personal use"); (Compl. ¶ 37) (alleging that "from May 1, 2007 through October 15, 2007, approximately $2 million was transferred from A&O Bonded Life Assets' Wells Fargo Account #4139 into the LP Account"). The Complaint goes even further and includes details regarding each individual's receipt of the Debtors' funds. (See, e.g., Compl. ¶ 42(a)) (alleging that "on July 2, 2007, ***Oncale*** and ***Allmendinger*** each deposited, in their personal accounts, $250,000 in checks drawn from the LP Account") (emphasis added).

C. Defendants' Arguments Regarding Alleged 9(b) Deficiencies, Including Arguments Regarding "Collective" or "Group" Pleading, are Inapposite In Cases Like the Present Case.

11. The main thrust of each Motion is that the Complaint should be dismissed because in some places, the Complaint refers to Defendants Almendinger and Oncale and the other former owners of the Debtors in the collective. As discussed above, the Complaint includes sufficient individualized allegations regarding Defendants to satisfy Rule 9(b)'s goal of giving each Defendant notice of the claims against him.

12. Moreover, Defendants' arguments regarding group pleading are misplaced because courts routinely relax the requirements of Rule 9(b) in cases, like the present one, where

the defendants are former "insiders," (*i.e.* former owners of the Debtors) and information regarding their fraud is within their exclusive knowledge or control.[11] Courts have applied this relaxed standard in bankruptcy cases to independent trustees pleading fraud based on second-hand information, and have denied, based on this standard, motions to dismiss over defendants' arguments regarding so called "group pleading" or being "lumped" together. See Wieboldt Stores, Inc. v. Schottenstein, 94 B.R. 488, 498 (Bankr. N.D. Ill. 1988) (acknowledging that courts generally evaluate averments of fraud in the bankruptcy context more liberally, and finding complaint met Rule 9(b) requirements where it was clear enough to advise each defendant or ***group*** of defendants of the claims against them) (emphasis added); Rave Commc'n., Inc. v. Entm't. Equities, Inc., 138 B.R. 390, 395-96 (Bankr. S.D.N.Y. 1992) (finding complaint satisfied 9(b), and noting that courts relax 9(b) standards in bankruptcy context because it is often the trustee, a third party outsider to the fraudulent transaction, that must plead fraud on second-hand knowledge for the benefit of the estate and all of its creditors).

13. For example, in Paloian v. Greenfield, the court found that a trustee had pled fraudulent conveyance and Illinois Uniform Transfer Act claims with sufficient specificity to survive a Rule 9(b) challenge. 349 B.R. 171, 80 (Bankr. N.D. Ill. 2008). The court specifically rejected the defendants' argument regarding group pleading, reasoning that, "individualized information about the role of each defendant in the fraud is not necessary when such information is uniquely within the defendants' knowledge." Paloian at 181. Where details of the acts asserted to constitute fraud itself "are within the defendant's exclusive knowledge, specificity

[11] See, e.g., Vicom, Inc. v. Harbridge Merch. Servs., Inc., 20 F.3d 771, 778 (7th Cir. 1994) (acknowledging that plaintiff need not plead defendants' individualized roles "when a plaintiff is alleging fraud against a third party and thus may lack the requisite Rule 9(b) information, or when such information is uniquely within the defendant's knowledge"); see also Petri v. Gatlin, 997 F.Supp. 956, 973-75 (N.D. Ill. 1997) (rejecting defendants' contention that complaint should be dismissed because it "lumped" defendants together); Cobb v. Monarch Fin. Corp., 913 F.Supp. 1164, 1180 (N.D. Ill. 1995) (same); Endo v. Albertine, 812 F.Supp. 1479, 1497 (N.D. Ill. 1993) (same).

requirements may be relaxed." Id. Under those circumstances, the complaint need only "plead the grounds from the plaintiff's suspicions of fraud." Id.

14. Similarly, the court in IFS Fin. Corp. v. Spohn found that the trustee's fraudulent transfers claims met Rule 9(b)'s requirements even though the complaint directed only one paragraph to defendant, which provided: "a large amount of money was . . . transferred to insiders. Included as a transferee is . . . Solloa, who received $1,130,000 by way of an account in the name of Spohn …." IFS Fin. Corp. v. Spohn, Bankruptcy No. 02-39553, Adversary No. 04-03830, 2009 WL 4910049 at *4 (Bankr. S.D. Tex. Dec. 9, 2009). According to the court, Rule 9(b) was satisfied because the complaint: a) classified individual defendant Ms. Solloa as one of the "insiders" who participated in the alleged scheme; b) provided extensive detail with respect to the overall alleged fraudulent conduct involving a group of insiders; c) specified the amount transferred to Ms. Solloa as part of the scheme; and d) provided date ranges when transfers occurred. Id. at * 4; See also Today's Destiny, Inc. v. Day, Bankruptcy No. 05-90080, Adversary No. 06-3285, 2003 WL 1232140 at *2-5 (Bankr. S.D. Tex. May 1, 2009).

15. Similar to the complaints in Paolian and IFS Fin. Corp., the Complaint includes numerous facts regarding Defendants' scheme to loot the Debtors. In addition to the numerous paragraphs that discuss Defendants' actions as part of the insider group of former owners, the Trustee included information, in his possession, specific to Defendants Allmendinger and Oncale. (See, e.g., Compl. ¶¶ 10, 21, 32, 42(a), 54, 56, 63). The Trustee was not required to plead any additional specifics beyond what he would reasonably know as a third-party outsider. The very nature of the fraud perpetrated here is such that Defendants Allmendinger and Oncale and the other insider defendants have exclusive knowledge regarding some of the particulars as to who performed certain specific acts in furtherance of their collective scheme. This Court

should follow the numerous rulings discussed above, and rule that the Complaint satisfies Rule 9(b).

D. Defendants' Other Arguments for Dismissal Also Fail.

Allmendinger Can Still be Liable for Damages after He Relinquished Control of the Debtors.

16. Allmendinger's assertion that he is not liable for breaches of fiduciary duty related to fraudulent transfers made after he claims to have relinquished control of the A&O Entities ("post-sale transfers") is incorrect and irrelevant to the Motions. First, it is unclear exactly what Allemendinger is asking this Court to do. There is not a separate count of fraud or breach of fiduciary duty for certain post-sale transfers, so there is nothing for the Court to dismiss in response to that portion of the Motion. Second, the Complaint plainly alleges that Allmendinger, together with his conspirators, created a system by which they siphoned money from the Debtors and into their own pockets. (Compl. ¶¶ 33, 35, 37, 42). These allegations in the Complaint sufficiently describe Allmendinger's participation in the conduct forming the basis for the counts of fraud and breach of fiduciary duty. Even if Allmendinger was not directly involved with the post-sale transfers (a point the Trustee does not concede here), Allmendinger can still be liable for the conduct that occurred after he left because it can reasonably be inferred that he was aware that the use of the slush fund he established would continue in exactly the same manner as it did when he was involved. A fiduciary cannot avoid liability for bad acts simply because he conveniently times his departure from a company when he is aware that the company will be harmed by future conduct. Xerox Corp. v. Genmoora Corp., 888 F.2d 345, 355 (5th Cir. 1989). Allmendinger can raise this argument as a defense to the Complaint, but it provides no basis to dismiss the Complaint or any portion thereof.

17. The case upon which Allmendinger relies is inapposite. In In re American International Refinery, the court dismissed claims of fraud against former members of the board of directors because the complaint was devoid of any facts connecting the former directors to the alleged fraudulent conduct. 402 B.R. 728, 739 (Bankr. W.D. La. 2008). However, here, the Complaint has been pled with specificity, directly tying Allmendinger's bad acts to the post-sale transfers.

The Trustee Has Sufficiently Stated Claims for Constructive Fraudulent Transfers under the Bankruptcy Code and State Law.

18. Trustee's Complaint contains counts to recover from Defendants under the Bankruptcy Code's Fraudulent Transfers Act,[12] and the Illinois and Texas equivalents.[13]

19. Defendants argue that the Complaint does not contain allegations that Debtors were insolvent at the time of the transfer and that Debtors received less that reasonable value for the transfers. These arguments are without merit.

The Complaint Sufficiently Alleges that Debtors were Insolvent at the Time of the Transfers or Became Insolvent as a Result of the Transfers.

20. The Complaint consistently alleges that Debtors were insolvent at the time of the transfers or that they became insolvent as a result of the transfers. (Compl. ¶¶ 41, 45, 49, 60, 68,

[12] To establish a fraudulent transfer under Section 548(a)(1)(B), a plaintiff must allege:(a) a transfer of the debtor's property or interest therein; (b) made within two years of the filing of the bankruptcy petition; (c) for which the debtor received less than a reasonably equivalent value in exchange for the transfer; and (d) either (i) the debtor was insolvent when the transfer was made or he was rendered insolvent thereby; or (ii) the debtor was engaged or about to become engaged in business or a transaction for which his remaining property represented an unreasonably small capital; or (iii) the debtor intended to incur debts beyond his ability to repay them as they matured; or (iv) the debtor made such transfer to or for the benefit of an insider. In re Eckert, 388 B.R. 813, 831 (Bankr. N.D. Ill 2008).

[13] Pursuant to the Illinois and Texas UFTAs, to establish a constructive fraudulent transfer, a claimant must establish that the debtor made the transfer: without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor (A) was engaged or was about to engage in a business or transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or (B) intended to incur, or believed or reasonably should have believed that he would incur, debts beyond his ability to pay as they became due. 740 Ill. Comp. Stat. 160/3(a)(2); Tex. Bus. & Comm. Code Ann. § 24.003(a)(2).

112, 120). These are sufficient allegations to survive a motion to dismiss. See White Metal Rolling and Stamping Corp., 222 B.R. 417, 430 (Bankr. S.D.N.Y. 1998).

21. In White Metal Rolling, the court refused to dismiss the claims of constructively fraudulent transfers although the trustee's allegations of insolvency were "somewhat conclusory." Id. Because "insolvency" is defined under New York's Debtor and Creditor law, the court held that "the allegation incorporates the definition and places flesh on a bare statement." Id. Similarly, here, too, definitions of "insolvent" are found in the Bankruptcy Code and the Illinois and Texas UFTAs. See 11 U.S.C. § 101(32)(A); 740 Ill. Comp. Stat. 160/3; Tex. Bus. & Comm. Code Ann. § 24.003. Thus, under the reasoning of White Metal Rolling, the Complaint's allegations that Debtors were insolvent or became insolvent, are sufficient to survive a motion to dismiss.

22. Indeed, the Trustee should not be punished for not alleging the insolvency of the Debtors with any more specificity because Defendants and their conspirators failed to observe corporate formalities, may have commingled funds, and lost (or turned over) books and records that were in disarray, thus making it difficult for the Trustee to extract relevant financial information. It would be unfair to dismiss the Complaint at this stage, before an opportunity to pursue discovery.

The Complaint Sufficiently Alleges that Debtors Received Less than Reasonably Equivalent Value.[14]

23. Whether a debtor received reasonably equivalent value is a question of fact. In re Zeigler, 320 B.R. 362, 374 (Bankr. N.D. Ill. 2005). A complaint that alleges that an entity transferred property to another without receiving reasonably equivalent value will survive a

[14] Presumably, Allmendinger's heading in his brief is a mistake: "The Plaintiff has not alleged facts showing that Allmendinger received less than reasonably equivalent value." Plaintiff only need to allege (and sufficiently does so) that the *Debtors* received less than reasonably equivalent value.

motion to dismiss. See, e.g., IRN Payment Sys., No. 07 C 0141, 2007 WL 2713366, at *4 (N.D. Ill. 2007). Further, nominal consideration or the absence of consideration is not "reasonably equivalent value." In re Joy Recovery Technology Corp., 286 B.R. 54, 75 (Bankr. N.D. Ill. 2002).

24. Defendants' arguments thus fail because the Complaint specifically alleges that the transfers were made for less than reasonably equivalent value. (Compl. ¶¶ 40, 44, 48, 59, 111, 119). In addition, the Complaint alleges that the transfers were made for the benefit of the defendants, including Allmendinger and Oncale, without providing any value to Debtors in exchange for the transfers. (Compl. ¶¶ 35, 37, 39, 42, 46, 47, 53, 55, 56, 58). Indeed, with respect to the sale transaction whereby Defendants' purportedly sold the Debtors, Allmendinger concedes that the Complaint alleges that the consideration received [*i.e.*, the relinquishing of control] for the purported $3 million purchase was less than reasonably equivalent value. (Def. Allmendinger's Br. at 8). The lack of reasonably equivalent value here is even more evident in light of the allegation that several of the defendants failed to relinquish control and thus, the Debtors did not even receive the bargain they purportedly sought. (Compl. ¶¶ 111, 119).

25. Further, Allmendinger cannot escape liability here because he purportedly gave up control. Whether his relinquishing of control is reasonably equivalent value is a question of fact and not appropriately disposed of in a motion to dismiss. See, e.g., Federalpha Steel LLC Creditors' Trust v. Fed. Pipe & Steel Corp., 368 B.R. 679, 693 (N.D. Ill. 2006) (denying motion to dismiss constructive fraudulent transfer claims because there was a factual dispute regarding issue of reasonable equivalent value).

The Complaint Sufficiently Alleges that Defendants Possessed Actual Intent to Defraud.

26. While Defendants are correct that the Code, as well as the Illinois and Texas UFTAs similarly require evidence of actual intent to hinder, delay or defraud,[15] proof of direct intent is rare. Therefore, courts will look to circumstantial evidence – the so-called "badges of fraud" – to infer direct intent. In re Knippen, 355 B.R. 710, 721 (Bankr. N.D. Ill. 2006). Some factors courts consider when determining whether there was a fraudulent transfer under section 548 of the Bankruptcy Code include: (a) absconding with the proceeds of the transfer immediately after their receipt; (b) absence of consideration when the transferor and transferee know that outstanding creditors will not be paid; (c) a huge disparity in value between the property transferred and the consideration received; (d) the fact that the transferee is or was an officer, agent, or creditor of an officer of the corporate transferor; (e) insolvency of the debtor; and (f) the existence of a special relationship between the debtor and the transferee. Id. at 722. Similarly, both the Illinois and Texas Uniform Fraudulent Transfer Acts, by statute, provide eleven factors (some of which overlap the factors listed above) that a court may consider, which Allmendinger sets forth in his brief. *See* Allmendinger Br. at 10; 740 Ill. Comp. Stat. 160/5(b); Tex. Bus. & Comm. Code Ann. § 24.005(b).

27. These lists of factors are not exhaustive, however. See id. ("In determining actual intent. . . consideration may be given, *among other factors*, to whether . . .") (emphasis added); Frank IX & Sons, Inc. v. Phillipp Indus. Inc., 1997 WL 534509, at *8 (N.D. Ill. Aug. 25, 1997). Critically, no single factor is dispositive to a finding of fraudulent intent. See In re Spatz, 222 B.R. 157, 168 (N.D. Ill. 1998).

28. Here, Allmendinger concedes that the Complaint alleges that the transfers were made to an insider; the debtors removed or concealed assets; the value of the consideration received by the debtors was not equivalent to the transferred asset; and that the debtors were

[15] 740 Ill. Comp. Stat. 160/5(a)(1); Tex. Bus. & Comm. Code Ann. § 24.005(a)(1).

insolvent or became insolvent shortly after the transfers were made. On this basis alone, his Motion to Dismiss should be denied. Allmendinger asserts that a purported failure to allege seven of these eleven UFTA factors is dispositive, yet he fails to offer authority to support this conclusion. Indeed, there is no requirement that a claimant must prove, much less allege in a complaint, each criteria. Allmendinger would have this Court impermissibly convert these *criteria* for determining fraudulent intent into required *elements*.

The Complaint Sufficiently Alleges that Defendants Breached Their Fiduciary Duties.

29. To adequately plead a breach of fiduciary duty, a plaintiff must allege: (a) the existence of a fiduciary duty, (b) a breach of that duty, and (c) damages proximately resulting from that breach.[16] The Complaint sufficiently alleges these elements as to Allmendinger.

30. The Complaint alleges that Defendants were owners of the Debtors and held themselves out to be business managers and principals. (Compl. ¶¶ 10, 21, 27). In these various positions, Defendants owed fiduciary duties to Debtors. (Compl. ¶ 132). Defendants breached those duties to the Debtors when they, inter alia, created a scheme by which they, along with their conspirators, siphoned money from the Debtors to themselves (Compl. ¶¶ 33, 35, 37, 39, 42, 53, 54, 56); mismanaged the Debtors' finances and business operations (Compl. ¶¶ 31, 38); wrongfully engaged in undisclosed non-arm's length transactions (Compl. ¶¶ 50-61); and Defendant Allmendinger removed himself from the management of the Debtors knowing the breaches of fiduciary duty would continue (Compl. ¶¶ 10, 62-68). The Debtors were damaged as a result of these breaches of fiduciary duty. (Compl. ¶¶ 40, 41, 44, 45, 48, 49, 59, 135). Additionally, there is no requirement that plaintiff plead the elements of common law fraud as a prerequisite to establishing a breach of fiduciary duty.

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[16] Navigant Consulting, Inc. v. Wilkinson, 508 F.3d 277, 283 (5th Cir. 2007) (Texas law); Cement-Lock v. Gas Technology Institute, No. 05 C 0018, 2005 WL 2420374, at *17 (N.D. Ill. Sept. 30, 2005) (Illinois law).

31. The case upon which Allmendinger relies is inapposite here. In Schaufenbuel v. InvestForClosures Financial LLC, plaintiffs were investors who alleged that they were fraudulently induced to purchase certain unregistered securities and brought claims including fraud and breach of fiduciary duty. 2009 WL 3188222, at *1 (N.D. Ill. Sept. 30, 2009). The court held that the claim for breach of fiduciary duty was subject to Rule 9(b) because it was based upon the alleged fraudulent inducement. Id. at *3. Because plaintiffs' claim for fraud failed, so did its claim for breach of fiduciary duty. Id. at *4. Here, the claims for breaches of fiduciary duty are patently distinct from the allegations of fraudulent transfers.[17]

32. Wherefore, Defendants' Motions should be denied.[18]

Dated: April 12, 2010

Respectfully submitted,

Jeff J. Marwil, solely as Trustee of LIFE FUND 5.1, LLC et al.

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[17] Allmendinger also mistakenly asserts that joint and several liability is not recognized under Illinois law for breaches of fiduciary duty and then he cites 805 Ill. Comp. Stat. 180/15-3(g)(4). However, that section of the statute merely states that an LLC operating agreement may delegate managerial authority to the members of the LLC, thus relieving the manager of the fiduciary duties associated with that authority. To the extent individuals together breach fiduciary duties, they can be held jointly and severally liable for resulting damages. See Jennings v. Pierce, No. 93 C 2539, 1995 WL 88795, at *2 (N.D. Ill. Mar. 1, 1995); see also Ohio Drill & Tool Co. v. Johnson, 625 F.2d 738, 742 (6th Cir. 1980).

[18] In the event any claims are dismissed for insufficient pleading under Rules 8 or 9(b), the Trustee respectfully requests that the dismissals be without prejudice and that the Trustee be granted leave to amend the Complaint to remedy any deficiencies. See, e.g., Bus. Sys. Engineering, Inc. v. International Bus. Machines Corp., No. 04 C 8254, 2005 WL 1766374, at *1 (N.D. Ill. July 20, 2005) (granting leave to replead).