

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	3
ALLEGATIONS OF THE COMPLAINT	4
LEGAL STANDARD	5
ARGUMENT	6
A. Plaintiff's Fraudulent Transfer Claims (Counts VI and VII) Should Be Dismissed For Failing To Meet The Heightened Pleading Requirements Of Rule 9(b)	6
B. Count VI Should Be Dismissed Because Plaintiff Fails to State A Claim For Fraudulent Transfers Against the "A&O Principals" Under 11 U.S.C. 548(a)(1) and 550(a).....	7
C. Count VII Should be Dismissed Because Plaintiff Fails to State A Claim Against the "A&O Principals" Under Both Illinois and Texas Fraudulent Transfers Acts.....	9
D. Count VIII Should be Dismissed Because Plaintiff Fails to State A Claim And Fails Adequately To Allege Actual Intent Against the "A&O Principals" Under Illinois and Texas Fraudulent Transfer Acts.....	11
E. Count IX Should be Dismissed Because Plaintiff Fails to State A Claim For Breach Of Fiduciary Duty Against the "A&O Principals"	11
CONCLUSION	11

Defendant Brent Oncale (“Oncale”) respectfully submits this Memorandum of Law in Support of his Motion To Dismiss the Original Complaint of Plaintiff Patrick Collins (“Complaint”), the duly appointed Chapter 11 Trustee of the Debtors A&O Life Fund, LLC; A&O Bonded Life Settlements, LLC; A&O Bonded Life Assets, LLC; Life Fund 5.1, LLC; Life Fund 5.2, LLC; Houston Tanglewood Partners, LLC; and A&O Resource Management, Ltd. (collectively “Debtors” or “A&O Entities”) pursuant to Federal Rules of Civil Procedure 9(b) and 12(b)(6); or, in the alternative, Defendant’s Motion For More Definite Statement pursuant to Fed. R. Civ. P. 12(e).

I. PRELIMINARY STATEMENT

On January 7, 2010, Plaintiff Liquidation Trustee (“Plaintiff” or “Trustee”) filed this adversary complaint (“Complaint”) against Defendant Debtor entities, their attorney and their former principals (“A&O Principals”), including Defendant Brent Oncale (“Oncale”). The Trustee purports to assert four causes of action against the former A&O Principals for: (1) avoidance and recovery of fraudulent conveyances by debtor pursuant to §§ 548(a)(1) and 550(a) of the Bankruptcy Code; (2) avoidance and recovery of fraudulent transfers pursuant to *the Illinois Uniform Fraudulent Transfers Act*, 740 ILCS 160/1 et seq. and/or the *Texas Uniform Fraudulent Transfers Act*, Tex. Bus. & Com. Code §§24.001 et seq.; (3) intentional violation of the Illinois and Texas Uniform Fraudulent Transfers Act; and (4) breach of fiduciary duty.

The Complaint is redundant, group-plead, and conclusory. It falls far short of stating a cognizable claim under any fraudulent conveyance statute and fails to state a claim for breach of fiduciary duty. Indeed, although Plaintiff identifies a number of transitions involving a combination of defendants in this Action, Plaintiff’s vague and conclusory statements as to the former principals of Debtors do not state a cause of action and should be dismissed. In the alternative, Plaintiff should be required to file a more definite statement in which, among other things, the group pleading defects are cured and Mr. Oncale is afforded an opportunity which act, omission, transaction or decision he is

actually being charged with. Moreover, to the extent the Complaint alleges that Mr. Oncale owed certain duties to the creditors of the A&O entities, Plaintiff should identify when and how those duties were allegedly breached by Mr. Oncale so that he might prepare a meaningful response.

Accordingly, Defendant Brent Oncale respectfully requests that this Court dismiss Counts VI, VII, VIII and IX or require a more definite statement of facts to supplement the conclusory allegations that are insufficient to support Plaintiff's.

II. ALLEGATIONS OF THE COMPLAINT

The allegations set forth in the Complaint concerning Mr. Oncale's purported violations of fraudulent transfer statute and of the common law are summarized as follows: (Compl., ¶¶1-3, 21);

- » Oncale and Allmendinger founded the original A&O business and at all relevant times prior to August 31, 2007, held themselves out to be business managers, owners and principals of the A&O Entities. (Compl., ¶21).
- » In late 2007, the Debtors were purportedly sold to one or more Nevis-based entities in exchange for \$3 million, which was to be paid to then-owners Brent Oncale, Adley Abdulwahab, also known as Adley Wahab ("Wahab"), and Christian Allmendinger ("Allmendinger"). Upon information and belief, the purported sale was engineered by Wahab, Oncale, Russell Mackert ("Mackert") an attorney for the Debtors and perhaps others to create the illusion that these principals had relinquished their financial stake in and control of the Debtors. At the time, regulatory investigations were proceeding in multiple states and, upon information and belief, the principals knew that there were significant issues with the "investments" that had been marked and sold to investors. (Compl., ¶1).
- » The sale was a sham and, in reality, at least Oncale, Wahab and Mackert maintained and continued to exercise authority and control over the financial accounts of the Debtors and investor funds, as well as the Debtors generally. In particular, as detailed below, at least Oncale, Wahab and Mackert engaged in a series of circular and fraudulent transfers of A&O investor funds through which Oncale, Wahab, and Allmendinger effectively received millions of dollars from the Debtors to "sell" the Debtors. (Compl., ¶2).
- » This purported sale was only one part of a larger series of insider transactions through which the Defendants caused over \$37 million dollars to be transferred from accounts of the Debtors into the accounts of A&O Life Funds, LP, a non-debtor affiliate of the Debtors. Millions of dollars of investor funds in A&O Life Funds, LP were then transferred directly to A&O principals for their own personal use. In addition, over \$12 million of these funds were transferred to Mackert's lawyer trust fund account, and distributed for the benefit of the A&O

principals and Mackert, including but not limited to over \$5 million each in transfers to and for the benefit of Oncale and Wahab. (Compl., ¶3).

Although the Complaint alleges specific transactions throughout, it fails to attribute any specific misconduct to Mr. Oncale, as opposed to the group of Defendants, and merely recites on information and belief, without any factual support, that Debtors were insolvent at the time of the transactions or became insolvent because of them. See Compl., ¶¶42 -68, 109-115, 122-130-134. These conclusory allegations are insufficient to action for a fraudulent conveyance or breach of fiduciary duty. Moreover, in many instances, the allegations in the Complaint constitute impermissible "group pleading" and fail to allege any of the essential "who, what, when, why and how" facts specific to Mr. Oncale as required under Rule 9(b)'s strict pleading requirements. Among other things, the pleadings do not identify any continuing duty of Mr. Oncale following his sale of the Debtor entities in 2007.

III. LEGAL STANDARD

In determining whether to grant a motion to dismiss, the Court assumes all well-pleaded allegations in the complaint to be true and draws all inferences in the light most favorable to the plaintiff. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556; *Killingsworth v. HSBC Bank*, 507 F.3d 614, 618 (7th Cir. 2007). To survive a motion to dismiss, the complaint must overcome "two clear, easy hurdles": (1) "the complaint must describe the claim in sufficient detail to give the defendant fair notice of what the claim is and the grounds on which it rests;" and (2) "its allegations must actually suggest that the plaintiff has a right to relief, by providing allegations that raise a right to relief above the 'speculative level.'" *Tamayo v. Blagojevich*, 526 F.3d 1074, 1084 (7th Cir. 2008).

IV. ARGUMENT

A. Plaintiff's Fraudulent Transfer Claims (Counts VI and VII) Should Be Dismissed For Failing To Meet The Heightened Pleading Requirements Of Rule 9(b).

When the plaintiff is alleging fraud, the pleading standard is more stringent. *Borsellino v. Goldman Sachs Grp., Inc.*, 477 F.3d 502, 507 (7th Cir. 2007). Rule 9(b) of the Federal Rules of Civil Procedure provides: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). This heightened pleading requirement is a response to the "great harm to the reputation of a business firm or other enterprise a fraud claim can do." *Borsellino*, 477 F.3d at 507. Thus, "[a] plaintiff claiming fraud or mistake must do more pre-complaint investigation to assure that the claim is responsible and supported, rather than defamatory and extortionate." *Id.* A complaint alleging fraud must provide "the who, what, when, where, and how" of the fraud. *Id.* Some courts have recognized that in cases where a bankruptcy trustee pleads fraud, greater liberality should be afforded, since the trustee often must plead fraud based on secondhand knowledge, or may find the debtor's records in disarray. *See Seidel v. Byron*, No. 05-6698, 2008 U.S. Dist. LEXIS 76306, 2008 WL 4411541, at *2 (N.D. Ill. Sept. 26, 2008). A motion to dismiss will be granted, however, where the trustee's allegations fail to raise the right to relief above a speculative level in that the complaint contains allegations too vague to give defendants notice of the claims against them; does not adequately indicate which allegations support what claims; or provides no support for the amount of relief requested. *Id.* at 5.

Here, Plaintiff fails to attribute any specific misconduct to Mr. Oncale. Rather, the allegations are group plead and generalized. The complaint does not plead the who what when and where required by Rule 9(b). It merely recites , on information and belief, without any factual support, that certain transactions occurred which constituted misconduct and that Debtors were insolvent at the time of the transactions or became insolvent because of them. Plaintiff should not be permitted to

avoid the necessity of properly pleading the insolvency of the Debtors at the time of the transactions or immediately thereafter.

B. Plaintiff Fails To State A Claim For Fraudulent Transfers Against the “A&O Principals” Under 11 U.S.C. 548(a)(1) and 550(a)

Under 11 U.S.C. § 548(a)(1)(A), the trustee of a debtor may avoid a transfer of an interest of the debtor in property made within two years before the date of the filing of a petition for bankruptcy, if the debtor made such transfer or incurred such obligation with actual intent to hinder, delay, or defraud any entity to which the debtor was or became, on or after the date that such transfer was made or such obligation was incurred, indebted.

Plaintiff simply concludes, without support, that the former principals had formed an “actual intent: to hinder, delay and defraud. The allegations, based on information and belief, without any factual support, cannot support the fraudulent transfer claims under any statute.

C. Count VII Should be Dismissed Because Plaintiff Fails to State A Claim Against the “A&O Principals” Under Illinois and Texas Fraudulent Transfer Act

Pursuant to Count VII of the Complaint, the Trustee seeks to avoid and recover the transfer of assets in 2007 from the Debtor entities to their former principals and others pursuant to the UFTA.

The UFTA provides in pertinent part:

§ 5. (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor’s claim arose before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred, if the debtor made the transfer or incurred the obligation:

- (1) with actual intent to hinder, delay, or defraud any creditor of the debtor;
- or
- (2) 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 a 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.

§ 6. (a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation.

740 ILCS 160/5(a) and 160/6(a).

Sections 5 and 6(a) of the UFTA are analogous to 11 U.S.C. § 548(a)(1) and (2).¹ *See Scholes v. Lehmann*, 56 F.3d 750, 756 (7th Cir.), cert. denied, 516 U.S. 1028 (1995). Therefore, precedent under § 548(a)(1) and (2) is equally applicable to the Illinois and Texas versions of the UFTA. *Martino v. Edison Worldwide Capital (In re Randy)*, 189 B.R. 425, 443 (Bankr. N.D. Ill. 1995).

In this case, the Complaint states no facts in support of its repeated conclusions that: (1) The Debtors were sold, and the Sale Transfers were made, for less than reasonably equivalent value; (2) Upon information and believe, the Debtors either were insolvent or became

insolvent as a result of the Sale Transfers; and (3) Upon information and belief, the "sale" was executed with the actual intent to defraud the Debtors. Compl., 59-62. Plaintiff's repetition of elements of a cause of action, without actual facts alleged, does not state a cognizable claim.

¹ An important difference between § 548 and the UFTA is that § 548 authorizes avoidance of transfers made within one year before the bankruptcy filing. 11 U.S.C. §548(a). Causes of action for fraudulent conveyances can be brought under the UFTA, however, within four years after the transfer was made. 740 ILCS 160/10(a). Because the transfer at issue was made more than one year before the bankruptcy filing, relief under §548 is not available to the Trustee and he must rely on the UFTA.

D. Claim And Fails Adequately To Allege "Actual Intent" Against the "A&O Principals" Under Illinois and Texas Fraudulent Transfer Act

The UFTA allows the Trustee to recover the transfer made by the Debtor under two theories: (1) if the Debtor made the transfer with actual intent to defraud a creditor; or (2) if the Debtor did not receive reasonably equivalent value in exchange for the transfer and was insolvent at the time of the transfer or became insolvent as a result of the transfer. *Id.* The UFTA speaks to two types of fraud -- "fraud in fact" and "fraud in law." *Scholes*, 56 F.3d at 756-57. "Fraud in fact" or actual fraud occurs when a debtor transfers property with the intent to hinder, delay or defraud his creditors. The moving party must prove a specific intent to hinder, delay or defraud. *Lindholm v. Holtz*, 221 Ill. App.3d 330, 334, 581 N.E.2d 860, 863 (2d Dist. 1991) (citing *Gendron v. Chicago & NorthWestern Transp. Co.*, 139 Ill.2d 422, 437, 564 N.E.2d 1207, 1214-15 (1990)). In determining whether a transfer is made with actual intent to defraud, the UFTA sets forth several factors--also known as the "badges of fraud"-- from which an inference of fraudulent intent may be drawn. Section 5(b) of the UFTA sets forth the following indicia:

- (1) the transfer or obligation was to an insider;
- (2) the debtor retained possession or control of the property transferred after the transfer;
- (3) the transfer or obligation was disclosed or concealed;
- (4) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
- (5) the transfer was of substantially all the debtor's assets;
- (6) the debtor absconded;
- (7) the debtor removed or concealed assets;
- (8) the value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;

- (9) the debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
- (10) the transfer occurred shortly before or shortly after a substantial debt was incurred; and
- (11) the debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

740 ILCS 160/5(b). Courts have held that when these “badges of fraud” are present in sufficient number, it may give rise to an inference or presumption of fraud. *Steel Co. v. Morgan Marshall Indus., Inc.*, 278 Ill. App.3d 241, 251, 662 N.E.2d 595, 602 (1st Dist. 1996) (citation omitted).

“Fraud in law,” on the other hand, does not require any showing of fraudulent intent. *Scholes v. Lehmann*, 56 F.3d 750, 757 (7th Cir.1995) (interpreting Illinois's version of the UFTA). The distinction between “fraud in fact” and “fraud in law” cases is derived from whether or not there was any consideration for the conveyance under attack. *Second Nat'l Bank of Robinson v. Jones*, 309 Ill. App. 358, 365, 33 N.E.2d 732, 736 (4th Dist. 1941). Lack of consideration or inadequate consideration for a debtor's conveyance, coupled with the existence or prospect of other unpaid creditors, triggers the “fraud in law” theory in which intent to hinder, delay or defraud is presumed from the circumstances. *See Capitol Indem. Corp. v. J.H. Keller*, 717 F.2d 324, 327 (7th Cir. 1983).

Under § 6(a) of the UFTA, the elements of the cause of action are (1) the creditor's claim arose before the transfer, (2) the debtor made the transfer without receiving a reasonably equivalent value in exchange for the transferred property, and (3) the debtor either was insolvent at the time of the transfer or became insolvent as a result of the transfer. *See Falcon v. Thomas*, 258 Ill. App.3d 900, 909 (4th Dist. 1994).

Here, Plaintiff's allegations fail to state a claim against Mr. Oncale under either test. Plaintiff merely recites the elements for each cause of action, and concludes that each element is satisfied without pleading facts in support.

E. Count IX Should be Dismissed Because Plaintiff Fails to State A Claim For Breach Of Fiduciary Duty Against the "A&O Principals"

Last, in Count IX, Plaintiff attempts to assert a claim for breach of fiduciary duty. Under Illinois law, a "fiduciary duty is the duty of an agent to treat his principal with the utmost candor, rectitude, care, loyalty, and good faith-in fact to treat the principal as well as the agent would treat himself." *Lagen v. Balcov Co.*, 274 Ill.App.3d 11, 653 N.E.2d 968, 975, 210 Ill. Dec. 773 (Ill. App. Ct. 2nd Dist. 1995) (quoting *Burdett v. Miller*, 957 F.2d 1375, 1381 (7th Cir. 1992)). A fiduciary relationship may also be established "[i]f a person solicits another to trust him in matters in which he represents himself to be expert as well as trust-worthy and the other is not expert and accepts the offer and reposes complete trust in him." *Burdett*, 957 F.2d at 1381. But trust is not enough because one trusts most people with whom one does business. *Lagen*, 653 N.E.2d at 975. The "touchstone of a fiduciary relationship is the presence of a significant degree of dominance and superiority of one party over another." *Lagen*, 653 N.E.2d at 975.

In this case, the Complaint does not allege any significant degree of power or dominance sufficient to create a fiduciary duty. Moreover, Plaintiff alleges no facts that would suggest a continuing duty that survived the sale of the entities in 2007. Accordingly, the Count IX should be dismissed.

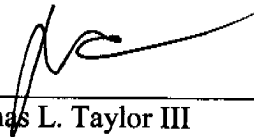
V. CONCLUSION

For all the foregoing reasons, Defendant Brent Oncale respectfully requests that this Court dismiss Counts VI, VII, VIII and IX.

Dated: March 10, 2010

Respectfully submitted,

TAYLOR CUADRADO P.C



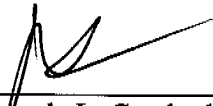
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CERTIFICATE OF SERVICE

I, Marcela L. Cuadrado, an attorney, hereby certify that on the 10th day of March, 2010, I caused to be served in a manner consistent with the Federal Rules of Civil Procedure a true and correct copy of **Defendant Brent Oncale's**:

- (1) **NOTICE OF MOTION;**
- (2) **MOTION TO DISMISS PLAINTIFF'S ORIGINAL COMPLAINT and MOTION FOR MORE DEFINITE STATEMENT;**
- (3) **MEMORANDUM OF LAW IN SUPPORT OF THEREOF; AND**
- (4) **[PROPOSED] ORDER**



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