

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

In re:
LIFE FUND 5.1, LLC, et. al.,

Debtors

JEFF J. MARWIL, solely as TRUSTEE of LIFE
FUND 5.1, LLC, et. al.,

Plaintiff,

v.

BRENT ONCALE; RUSSELL MACKERT;
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.

§ Chapter 11
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§ Case No. 09-32672
§ (Jointly Administered)
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§ Hon. A. Benjamin Goldgar
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§ Adversary No.: 10 A 00042
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**DEFENDANT CHRISTIAN ALLMENDINGER'S
REPLY IN SUPPORT OF HIS MOTION TO DISMISS**

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**DEFENDANT CHRISTIAN ALLMENDINGER'S
REPLY IN SUPPORT OF HIS MOTIONS TO DISMISS**

Defendant Christian Allmendinger ("Allmendinger") respectfully submits this Reply in support of his Motion to Dismiss pursuant to Rules 8(a), 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

INTRODUCTION

The Trustee, in his Response, makes multiple attempts to justify his vague and legally insufficient Complaint against Allmendinger. First, the Trustee argues that the Complaint satisfies Rule 9(b) because a trustee is afforded more deference in bankruptcy cases. The Trustee then contends that the Complaint adequately pleads the particularity required as to each Defendant. The Response also claims that Allmendinger can still be held liable even after he relinquished control if it is alleged that he knew of the ongoing fraud at the time he relinquished control. The Trustee further maintains that he was under no obligation to plead Allmendinger's alleged breach of fiduciary duty or constructive fraud under the Texas Uniform Fraudulent Transfer Act ("TUFTA") to the extent of specificity required under Rule 9(b). Finally, the Trustee argues that the Complaint sufficiently states claims for constructive fraudulent transfers under the Bankruptcy Code and Texas law. Allmendinger stands by his Motion to Dismiss and respectfully argues, as set forth in the Motion to Dismiss and below, that the Complaint against him should be dismissed.

ARGUMENT

I. THE COMPLAINT STILL FAILS TO ALLEGE FACTS DEMONSTRATING THAT ALLMENDINGER KNEW ABOUT THE ALLEGED FRAUDULENT CONDUCT OF OTHER DEFENDANTS AFTER HIS DEPARTURE.

The Trustee asserts that in the context of bankruptcy cases, courts are to evaluate averments of fraud more liberally than other civil cases because the Trustee ordinarily does not

have first-hand knowledge of the alleged fraud. But here, because the Trustee had access to a plethora of information, including debtors' records and investors, he did not have to speculate about any alleged fraud to the great extent the Trustee claims that he does. Unlike other cases, the Trustee had the information at his disposal to plead facts regarding Allmendinger's alleged knowledge of any fraud. Regardless of any liberties that may be afforded to a less knowledgeable Trustee, this does not grant the Trustee here a reprieve from including facts and details of the circumstances constituting the alleged fraud. *Neiman v. Irmen (In re Irmen)*, 379 B.R. 299, 309 (Bankr. N.D. Ill. 2007). Fair notice requires facts supporting the allegations; allegations founded upon "information and belief" will not suffice unless a statement of fact providing the basis of this belief is included. *Id.*

Moreover, the cases cited by the Trustee in support of this proposition are inapposite. Two of the cases cited by the Trustee, *Wieboldt Stores, Inc. v. Schottenstein* and *Rave Communication, Inc. v. Entertainment Equities, Inc.*, are pre-*Twombly* and *Iqbal*. (Response ¶ 6); *Bell Atl. Corp. v. Twombly*, 550 U.S. 540 (2007); *Ashcroft v. Iqbal*, ---U.S.---, 129 S. Ct. 1937 (2009). Accordingly, post-*Twombly* and *Iqbal*, the requirements are more stringent. *Elliott v. Credit Control Servs., Inc.*, No. 09CV2649 DMS, 2010 WL 1495402 (S.D. Cal., Apr. 14, 2010). The last case, *Seidel v. Byron*, is a memorandum opinion in which the court granted the Defendant's 12(b)(6) motion because the Complaint lacked sufficient information to comply with the holding in *Twombly*. *Seidel v. Byron*, No. 05 C 6698, 2008 WL 4411541 (N.D. Ill. Sept. 26, 2008). In *Seidel*, while the court did note that in other jurisdictions the Trustee has been afforded leniency with his pleadings, the court stated that the Complaint must still provide enough information to give the defendants an understanding of the claims against them. *Id.* at *2. Here, even with any leeway given to the Trustee, the Complaint fails to allege facts sufficient to

comply with *Twombly* and *Iqbal* as discussed further in Allmendinger's Memorandum of Law in Support of his Motion to Dismiss.

II. THE COMPLAINT DOES NOT SUFFICIENTLY PLEAD THE PARTICULARS AS TO EACH DEFENDANT.

The Trustee contends that the Complaint includes sufficient information to satisfy the requirements of Rule 9(b) as to each individual. However, the Trustee ignores the fact that Allmendinger's role is, by the Trustee's own allegations, different than that of the other Defendants. The Complaint avers that Allmendinger, unlike Wahab and Oncale, relinquished control of Debtors on August 31, 2007; however, it continues to lump Allmendinger in with Wahab and Oncale despite his departure in August 2007. (Compl. ¶ 10). Further, the bankruptcy cases discussed in Allmendinger's Memorandum hold that a Complaint which merely refers to defendants as a collective group is insufficient because it fails to set forth allegations against each individual defendant. *Schaufenbuel v. InvestForClosures Fin., L.L.C.*, No. 09 C 1221, 2009 WL 3188222, at *4 (N.D. Ill. Sept. 30, 2009) (mem. op.); *Searcy v. Knight (In re Am. Int'l Refinery)*, 402 B.R. 728 (Bankr. W.D. La. 2008).

Further, in *Jepson, Inc. v. Makita Corp.*, the Seventh Circuit dismissed Plaintiff's fraud claims because the claims did not conform to the requirements of Rule 9(b). *Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1331 (7th Cir. 1994). There, the court noted that a plaintiff should avoid attributing acts of fraud by lumping together individual defendants under a single name. *Id.* at 1328-29. Instead, when the complaint accuses multiple defendants of participating in a fraudulent scheme, the plaintiff should identify which defendant was responsible for each act of fraud. *Id.* at 1328. As the Trustee referenced, in situations where the details are within the exclusive knowledge of the defendant, there may be times when the specificity requirements may be relaxed. However, when the plaintiff has available other sources of information about the

fraudulent scheme, the facts are no longer in the realm of the defendant's exclusive knowledge. *Id.* For example, in *Jepson*, the plaintiff referred to defendants as "Makita" and urged the court to relax its specificity requirement because the details of the fraud were within the exclusive knowledge of the defendants. *Id.* The Seventh Circuit rejected this argument, informing the plaintiff that he could have acquired this information through other sources; therefore, the complaint failed to adhere to the requirements of Rule 9(b) and was properly dismissed.

Likewise, many of the alleged facts in the Complaint could have been acquired through other sources. The Complaint makes sweeping generalized statements when the Trustee was more than capable of providing specifics. (Compl. ¶¶ 28, 30, 36). For instance, the Trustee has access to the records of the Debtors. The Complaint states that the A&O Principals made numerous representations to investors including that the A&O Entities held sufficient cash reserves, paid premiums up front, yielded a 15% return, and that its life settlements were bonded. (Compl. ¶ 28). However, the Complaint does not identify which A&O Principal made these representations. Obviously, these alleged representations were allegedly made to an investor; therefore, similar to *Jepson*, knowledge of these representations is not within the defendants' exclusive knowledge. As a result, the Trustee must plead the facts with the specificity required under Rule 9(b).

III. THE COMPLAINT HAS FAILED TO PLEAD FACTS SHOWING THAT ALLMENDINGER HAD ADVANCED KNOWLEDGE OF OTHERS' ALLEGEDLY FRAUDULENT CONDUCT AFTER HE RELINQUISHED CONTROL.

The Trustee asserts that Allmendinger, as a fiduciary, may still be liable for the acts of others if he knew the company would be harmed by future fraudulent acts. The case on which the Trustee relies is inapposite. In *Xerox Corp. v. Genmoora Corp.*, there were ample facts pleaded that the ex-director knew of the ongoing fraud and even participated in the fraud after his

resignation. *Xerox Corp. v. Genmoora Corp.*, 888 F.2d 345, 348 (5th Cir. 1989). Here, the Trustee has presented no factual averment indicating that Allmendinger participated in any fraud after he relinquished control of the Debtors or that he knew that any alleged ongoing fraud of others existed or would continue to exist.

Indeed, *Xerox* does not change the standard by which the Trustee must frame his Complaint: the Complaint must still plead factual allegations specific to Allmendinger that, if true, show that he participated in fraudulent conduct post-relinquishment or that he had personal knowledge of an alleged ongoing fraud by others post-departure. *Id.* at 355; *In re Amer. Int'l Refinery*, 402 B.R. at 739. Accordingly, the Complaint here is more similar to that at issue in *In re American International Refinery*, the case cited by Allmendinger in his Motion to Dismiss. The Complaint "still omits the essential facts necessary to connect these defendants to the fraudulent conduct alleged. . . ." 402 B.R. at 739. Because the Complaint fails to allege specific facts as to Allmendinger, it should be dismissed.

IV. THE TRUSTEE'S ALLEGATIONS MUST BE PLED IN ACCORDANCE WITH RULE 9(B) BECAUSE ALL OF THE ALLEGED VIOLATIONS ARE BASED UPON THE SAME UNDERLYING FRAUD.

A. Allmendinger's Alleged Breach Of Fiduciary Duties Are All Based Upon Allegedly Fraudulent Conduct.

The Trustee contends that because the claims for breaches of fiduciary duty are patently distinct from the allegations of fraudulent transfer, the Complaint need not comply with the standards mandated by Rule 9(b). (Response ¶ 31). However, regardless of any attempts by the Trustee to circumvent Rule 9(b), when the underlying allegations of the breaches of fiduciary duty are premised upon fraudulent conduct, Rule 9(b) applies. *Schaufenbuel*, 2009 WL 3188222, at *3 (quoting *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502 (7th Cir. 2007)); see also *The Responsible Person of Musicland Holding Corp. v. Best Buy, Co., Inc.* (*In re Musicland*

Holding Corp.), 398 B.R. 761, 773 (Bankr. S.D.N.Y. 2008) (stating “even where fraud is not an element of the claim, the allegations must satisfy FED. R. CIV. P. 9(b) if the claim is based on fraudulent conduct.”). Similar to this case, in *In re Saba Enterprises, Inc.*, the Complaint alleged that the defendant breached his duty of loyalty and care. (Compl. ¶ 132); 421 B.R. 626, 655-56 (Bankr. S.D.N.Y. 2009). There, the court held that although the Trustee’s allegations of breaches of duty of loyalty and care were not on their face premised upon fraudulent conduct, a complete reading of the Complaint provided no factual basis for the Trustee’s claim other than the fraudulent transfers allegedly orchestrated by different corporate entities all owned by the same defendant. *Id.* at 655 n.2. As a result, the court required the claims of breaches of fiduciary duty to satisfy the requirements set forth in Rule 9(b). *Id.* Likewise, it is evident when reading the Trustee’s Complaint here in its entirety that the essence of the Complaint surrounds the alleged fraudulent transfers and/or other allegedly fraudulent behavior of the defendants. Therefore, much like in *In re Saba*, the Complaint’s alleged claims of breaches of fiduciary duty should be held to the standard of Rule 9(b). Consequently, as stated further in Allmendinger’s Memorandum of Law in Support of his Motion to Dismiss, the Trustee’s Complaint has failed to meet this standard.¹

¹ Trustee cites two cases in which he claims that to the extent individuals together breach fiduciary duties, they may be held jointly and severally liable. (Response ¶ 15 n.17). Neither case discusses joint and several liability with regard to breaches of fiduciary duty involving the Uniform Fraudulent Transfer Act. *Jennings*, a memorandum opinion, discusses the imposition of joint and several liability between trustees in an ERISA claim. *Jennings v. Pierece*, N. 93 C 2539, 1995 WL 88795 (N.D. Ill. Mar. 1, 1995) (mem. op.). *Ohio Drill & Tool Company*, a Sixth Circuit case, involves a federal claim under rule 10(b) of the Securities Act. *Ohio Drill & Tool Co. v. Johnson*, 625 F.2d 738 (6th Cir. 1980).

B. The Complaint's Constructive Fraud Claim Under The UFTA Should Be Subject To Rule 9(b) Because It, Too, Is Premised Upon an Underlying Fraud.

The Trustee argues that a constructive fraud claim under TUFTA is not subject to the requirements set out in Rule 9(b).² (Response ¶ 7). However, unlike the Seventh Circuit which applies Rule 9(b) to constructive fraud claims under UFTA, the Fifth Circuit has yet to definitively rule whether a constructive fraud claim under TUFTA must be pled with the specificity required by Rule 9(b). *Biliouris v. Sundance Res., Inc.*, 559 F. Supp. 2d 733, 736 (N.D. Tex. 2008) (noting that although the Fifth Circuit has yet to address whether 9(b) applies to claims for fraudulent transfer, the complaint in that case satisfied the requirements of 9(b) regardless). Moreover, courts in Texas have applied Rule 9(b) to claims of constructive fraud and negligent misrepresentation. *Litson-Gruenber v. J.P. Morgan Chase & Co.*, 2009 WL 4884426, *5 (N.D. Tex. Dec. 16, 2009) (holding constructive fraud claim subject to pleading requirements of Rule 9(b)); *Patel v. Pac. Life Ins. Co.*, 2009 WL 1456526, *16 (N.D. Tex. May 22, 2009) (applying Rule 9(b) to a claim involving negligent misrepresentation). Particularly, when both negligent misrepresentation claims and claims of fraud are based upon the same operative facts, the court should apply Rule 9(b) to the negligent misrepresentation claim. *Patel*, 2009 WL 1456526 at *16. Here, this case is no different. The Trustee's Complaint uses the same operative facts to cover both the claim of actual fraud under TUFTA and the claim of constructive fraud under TUFTA. Accordingly, the Court should apply the specificity requirement of Rule 9(b) to the Trustee's constructive fraud claim under TUFTA.

² Indeed, the Trustee concedes that Rule 9(b) applies to a constructive fraud claim under the Illinois UFTA as he limits his arguments solely to the Texas UFTA. The Seventh Circuit has indicated that Rule 9(b) does in fact apply to a constructive fraud claim under the Illinois UFTA. *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1079-80 (7th Cir. 1997).

V. TRUSTEE HAS NOT PLED FACTS SUFFICIENT TO MEET RULE 9(B) IN REGARDS TO HIS CONSTRUCTIVE FRAUDULENT TRANSFERS CLAIMS.

The Trustee claims that if the Complaint merely alleges that Debtors were insolvent at the time of the transfer or that they became insolvent as a result of the transfers then this is enough to survive a motion to dismiss for a constructive fraudulent transfer claim under the Bankruptcy Code and applicable state law. (Response ¶ 20). In support of this proposition, the Trustee cites to *White Metal Rolling & Stamping Corp. v. Drew Indus., Inc.*, 222 B.R. 417 (Bankr. S.D.N.Y. 1998). The Trustee's use of that case is inapposite. *White Metal* was a New York case that applied New York law. *Id.* As stated above, Illinois law requires Rule 9(b)'s particularity standards to be applied to constructive fraud claims. *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1079-80 (7th Cir. 1997). Therefore, the Trustee's Complaint must still plead factual allegations in support of its contention. More pertinent to the issues regarding this case is *Coleman v. Greenfield*, the case cited to in Allmendinger's Memorandum of Law in support of his Motion to Dismiss. In *Coleman v. Greenfield*, the court wrote that:

"Allegations based on information and belief usually do not satisfy the particularity requirement in Rule 9(b)." *Id.* However, as noted above, a plaintiff has more leeway when the facts supporting the allegations are in the exclusive knowledge of the defendant. *Id.* Nevertheless, "even when facts are 'inaccessible to the plaintiff, unless the plaintiff states the grounds for his suspicions,' a claim for fraud 'upon information and belief' is insufficient." *Id.*

No. 05 C 3894, 2005 WL 2592538, *5 (N.D. Ill. Oct. 11, 2005) (mem. op.) (quoting *W. United Life Assurance Co. v. Fifth Third Bank*, No. 02 C 7315, 2003 WL 444417, at *3 (N.D. Ill. Feb. 21, 2003) (mem. op.)). In this case, even if the allegations were in the exclusive knowledge of the defendant, the Trustee has failed to state the grounds for his suspicion.³ (Compl. ¶ 41).

³ Allmendinger contends that this information should not be considered as within his exclusive knowledge particularly because a constructive fraud claim under the UFTA does not require scienter and because Trustee has possession of sufficient factual detail in this matter.

In addition, the Trustee claims that he sufficiently alleged that the Debtors received less than reasonably equivalent value. (Response ¶ 23). In support of this contention, the Trustee states that Allmendinger conceded this point in his Motion to Dismiss. Allmendinger denies that he conceded this point; rather, the motion simply noted that it was difficult to discern from the Complaint what the Trustee was alleging. (Compl. ¶¶ 10, 50, 56). Allmendinger's motion was premised upon an assumption that the Complaint's claim was that \$3 million was unreasonably low because the A&O Principals allegedly did not give up control. (Motion to Dismiss. p. 9, noting the ambiguity surrounding the Complaint's assertion). In actuality, the Trustee's own Complaint acknowledges that Allmendinger was paid a material amount to relinquish control and did in fact relinquish control. (Compl. ¶¶ 10, 56).

Further, the Trustee argues that the lack of reasonably equivalent value is more evident in light of the fact that several defendants failed to relinquish control. (Response ¶ 24). This ignores the fact that the Trustee alleges that Allmendinger did relinquish control. Thus, according to the Trustee's own allegations the value must have been reasonably equivalent. (Compl. ¶¶ 10, 50, 56). At the very least, the Complaint must allege particulars as to each defendant; therefore, this generic reference to "defendants" is too generalized, considering that the Complaint plainly states that one Defendant—Allmendinger—relinquished control of the Debtors, unlike Wahab and Oncale.

The Trustee has failed to supply the necessary "who," "what," "when," "how" and "why" in regard to its assertion that the Debtors received less than reasonably equivalent value from Allmendinger. *Paloian v. Greenfield (In re Rest. Dev. Group, Inc.)*, 397 B.R. 891, 897 (Bankr. N.D. Ill. 2008). Particularly, the Complaint has failed to allege facts specific to Allmendinger

indicating why the value received by the Debtors was less than reasonably equivalent value. Accordingly, the Trustee's Complaint should be dismissed.

CONCLUSION

For all the foregoing reasons, Christian Allmendinger respectfully submits that his Motion To Dismiss should be granted and that the Complaint should be dismissed against him with prejudice.

Respectfully submitted,

CHRISTIAN ALLMENDINGER

By: /s/ Jason Ross
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document was served on the following counsel of record via electronic mail on this the 22nd day of April, 2010.

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