

**United States Bankruptcy Court
Northern District of Illinois
Eastern Division**

Transmittal Sheet for Opinions for Publishing and Posting on Website

Will This Opinion be Published? No

Bankruptcy Caption: In re Life Fund 5.1, LLC, *et al.*

Bankruptcy No. 09 B 32672

Adversary Caption: Jeff Marwil, Trustee 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

Adversary No. 10 A 42

Date of Issuance: June 30, 2010

Judge: A. Benjamin Goldgar

Appearance of Counsel:

Attorneys for plaintiff Jeff Marwil, Trustee: Marc E. Rosenthal, Jeremy T. Stillings, Proskauer Rose LLP, Chicago, IL

Attorneys for defendant Brent Oncale: Thomas L. Taylor III, Marcella L. Cuadrado, Taylor Cuadrado P.C., Houston, TX

Attorneys for defendant Christian Allmendinger: Jason Ross, Curran Tomko Tarski, LLP, Dallas, TX; Terry D. Weissman, Kyle D. Rettberg, Brody E. Dawson, Neal, Gerber & Eisenberg LLP, Chicago, IL

**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION**

In re:)	Chapter 11
)	
LIFE FUND 5.1 LLC, <i>et al.</i>)	No. 09 B 32672
)	(jointly administered)
Debtors.)	
<hr style="width:45%; margin-left:0;"/>		
)	
JEFF MARWIL, Trustee,)	
)	
Plaintiff,)	
)	
v.)	No. 10 A 42
)	
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.)	Judge Goldgar

MEMORANDUM OPINION

This matter is before the court on the motions of defendants Brent Oncale and Christian Allmendinger to dismiss four counts of the adversary complaint of chapter 11 trustee Jeff Marwil. For the reasons that follow, the motions will be granted in part and denied in part.

1. Facts

The complaint alleges the following facts which are taken as true for purposes of the pending motions. *Rujawitz v. Martin*, 561 F.3d 685, 688 (7th Cir. 2009). The debtors in these jointly administered cases are Life Fund 5.1 LLC, Life Fund 5.2 LLC, A&O Life Fund LLC, A&O Resource Management, Ltd., A&O Bonded Life Settlement LLC, A&O Bonded Life

Assets LLC, and Houston Tanglewood Partners LLC. Each of the debtors operate in what is known as the “life settlement industry,” soliciting funds from individual investors to acquire life insurance policies. (Compl. ¶ 23).

Oncale and Allmendinger founded the business and held themselves out as its managers and principals. (*Id.* ¶ 21). From late 2004 through early 2008, Oncale, Allmendinger, and another defendant, Adley Abdulwahab (also known as “Adley Wahab”), solicited and received roughly \$100 million in investments from more than 700 investors who were told they were investing in life insurance policies that the debtors owned. (*Id.* ¶ 24).

The businesses themselves consist of a complicated network of limited partnerships and limited liability companies. A&O Life Funds, LP is a limited partnership that was held out as the controlling entity of all the debtors. (*Id.* ¶ 5). A&O Life Funds Management, LLC is a Delaware limited liability company that served the general partner of A&O Life Funds, LP. (*Id.* ¶ 6). Oncale, Allmendinger, and Wahab were owners of A&O Life Funds, LP and A&O Life Funds Management, LLC, and controlled both of them. (*Id.* ¶¶ 8-10, 12).

According to the complaint, Oncale, Allmendinger, Wahab, and others orchestrated a scheme through which they looted the debtors, transferring millions of dollars to themselves. (*Id.* ¶ 3). In 2007, Oncale, Wahab, and attorney Russell Mackert also engaged in a sham sale of the debtors designed to create the false impression that Oncale and Wahab had relinquished their financial stake in, and control of, the debtors. (*Id.* ¶¶ 1, 2). (Allmendinger was not involved with the debtors after the purported sale. (*Id.* ¶ 10).)

The complaint groups the transfers into four categories. The first, the “LP Transfers,” are transfers of funds from the debtors to a Wells Fargo bank account (the “LP Account”) that A&O Life Funds, LP owned. (*Id.* ¶¶ 32-37). The remaining three categories all consist of transfers of

the debtors' funds from the LP Account to Oncale, Allmendinger, and Wahab. The second category, the "LP-Principal Transfers," are transfers of funds in the months before the purported sale of the debtors. (*Id.* ¶ 42). The third category, the "Sale Transfers," are transfers of funds in connection with the purported sale of the debtors. (*Id.* ¶¶ 50-57). The fourth category, the "Post-Sale Transfers," are transfers of funds after the purported sale. (*Id.* ¶¶ 62-65). With limited exceptions, the complaint details the specific transfers.^{1/}

Marwil's complaint names seven defendants, including Oncale and Allmendinger, and has fifteen counts. Only four of the counts are directed at Oncale and Allmendinger. Count VI seeks to avoid the transfers under section 548(a)(1) of the Bankruptcy Code, 11 U.S.C. § 548(a)(1), on the basis of both actual and constructive fraud and to recover the avoided transfers pursuant to section 550(a) of the Code, 11 U.S.C. § 550(a). In Counts VII and VIII, Marwil invokes his strong-arm power under section 544 of the Code, 11 U.S.C. § 544, combined with his section 550(a) recovery powers, to avoid and recover all the transfers on state law grounds available to judgment lien creditors. Count VII is a constructive fraud claim under the Illinois and Texas Uniform Fraudulent Transfer Acts ("UFTA"), 740 ILCS 160/1, *et seq.*; Tex. Bus. and Com. Code § 24.001, *et seq.*^{2/} Count VIII is an actual fraud claim under these Acts. Count IX is a breach of fiduciary duty claim but is based on the same culpable conduct as the fraudulent

^{1/} The details of the many transfers are evident from the face of the complaint and will not be repeated here.

^{2/} Not only does Count VI allege both actual and constructive fraud in the same count, that count alleges multiple constructive fraud theories. Count VII likewise alleges multiple constructive fraud theories under the Illinois and Texas versions of the UFTA. Although Rule 10(b) does not require a plaintiff to separate different legal theories into different counts, doing so makes life easier for defendants – and for the court. Marwil (who is not responsible for the complaint which was filed by his predecessor) may want to consider changes along these lines should he choose to amend.

transfer counts. Each of the four counts seeks to avoid and recover from Oncale and Allmendinger, not only the transfers they are specifically alleged to have received, but all of the transfers regardless of recipient. Marwil's theory is that all of the transfers were made "for the benefit of" Oncale and Allmendinger. (*See* Compl. ¶¶ 39, 47, 58, 66).

Oncale and Allmendinger now move pursuant to Rule 12(b)(6) (made applicable by Fed. R. Bankr. P. 7012) to dismiss Counts VI-IX on the ground that the claims fail to comply with Rules 8(a) and 9(b) (made applicable by Fed. R. Bankr. P. 7008(a) and 7009). The movants contend the complaint fails to allege fraud with the particularity Rule 9(b) requires because, among other reasons, the complaint lumps the defendants together and seeks to recover all of the transfers from each of them. The movants also contend the complaint fails to comply with Rule 8(a) because it contains no facts supporting its allegations of insolvency and lack of reasonably equivalent value and alleges insufficient facts to support its allegation of intent to defraud.

2. Discussion

The motions to dismiss will be granted in part and denied in part. The complaint complies with Rule 9(b) in large part because it alleges enough detail about almost all of the transfers. The complaint also adequately alleges intent and lack of reasonably equivalent value. Claims based on the few transfers that are not alleged with sufficient detail, however, will be dismissed, as will claims based on the theory that the defendants gained some unspecified "benefit" even from the transfers they did not receive. The constructive fraud claims in Counts VI and VII based on insolvency will also be dismissed because insolvency is alleged only as a conclusion with no supporting facts. Marwil will be given leave to amend.

a. Rule 8(a) and Rule 9(b) Standards

Rule 8(a) requires only that a complaint contain “a short and plain statement of the claim showing that the pleader is entitled to relief.” Fed. R. Civ. P. 8(a)(2). A complaint will not be dismissed for failure to satisfy this requirement if it clears “two easy-to-clear hurdles.” *E.E.O.C. v. Concentra Health Servs.*, 496 F.3d 773, 776 (7th Cir. 2007). First, the complaint must contain enough information to give the defendant “fair notice” of the claim. *Regert Dev’t LLC v. National City Bank*, 592 F.3d 759, 764 (7th Cir. 2010) (internal quotation omitted). To do so, the complaint need not make “detailed factual allegations,” but there must be at least some facts supporting each element of the claim. *Ashcroft v. Iqbal*, ___ U.S. ___, ___, 129 S. Ct. 1937, 1949-50 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also Pisciotta v. Old Nat’l Bancorp.*, 499 F.3d 629, 633 (7th Cir. 2007).

Second, the facts alleged must not only give notice of the claim but must also plausibly suggest that the plaintiff has a right to relief, raising that right above the “speculative level.” *Concentra*, 496 F.3d at 776 (quoting *Twombly*, 550 U.S. at 555 (2007)). “Plausible” does not mean “probab[le],” *Brooks v. Ross*, 578 F.3d 574, 581 (7th Cir. 2009), but it does mean more than “conceivable,” *Tully v. Barada*, 599 F.3d 591, 593 (7th Cir. 2010). The allegations of the complaint must “allo[w] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Iqbal*, ___ U.S. at ___, 129 S. Ct. at 1949; *Brooks*, 578 F.3d at 581.

Where fraud is concerned, however, Rule 9(b) requires more. Under Rule 9(b), a party “must state with particularity the circumstances constituting fraud” Fed. R. Civ. P. 9(b). “Particularity” means “the who, what, when, where and how: the first paragraph of any newspaper story.” *Katz v. Household Int’l, Inc.*, 91 F.3d 1036, 1040 (7th Cir. 1996) (internal quotation omitted); *see also Rao v. BP Prods. N. Am., Inc.*, 589 F.3d 389, 401 (7th Cir. 2009).

When a common law fraud claim is alleged, a complaint must therefore identify who made the misrepresentation; state the time, place, and content of the misrepresentation; and describe how the misrepresentation was communicated. *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663, 668 (7th Cir. 2008); *Kennedy v. Venrock Assocs.*, 348 F.3d 584, 593 (7th Cir. 2003).

Although fraudulent transfer claims of the kind Marwil alleges are not the same as common law fraud claims, the requirements of Rule 9(b) apply nonetheless, whether the claim is based on actual or constructive fraud. *General Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1079 (7th Cir. 1997). When the claim is for constructive fraud, the complaint must allege what (or how much) was transferred, when the transfer was made, how it was made, who made it, who received it, and under what circumstances. *Id.* at 1079-80.^{3/} When the claim is for actual fraud, these same allegations are necessary. *See Pereira v. GrecoGas Ltd. (In re Saba Enters., Inc.)*, 421 B.R. 626, 640 (Bankr. S.D.N.Y. 2009); *Gold v. Winget (In re NM Holdings Co.)*, 407 B.R. 232, 261 (Bankr. E.D. Mich. 2009).

b. Marwil's Complaint

i. Rule 9(b)

At least with respect to the transfers allegedly made to Oncale and Allmendinger, Marwil's complaint largely meets the requirements of Rule 9(b).^{4/} Nearly all of the transfers

^{3/} The Seventh Circuit's application of Rule 9(b) to constructive fraud claims represents the minority view. *See Air Cargo, Inc. Litig. Trust v. i2 Techs., Inc. (In re Air Cargo, Inc.)*, 401 B.R. 178, 192 n.7 (Bankr. D. Md. 2008) (collecting cases).

^{4/} Only Oncale and Allmendinger have moved to dismiss the complaint. Whether the complaint satisfies Rule 9(b) with respect to transfers to other defendants need not be addressed.

alleged identify the transferor, the transferee, the amount of the transfer, the manner in which the transfer took place, and the date. To take but one example, paragraph 42 alleges that \$1.5 million was transferred from the LP Account to Oncale, Allmendinger, and Wahab in the two months before the purported sale, and the subparts of paragraph 42 specify for each transfer the day, amount, transferee, and manner of the transfer. (Compl. ¶¶ 42(a)-(d)).

The only information occasionally missing from the otherwise adequately alleged transfers is the manner of transfer: whether the transfer was by check, wire, or another method. (See, e.g., *id.* ¶¶ 37, 53-54, 64(a)-(c), 65(a), (b), (d)). But these omissions can be forgiven. As Marwil correctly notes, a fraud claim is evaluated less stringently under Rule 9(b) when the alleged fraud was committed against a third party and the plaintiff lacks information that a fraud victim might ordinarily have. *Uni*Quality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 923 (7th Cir. 1992). A bankruptcy trustee asserting the rights of the estate falls under this exception. See *Air Cargo*, 401 B.R. at 192 n.8 (noting that courts have consistently relaxed heightened pleading standards “in cases pursued by a . . . trustee rather than the debtor”). Even without information about the manner of transfer, there is enough detail here to satisfy the twin concerns of Rule 9(b): to give the defendants notice of the claims and to ensure the claims are asserted responsibly. See *Ackerman v. Northwestern Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999).

In three instances, however, Oncale and Allmendinger are right that the complaint fails to comply with Rule 9(b).

- In paragraph 36, the complaint alleges that “over \$2 million” was deposited into the LP Account. The complaint fails to specify the precise amount of the transfer, the date of the

transfer, or the debtor from whose account the money was transferred.^{5/}

- In paragraph 46, the complaint alleges that “prior to the time of these bankruptcy filings,” Oncale and Allmendinger “transferred millions of dollars of investor funds to their own personal accounts or accounts over which they had direct or individual control, including from accounts in the name of the Debtors, including, but not limited to, accounts held in the name of A&O Resource Management and Houston Tanglewood Partners.” Its tortured prose aside, paragraph 46 identifies no specific transfers from specific transferors to specific transferees on specific dates.

- In paragraphs 64(a)-(c), the complaint alleges post-sale transfers from the LP Account to Mackert’s attorney trust account. In paragraph 65(a), the complaint then alleges that on January 9, 2008, Oncale used money from these transfers to buy a Ferrari. At no point, however, does the complaint allege a specific transfer from Mackert’s account to Oncale in a specific amount on a specific date.

The complaint is also deficient under Rule 9(b) in another more important respect. Oncale and Allmendinger object to what they call the “lumping together” of the defendants, and that is indeed impermissible. *See Jepson, Inc. v. Makita Corp.*, 34 F.3d 1321, 1328 (7th Cir. 1994). Generally, though, the complaint alleges specific transfers to specific defendants. The complaint “lumps” the defendants only to the extent that it seeks to recover all transfers from Oncale and Allmendinger (as well as Wahab) regardless of who the actual recipients were – a form of joint and several liability. (That Marwil wants to recover everything from these

^{5/} Paragraph 36 also contains the general allegation that in 2007 more than \$37 million was transferred to the LP Account, but the next paragraph spells out the specific transferors and dates of the transfers.

defendants is evident from his requests for relief at the end of each count.) Marwil bases this recovery on his allegations that the transfers were made “for the benefit of the A&O Principals” (Compl. ¶¶ 39, 47, 58, 66), a term defined as Oncale, Allmendinger, and Wahab (*id.* ¶ 11).

This phrase is presumably meant to permit Marwil’s recovery of avoided transfers under section 550(a)(1) of the Code. Under that section, a trustee can recover a fraudulent transfer, not only from the initial transferee, but also from “the entity for whose benefit such transfer was made.” 11 U.S.C. § 550(a)(1); *see Boyer v. Belavilas*, 474 F.3d 375, 378 (7th Cir. 2007); *Bonded Fin. Servs. Inc. v. European Am. Bank*, 838 F.2d 890, 895 (7th Cir. 1988). The classic example is a guarantor – “someone who receives the benefit but not the money.” *Bonded*, 838 F.2d at 895. The guarantor benefits from the initial transfer to the creditor because the transfer has the effect of reducing the guarantor’s obligations on the guaranty. *Id.*; *see also Baldi v. Lynch (In re McCook Metals, L.L.C.)*, 319 B.R. 570, 590 (Bankr. N.D. Ill. 2005).

Marwil has two problems recovering the transfers from Oncale and Allmendinger on a “benefit” theory. The first is that an “entity for whose benefit such transfer was made” is a “person who receives a benefit from the *initial* transfer,” *Bonded*, 838 F.2d at 896 (emphasis added), not someone who benefits from a subsequent transfer. Here, however, the initial transfers from the debtors were all made to the LP Account, making that account (or at least the account holder) the initial transferee. The remaining transfers alleged in the complaint were all subsequent transfers from the LP Account to the various defendants, including Oncale and Allmendinger. Because those transfers were subsequent transfers, no recovery of them is possible under section 550(a)(1) on the theory they were made for the benefit of Oncale and Allmendinger. The only transfers potentially recoverable on this theory are the transfers to the LP Account alleged in paragraph 37.

Second, Marwil alleges no facts from which a benefit to Oncale and Allmendinger from the initial transfers can be inferred. An entity for whose benefit a transfer was made must actually receive a benefit from the transfer; that the transferor intended to confer a benefit on the transferee is not enough. *Freeland v. Enodis Corp.*, 540 F.3d 721, 740 (7th Cir. 2008). The complaint here alleges only the bald conclusion that the initial transfers were made for the benefit of Oncale and Allmendinger. No facts are offered to explain this allegation – and, indeed, it is hard to imagine under the circumstances of this case how the two men could have received a benefit from transfers that did not end up, directly or indirectly, in their own pockets. If Marwil wants to pursue this kind of recovery, he must specify the benefit Oncale and Allmendinger obtained. Otherwise, Marwil’s recovery is limited to “the property transferred” to Oncale and Allmendinger or “the value of such property.” 11 U.S.C. § 550(a).^{6/}

Because the allegations of the more than \$2 million transfer in paragraph 36 and the transfers in paragraphs 46 and 64(a)-(c) lack the particularity necessary under Rule 9(b), the claims based on those transfers will be dismissed with leave to amend. Claims to recover subsequent transfers from the LP Account that Oncale and Allmendinger did not themselves receive on the theory that they nevertheless benefitted from those transfers will be dismissed with prejudice. Claims to recover initial transfers to the LP Account on the theory that Oncale and Allmendinger benefitted from those transfers will be dismissed with leave to amend. In all other respects, the motions to dismiss under Rule 9(b) will be denied.

^{6/} Whether this is a Rule 9(b) deficiency or a deficiency under Rule 8(a) is debatable, but it makes no difference to the outcome here. The complaint is inadequate even under the more lenient Rule 8(a) standard. Not only does the complaint fail to plead with particularity *how* Oncale and Allmendinger benefitted from transfers they did not receive directly, it fails to allege facts suggesting there was any benefit *at all*.

ii. Rule 8(a)

Just as the complaint satisfies Rule 9(b) in large part, it also largely satisfies Rule 8(a), adequately alleging a lack of reasonably equivalent value in the constructive fraud counts and intent to defraud in the actual fraud counts. Only the allegation of the debtors' insolvency is insufficient.

The complaint contains facts that give notice of, and render plausible, its allegations of lack of reasonably equivalent value for the transfers. It is true that those allegations appear in several places only as conclusions. (*See, e.g.*, Compl. ¶¶ 40, 44, 48, 59, 67, 111, 119). It is true, as well, that after *Twombly* and *Iqbal* a complaint will not survive a motion to dismiss if it pleads that a transfer was made for “less than reasonably equivalent value” without any supporting facts. *Feldman v. Chase Home Fin. (In re Image Masters, Inc.)*, 421 B.R. 164, 179-80 (Bankr. E.D. Pa. 2009); *Angell v. Burrell (In re Caremerica, Inc.)*, 409 B.R. 759, 767 (Bankr. E.D.N.C. 2009); *contra Saba Enters.*, 421 B.R. at 646 (stating not only that a plaintiff alleging constructive fraud need not comply with Rule 9(b) but also that he need not “plead specific facts” to satisfy Rule 8(a)).^{7/}

Focusing on Marwil's legal conclusions, however, ignores the rest of his complaint. Elsewhere, Marwil alleges at some length an elaborate scheme in which Oncale, Allmendinger, and others *stole* (for want of a better word) more than \$37 million from the debtors. So there

^{7/} There is some question whether the Seventh Circuit would reach this conclusion even after *Twombly* and *Iqbal*. In *General Electric*, the court held that lack of reasonably equivalent value could be pled as a legal conclusion. *General Elec.*, 128 F.3d at 1080 & n.5. Although *General Electric* was decided before *Twombly* (and so before *Iqbal*), the court in *General Electric* reached its conclusion by examining Official Form 13, the complaint for fraudulent transfers, which Rule 84 deems adequate as a matter of law. *Id.* at 1079-80. The form remains the same post-*Twombly* and *Iqbal*. *See Fed. R. Civ. P., Off. Form 13.*

were no exchanges here. This is consequently not a case in which the competing values of what was exchanged might be compared and debated, nor is it a case in which a defendant might fairly object that the complaint fails to detail those values. *No* value is given, let alone reasonably equivalent value, for stolen funds. Because the complaint here alleges no value, it necessarily alleges the absence of reasonably equivalent value.

Marwil's complaint also adequately alleges fraudulent intent. In *Iqbal*, the Court held that in allowing mental state to be "alleged generally," Fed. R. Civ. P. 9(b), Rule 9(b) merely excuses a party from pleading mental state with particularity. *Iqbal*, ___ U.S. at ___, 129 S. Ct. at 1954. Allegations of mental state must still satisfy Rule 8, meaning mental state cannot be alleged as a conclusion. *Id.* at ___, 129 S. Ct. at 1954; *see Ciszewski v. Denny's Corp.*, No. 09 C 5355, 2010 WL 1418582, at *2 (N.D. Ill. Apr. 7, 2010) (noting that under *Iqbal*, Rule 9(b) "does not exempt allegations of intent from the requirements of [Rule 8]"). Facts supporting the conclusion are necessary – facts sufficient both to give notice and to render the allegation plausible. *Iqbal*, ___ U.S. at ___, 129 S. Ct. at 1949-50.

The complaint here meets these requirements. As both sides acknowledge, intent to defraud under section 548(a)(1) and under the UFTA can be established either directly or circumstantially through "badges" of fraud. *See* 740 ILCS 160/5(b) (2008); Tex. Bus. and Com. Code § 24.005(b); *Friedrich v. Mottaz*, 294 F.3d 864, 869-70 (7th Cir. 2002) (discussing section 548(a)(1)). In this case, as Marwil argues, the complaint alleges several badges of fraud: the transfers were made to insiders, the insider-transferees made off with the transferred funds, and the value of the transferred funds was not reasonably equivalent to the value received. Allmendinger notes that the complaint does not allege many badges. But "no set number or combination automatically demonstrates fraudulent intent." *CLC Creditors' Grantor Trust v.*

Howard Sav. Bank (In re Commercial Loan Corp.), 396 B.R. 730, 746 (Bankr. N.D. Ill. 2008).

The transfers alleged amount to theft by corporate officers on a massive scale. It is hard to see what more Marwil needs to allege to raise a reasonable inference of intent to defraud.

On the insolvency question, however, Marwil does not fare as well. Just as a complaint alleging a constructive fraud claim based on a lack of reasonably equivalent value must plead facts in support, a complaint alleging a constructive fraud claim based on insolvency, *see, e.g.*, 11 U.S.C. § 548(a)(1)(B)(ii)(I); 740 ILCS 160/6(a) (2008); Tex. Bus. and Com. Code § 24.006(a), must plead facts from which an inference of insolvency can be drawn, *Yelverton v. Homes at Potomac Greens Assocs., L.P. (In re Yelverton)*, Nos. 09-414, 10-10001, 2010 WL 1688403, at *2-3 (Bankr. D.D.C. Apr. 22, 2010); *Caremerica*, 409 B.R. at 767; *contra Saba Enters.*, 421 B.R. at 646. Conclusions are not enough. *See Iqbal*, ___ U.S. at ___, 129 S. Ct. at 1949-50; *Brooks*, 578 F.3d at 581 (plaintiffs may not “merely parrot the statutory language of the claims that they are pleading”).

Marwil nowhere alleges facts to support his conclusions that the debtors were insolvent at the time of the transfers or became insolvent as a result of them. He alleges that approximately \$100 million was invested in the various debtors (Compl. ¶ 24) and something in excess of \$37 million was transferred to the LP Account (and then to the defendants) (*id.* ¶ 36), but that information does not even suggest the debtors as a group were insolvent, much less that any particular debtor was insolvent at any particular time. More is necessary before Marwil can pursue constructive fraud claims based on insolvency.

Because the complaint alleges no facts suggesting insolvency, the claims in Counts VI and VII based on insolvency will be dismissed. Otherwise, the motions to dismiss based on

asserted Rule 8(a) deficiencies will be denied.^{8/}

3. Conclusion

The motions of defendants Brent Oncale and Christian Allmendinger to dismiss Counts VI-IX of the adversary complaint of trustee Jeff Marwil are granted in part and denied in part as follows:

- a. The claims in Counts VI-IX based on the allegations of the more than \$2million transfer in paragraph 36 and the transfers in paragraphs 46 and 64(a)-(c) are dismissed.
- b. The claims in Counts VI-IX to recover subsequent transfers that Oncale and Allmendinger did not themselves receive on the theory that they benefitted from those transfers are dismissed with prejudice. The claims in Counts VI-IX to recover initial transfers from Oncale and Allmendinger on the theory that they benefitted from those transfers are dismissed.
- c. The claims in Counts VI, VII, and IX based on allegations of insolvency are dismissed.
- d. In all other respects, the motions to dismissed are denied. Marwil is granted leave to file an amended complaint. The amended complaint is due on or before July 21, 2010.

Defendants Oncale and Allmendinger must answer or otherwise plead on or before August 18,

^{8/} The parties devote considerable attention to the breach of fiduciary claim in Count IX, but there is no reason to discuss that count separately. To the extent Marwil's breach of fiduciary claim against Oncale and Allmendinger is based on the fraudulent transfers, the claim is subject to Rule 9(b). See *Saba Enters.*, 421 B.R. at 655-56. Count IX therefore has the same Rule 9(b) deficiencies as Marwil's other claims and will likewise be dismissed. To the extent the claim in Count IX is based on the simple theory that corporate officers breach their fiduciary duties when they make off with more than \$37 million in corporate assets, the claim satisfies Rule 8(a), and the motions to dismiss will be denied.

2010.

Dated: June 30, 2010

A. Benjamin Goldgar
United States Bankruptcy Judge