UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:

LAND RESOURCE, LLC,
et al.,[1]
Debtors.
_____/

CASE NO. 6:08-bk-10159-ABB
(Jointly Administered Under Chapter 7)

LEIGH R. MEININGER,

Chapter 7 Trustee,

Plaintiff,
v.

EURAM, LLC,
et al.,

Defendants.

_____/

Adversary No. 6:10-ap-273-JAF

ORDER GRANTING IN PART
MOTIONS TO DISMISS TRUSTEE'S AMENDED COMPLAINT

This proceeding is before the Court on: (1) Motion to Dismiss Amended Complaint filed by the Euram Defendants (Doc. 15); (2) Motion to Dismiss filed by Defendant Barrington H. Branch (Docs. 16, 17); (3) Omnibus Response to Motions to Dismiss filed by Plaintiff, the Trustee (Doc. 22); (4) Reply of Euram Defendants to Plaintiff's Omnibus Response to Motion to Dismiss Amended Complaint (Doc. 38); (5) Motion to Dismiss filed by Defendants Realan Investment Partners, LLLP and Weeks-Gray Rock, LLC (Docs. 25, 26); (6) Plaintiff's Response to Defendants Realan Investment Partners, LLLP and Weeks-Grey Rock, LLC's Motion to Dismiss and Sur-Reply to Reply of Euram Defendants to Plaintiff's Omnibus Response to Motions to Dismiss (Doc. 50);

[1] The jointly administered cases are listed in footnote one of the Amended Complaint (Doc. 7 at 2 n.1).

and (7) Reply in Support of the Motion to Dismiss filed by Defendants Realan Investment Partners, LLLP and Weeks-Gray Rock, LLC (Doc. 51). For the reasons stated herein, the Court finds the instant motions are due to be granted in part.[2]

I. BACKGROUND

This adversary proceeding arises out of and relates to the Chapter 7 case of Land Resource, LLC, Case No. 6:08-bk-10159-ABB, and the jointly administered cases. Plaintiff, Leigh R. Meininger, is the Trustee for the jointly administered cases.[3] In the Amended Complaint (Doc. 7), Plaintiff maintains Defendants were parties to a complex series of transactions that are alleged to have been conducted in a fraudulent manner. More particularly, it is alleged that Defendants were involved in a ponzi-type scheme, whereupon Land Resource, LLC and its many subsidiary affiliates (which were operated and controlled by an individual named J. Robert Ward) defrauded land purchasers in North Carolina, Georgia, Tennessee, West Virginia, and Florida (*see* Doc. 7 at 4-18; Doc. 22 at 23). The Amended Complaint collectively refers to Land Resource, Inc., the authorized

[2] Plaintiff filed an unopposed Motion for Voluntary Dismissal of Dinur & Associates, P.C. with Prejudice (Doc. 32), which the Court will grant. Additionally, Plaintiff filed an unopposed motion to abate the instant adversary proceeding as to Defendant Daniel D. Dinur (Doc. 39) "until such time as the Court has ruled on the pending Motions to Dismiss" (Doc. 39 at 2). The Court will likewise grant this motion.

[3] On October 30, 2008, Land Resource, LLC filed a voluntary petition under Chapter 11, thereby commencing Case No. 6:08-bk-10159-ABB. On March 20, 2009, the Court entered an Order Converting Cases to Proceedings Under Chapter 7 of the Bankruptcy Code (Doc. 441, Case No. 6:08-bk-10159-ABB), which converted the Debtors' cases into separately administered cases under Chapter 7. On July 21, 2009, the Court entered an Order Granting Trustee's Motion for Order Directing Joint Administration of Related Chapter 7 Cases (Doc. 522, Case No. 6:08-bk-10159-ABB), directing that the related cases pending in Chapter 7 be jointly administered with Land Resource, LLC (Case No. 6:08-bk-10159-ABB) as the primary case.

manager of Land Resource, LLC, f/k/a Land Resource Companies, LLC (hereinafter referred to as "Land Resource") and its affiliate subsidiaries as the "Debtors" (Doc. 7 at 5).[4]

It is alleged that the Debtors were in the business of acquiring undeveloped parcels of land and developing them into residential communities consisting of private lots and amenity areas (Doc. 7 at 4). The subject land was marketed and sold prior to and during the construction of necessary infrastructure improvements and amenities (Doc. 7 at 4). It is claimed that Land Resource, LLC was the "parent company" of not less than twenty-six (26) of the debtor entities created to facilitate the marketing, sale, and infrastructure improvements of the developments (Doc. 7 at 4-5). Defendants were part equity owners of one or more of such entities (*see* Doc. 7 at 5-12). By way of example, one such entity, LR Buffalo Creek, LLC, was owned as follows: Land Resource, LLC (75.0%); Defendant Euram Grey Rock Associates, LP (13.25%); Realan Capital Corporation (5.0%); Defendant Weeks-Grey Rock, LLC (5.0%); Defendant Barrington H. Branch (0.5%); Defendant DPB Solutions, LLC (0.625%); and Defendant Daniel D. Dinur (0.625%) (Doc. 7 at 6).

The causes of action asserted in the Amended Complaint (Doc. 7) can generally be divided into three categories. The first category of claims, set forth in Counts III, IV, V, VI, VII, VIII, and IX of the Amended Complaint, allege avoidable transfers under both the Bankruptcy Code and the statutes of Florida (the "Avoidance Claims"). The second group of claims, set forth in Counts I and XI of the Amended Complaint, seek: (1) a declaratory judgment that any Defendant who received an avoidable transfer be deemed an initial transferee for purposes of sections 544, 548, 549 or 550 of the Code (Count I); and (2) recovery of any avoidable transfers (Count XI) (the "Avoidance-Related Claims"). The final group of claims consists of Counts II and X, which respectively seek

[4] It should be noted that neither Mr. Ward nor Land Resource are parties to this adversary proceeding.

an accounting (Count II) and assert a claim for breach of fiduciary duty (Count X) (the "Fiduciary Duty Claims").

Plaintiff alleges that, between January 1, 2005 and December 31, 2007, Debtors paid the following approximate aggregate-amounts to the following Defendants: (1) $5,846,401 to Euram Resources, LLC and Euram, LLC; (2) $5,159,295 to Euram Grey Rock Associates, LP; (3) $5,050,000 to Euram Point Peter Associates, LP; (4) $4,000,000 to Point Peter, LLLP; (5) $2,400,000 to Euram Laird Point Associates, LP; (6) $1,940,320 to Realan Investment Partners, LLP; (7) $1,940.320 to Weeks-Grey Rock, LLC; and (8) $1,014,296 to Barrington H. Branch (Doc. 7 at 7-10).

Additionally, for the taxable years ending in 2006 and 2005, it is alleged that: (1) "management fees" were paid to Euram Resources, LLC and Euram, LLC in the approximate amounts of $971,471 and $3,863,295, respectively; (2) "debt placement fees" were paid to Barrington H. Branch in the approximate amounts of $108,480 and $91,313, respectively; and (3) "consulting fees" were paid to Barrington H. Branch in the approximate amounts of $323,645 and $176,000, respectively (Doc. 7 at 7, 10).

In general, it is claimed that the aforementioned transfers were fraudulent as to the land purchasers and other creditors in that they were made without any consideration, collateral, security interest, or promise to repay (Doc. 7 at 15). Plaintiff maintains such transfers left the subject companies with unreasonably small capital, and that they were thus unable to complete the promised infrastructure improvements (Doc. 7 at 15-16). As a result, it is alleged that many of the land purchasers did not receive the benefit of their respective purchase agreements since infrastructure improvements (such as certain amenities, paved roads, electric, telephone, and water service lines)

were never completed (Doc. 7 at 14). Plaintiff claims many purchasers were left without access to the land they purchased as there are no access roads or other means of ingress to such properties (Doc. 22 at 5).

Based on the foregoing, Plaintiff seeks, among other forms of relief, to avoid the subject transfers.

II. MOTION TO DISMISS STANDARD

A motion to dismiss pursuant to Rule 12(b)(6) tests the sufficiency of a complaint and asks the court to determine whether the complaint sets forth sufficient factual allegations to establish a claim for relief. When evaluating whether a plaintiff has stated a claim, a court must determine whether the complaint satisfies Rule 8(a)(2), which requires "a short and plain statement of the claim showing that the pleader is entitled to relief." In addition, if a complaint contains claims of intentional fraud, the complaint must satisfy the more stringent pleading requirements of Rule 9(b) of the Federal Rules of Civil Procedure.

To survive a Rule 12(b)(6) motion, the complaint must contain enough factual matter (taken as true) to "raise [the] right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "[N]aked assertions devoid of further factual enhancement" will not satisfy Rule 8(a)(2)'s requirement of a short plain statement of the claim showing the pleader is entitled to relief. *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009) (citing *Twombly*, 550 U.S. at 557) (internal quotations omitted). In addition, "a formulaic recitation of the elements of a cause of action will not do." *Id*. A plaintiff must plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the conduct alleged." *Twombly*, 550 U.S. at 555. A mere possibility that the defendant acted in contravention to the law will not suffice. *Id*.

Although a court must accept all well pleaded facts as true, it is not required to accept legal conclusions. *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009). A complaint must contain sufficient factual matter, accepted as true, to state a claim for relief that is plausible on its face. *Iqbal*, 129 S.Ct. at 1949.

III. ANALYSIS

The Court will address Defendants' arguments in conjunction. As a preliminary matter, Defendants maintain the Amended Complaint should be dismissed for failure to join an indispensable party pursuant to Rule 19 of the Federal Rules of Civil Procedure, made applicable by Rule 7019 of the Federal Rules of Bankruptcy Procedure. The gravamen of Defendants' argument in this regard is that Debtors, as putative initial transferees, are indispensable parties to the action against Defendants as subsequent transferees (*see* Doc. 15 at 27). The Eleventh Circuit Court of Appeals, however, has held that a plaintiff in an avoidance action is not required to pursue the initial transferee prior to pursuing any immediate or mediate transferees. *IBT Int'l, Inc. v. Northern (In re Int'l Admin. Servs.*), 408 F.3d 689, 706-08 (11th Cir. 2005); *see also Leonard v. Optimal Payments Ltd. (In re Nat. Audit Def. Network),* 332 B.R. 896, 915-16 (Bankr. D. Nev. 2005). Accordingly, Defendants' motions to dismiss the Amended Complaint on this premise are denied.

A. The Avoidance Claims—All Defendants

Counts III, IV, V, VI, VII, VIII, and IX of the Amended Complaint allege avoidable transfers under both the Bankruptcy Code and the statutes of Florida.

1. *Actual Fraud Under the Bankruptcy Code*

Count III of the Amended Complaint seeks to avoid certain transfers pursuant to section 548(a)(1)(A) of the Bankruptcy Code, which provides for the avoidance of transfers of property of

the debtor made with the "actual intent to hinder, delay or defraud" within two years of the petition date. 11 U.S.C. § 548(a)(1)(A). Debtors filed their respective bankruptcy petitions on October 30, 2008. Thus, in order to state a claim under section 548(a)(1)(A), Plaintiff must allege fraudulent transfers occurring on or subsequent to October 30, 2006. Count III claims that between January 1, 2005 and December 31, 2007, Debtors made an aggregate-amount or series of monetary transfers to Defendants, and that such transfers were made with the actual intent to hinder, delay, or defraud an entity to which Debtors were or became indebted on or after the date of such transfer(s) (Doc. 7 at 20-21).

Defendants contend that the Amended Complaint fails to satisfy the heightened pleading standard for actual fraud pursuant to Rule 9(b) of the Federal Rules of Civil Procedure. For the reasons stated herein, the Court agrees.

Rule 9(b), made applicable by Rule 7009 of the Federal Rules of Bankruptcy Procedure, requires a party alleging fraud to "state with particularity the circumstances constituting fraud. . . ." Fed. R. Civ. P. 9(b); Fed. R. Bankr. P. 7009. Malice, intent, knowledge, and other conditions of a person's subjective intent, however, "may be alleged generally." Fed. R. Civ. P. 9(b). A claim asserting an actual fraudulent transfer under section 548 "must satisfy the particularity requirement of Rule 9(b)." *Angell v. Ber Care Inc. (In re Caremerica, Inc.)*, 409 B.R. 737, 755 (Bankr. E.D.N.C. 2009); *see also Campbell v. Cathcart (In re Derivium Capital, LLC)*, 380 B.R. 429, 439 (Bankr. D.S.C. 2006); *Morris v. Zelch (In re Regional Diagnostics, LLC*), 372 B.R. 3, 17 (Bankr. N.D. Ohio 2007) (a plaintiff is required to "state with particularity the circumstances constituting fraud according to the requirements imposed by [R]ule 9(b)" when he or she alleges a fraudulent transfer based on actual fraud).

Defendants maintain the Amended Complaint does not adequately state a claim under section 548(a)(1)(A) because Plaintiff failed to specifically identify both the transferor and the specific date of the subject transfers. In response, Plaintiff argues the particularity requirement of Rule 9(b) should be relaxed as applied to him because, as a trustee, he is merely a third-party with only second-hand knowledge and limited access to information at the pleading stage.

The requirements of Rule 9(b) may be relaxed when a plaintiff alleges facts particularly within the knowledge of the defendant. *Gold v. Winget* (*In re NM Holdings Co., LLC)*, 407 B.R. 232, 258 (Bankr. E.D. Mich. 2009). This principle has been applied in bankruptcy cases where a trustee brings the claim and, as such, is a third-party outsider with limited information. *Id*. Nevertheless, an allegation that a debtor made an aggregate-amount or series of cash or other transfers over a period of time, without further particularization, is insufficient to state a claim of actual fraud. *Id*. at 261. While "badges of fraud" may help to establish the fraudulent intent of a debtor, "it is not the fraudulent intent of the debtor that must be pled with particularity; rather it is the 'circumstances constituting fraud.'" *Id*. at 262. Such alleged circumstances must, at a minimum, identify the transferor and transferee, the date of the transfer, and the amount of the transfer. *See id.; see also In re Caremerica,* 409 B.R. at 755.

In this instance, to recover under section 548(a)(1)(A), Plaintiff must establish, among other things, that Defendants received transfers on or after October 30, 2006. Plaintiff's allegation that Defendants received payments "between January 1, 2005 and December 31, 2007" is insufficient. Plaintiff must identify a specific transfer made to each Defendant on a specific date, occurring on or subsequent to October 30, 2006, in order to place Defendants on notice of the precise misconduct with which they are charged. *See id*.; *see also In re Caremerica,* 409 B.R. at 755.

With respect to the identity of the transferor(s), in the Amended Complaint, Plaintiff claims either the"Debtor"or "Debtors" made the subject transfers (*see* Doc. 7 at 7-11, 21). "Debtors" are defined in the Amended Complaint as Land Resource and its subsidiaries (Doc. 7 at 5). The word "Debtor," however, is not defined in the Amended Complaint. Although Plaintiff's use of the word "Debtor" may have been a typographical error (*see* Doc. 7 at 5, 7-11, 21), the Court nevertheless finds the transferor(s) have not been identified with particularity. *See In re NM Holdings Co., LLC*, 407 B.R 263-63 (finding allegations that one or more of the "Debtors" made a fraudulent transfer did not specifically identify the transferee since there were eleven (11) "Debtors"). The Court would note that this fact, standing alone, might not have required dismissal in this instance since the requirements of Rule 9(b) may be relaxed when a trustee-plaintiff alleges facts particularly within the knowledge of the defendant. *See In re NM Holdings Co., LLC*, 407 B.R at 258; *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (noting the application of Rule 9(b) "must not abrogate the concept of notice pleading"). This omission, however, combined with the lack of specificity as to the dates and amounts of the alleged transfers, subjects Count III of the Amended Complaint to dismissal.

Defendants additionally argue that any dismissal should be with prejudice. The Court is not persuaded. Rule 15 of the Federal Rules of Civil Procedure authorizes a party to amend a pleading with the court's leave. Fed. R. Civ. P. 15(a)(2); Fed. R. Bankr. P. 7015. Leave to amend pleadings "shall be freely given when justice so requires," and should be granted absent prejudice to the opposing party, bad faith on the part of the moving party, or futility of amendment. *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1270 (11th Cir. 2006).

In Plaintiff's Sur-Reply to Reply of Euram Defendants to Plaintiff's Omnibus Response to Motions to Dismiss (Doc. 50), Plaintiff states that if he is permitted leave to amend, he would include in any amendment "factual details" regarding the dates and amounts of the subject transfers, the transferors, and the transferees (Doc. 50 at 10). The Court finds such information might assist Defendants in asserting any affirmative defenses to Plaintiff's claims. *See In re Caremerica,* 409 B.R. at 757. Further, the Court finds Plaintiff has neither acted in bad faith nor that amendment would be futile. Thus, Plaintiff will be permitted to amend the complaint.

With respect to Defendants' arguments that any amendment should not relate back, the Court is likewise unpersuaded. An amendment to a pleading relates back to the date of the original pleading when "the amendment asserts a claim or defense that arose out of the conduct, transaction, or occurrence set out—or attempted to be set out—in the original pleading." Fed. R. Civ. P. 15(c)(1)(B); Fed. R. Bankr. P. 7015. "Relation back is contingent on the court determining that there is a factual nexus between the amendment and the original claim and that the defendants had notice of the claim and will not be prejudiced by the amendment." *In re Caremerica,* 409 B.R. at 757.

Here, Plaintiff maintains his proposed amendment would specify the dates and amounts of each transfer, and that any amendment would neither include new transfers nor add new defendants (Doc. 50 at 12-13). Thus, it follows that any amended claim would be based on the same transactions or occurrences set forth in the previously filed complaint. Accordingly, should Plaintiff file an amended complaint, it will relate back to the filing of the original complaint.

2. *Constructive Fraud Under the Bankruptcy Code*

Section 548(a)(1)(B) of the Bankruptcy Code provides for the avoidance of constructive fraudulent transfers of property of a debtor made within two years of the petition date made for less than reasonably equivalent value while the transferor was insolvent or was rendered insolvent thereby. Courts have held that Rule 9(b)'s particularity requirement does not apply to claims of constructive fraud. *See, e.g., In re NM Holdings Co., LLC,* 407 B.R at 259; *State Bank & Trust Co. v. Spaeth (In re Motorwerks, Inc.),* 371 B.R. 281, 295 (Bankr. S.D. Ohio 2007). Such courts reason that constructive fraudulent transfer claims,

> do not necessarily require proof that the defendant engaged in some form of deceit, misrepresentation or fraudulent activity. In fact, a fraudulent transfer claim based on constructive fraud need only allege that the transfer was made without reasonably equivalent value while the debtor was insolvent. In other words, there is no reason to require a trustee to plead a defendant's fraud or misconduct with specificity if such fraud or misconduct is not an element of the trustee's fraudulent transfer claim.

Motorwerks, 371 B.R. at 295 (citing *Giuliano v. U.S. Nursing Group (In re Lexington Healthcare Group, Inc.*), 339 B.R. 570, 574–75 (Bankr. D. Del. 2006) (internal citations omitted)). The Court agrees with the reasoning noted above. Thus, Rule 8(b)(2), which requires only a short and plain statement of the claim showing that the pleader is entitled to relief, shall apply to the instant constructive fraudulent transfer claims.

In applying the aforementioned principals, the Court finds Plaintiff has met the minimal pleading requirements as to Count IV. More particularly, Plaintiff describes the alleged fraudulent scheme, identifies its participants, specifies the aggregate amount(s) of the subject transfers, provides the relevant time-period(s), and pleads facts in support of the claim that such transfers were made while the Debtors were either insolvent or rendered insolvent thereby (Doc. 7 at 4-23). *See In re Caremerica,* 409 B.R. at 752 ("the trustee must allege facts sufficient to show that such insolvency is plausible"). Plaintiff attached to the Amended Complaint balance-sheet information,

bank-financing information, and income statements which, taken together, lend factual support to Plaintiff's claim(s) of insolvency (*see e.g.*, Doc. 7-1 at 3-20, 25-26; Doc. 7-2 at 23-24; Doc. 7-3 at 3-9, 13-14; Doc. 7-4 at 3-4, 7-8, 21-26). Plaintiff additionally alleges that the subject transfers were made without any consideration, collateral, security interest, or promise to repay (Doc. 7 at 15). *See In Re Derivium Capital, LLC*, 380 B.R. at 438-39 (finding, *inter alia*, that the trustee's allegation the debtor received "inadequate consideration" for the subject transfers was sufficient under notice pleading).

Based on the foregoing, the Court finds Count IV asserts a plausible claim for constructive fraud. Moreover, the pleading in this regard adequately places Defendants on notice as to what Plaintiff's constructive fraud claims are and the basis upon which they rest. Accordingly, Defendants' respective motions to dismiss Count IV of the Amended Complaint for failure to state a claim will be denied.

3. *Fraudulent Transfers Under the Statutes of Florida*

Counts V, VI, VII, and VIII assert active and constructive fraud claims, and a preferential transfer claim under the statutes of Florida (Doc. 7 at 23-28).

Section 544(b)(1) of the Bankruptcy Code provides the trustee with the power to avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor "that is voidable under applicable [state or federal] law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title."

As an initial matter, Defendants argue that in order to invoke section 544(b)(1), Plaintiff must identify a specific creditor that holds an allowable unsecured claim (*see e.g.*, Doc. 26 at 20).

While a trustee-plaintiff bears the burden of proving the existence of a qualified unsecured creditor prior to recovery, at the pleading stage of the proceedings, courts typically do not require a trustee-plaintiff to specifically name a qualifying creditor. *Welt v. Jacobson (In re Aqua Clear Technologies, Inc.)*, 361 B.R. 567, 582 n.18 (Bankr. S.D. Fla. 2007) (citing *Pardo v. Avanti Corp. Health Care Sys., Inc. (In re APF CO.)*, 274 B.R. 634, 639 (Bankr. D. Del. 2001)).

Defendants further argue that Florida law is not applicable to the instant avoidance claims. Thus, the Court finds it necessary to conduct a choice-of-law analysis before proceeding to the sufficiency of the pleadings. Bankruptcy courts must apply the choice of law rules of the state in which the court sits. *Bohm v. The Horsley Co.*, 333 B.R. 261, 276 (Bankr. W.D. Pa. 2005). This action is pending in Florida, which applies the Restatement (Second) of Conflict of Laws. *Bishop v. Florida Specialty Paint Co.*, 389 So. 2d 999, 1001 (Fla. 1980). Because the instant counts are based upon section 544(b)(1) of the Code, the Court must determine whether Florida's fraudulent conveyance laws are applicable to the facts presented.

In accordance with the Restatement (Second) of Conflict of Laws, "[t]he law of the jurisdiction with the most significant contacts to the relevant transfers and relevant parties applies to a state-law fraudulent transfer claim brought under section 544(b) of the Bankruptcy Code." *Official Comm. of Unsecured Creditors of Hydrogen, L.L.C. v. Blomen (In re Hydrogen, L.L.C.)*, 431 B.R. 337, 353-54 (Bankr. S.D.N.Y. 2010). Contacts to be considered include: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the place of incorporation and place of business of the parties; and (4) the place where the relationship, if any, between the parties is centered. Restatement (Second) of Conflicts of Laws § 145. Such contacts "are to be evaluated according to their relative importance with respect to the particular issue." *Id.*

Defendants assert that there are not enough contacts with the State of Florida for Plaintiff to maintain the instant avoidance claims.

Here, the Court finds the jurisdiction with the most significant contacts is likely to be either Georgia or Florida. The Court would note that the Amended Complaint does not provide enough information regarding the subject transfers for the Court to make an informed decision as to which state's law would apply. For instance, the alleged injuries occurred in both Georgia and Florida, as well as in several other states, including North Carolina. As noted above, Plaintiff alleges fraudulent transfers in aggregate amounts over a three-year time period (January 1, 2005 through December 31, 2007) (Doc. 7 at 7-10). While the place of incorporation of Defendants and Land Resource, LLC is Georgia, Land Resource, LLC's annual report, filed with the Georgia Secretary of State on December 4, 2006, provides that its principal place of business relocated to Orlando, Florida, sometime within the previous year.[5] Because the alleged fraudulent transfers and other financial decisions were most likely made at the corporate headquarters of Land Resource, LLC, the injury-causing conduct arguably took place in either Georgia or Florida depending on when the transaction(s) occurred.

It should also be noted that LR Buffalo Creek, LLC's annual report, filed with the Georgia Secretary of State on March 31, 2008, provides that it relocated its principal place of business to Orlando, Florida, sometime within the previous year (*i.e.*, at some point subsequent to March 26, 2007, the date it filed its prior annual report). Similarly, Point Peter, LLLP's annual report, filed with the Georgia Secretary of State on March 31, 2008, provides that its principal place of business relocated to Orlando, Florida, within the previous year. The Court makes note of this because

[5] The Court takes judicial notice of the corporate filings of the parties.

Defendants maintain that, at all relevant times, they had minimal contacts with the State of Florida (*see e.g.*, Doc. 17 at 15-16; Doc. 26 at 23-25).

Since the Court finds either Georgia or Florida law could apply to the facts of this case, depending in part on when a particular transfer occurred (*e.g.*, if a transfer was made while a certain entity was operating from Georgia as opposed to Florida), the Court will determine the sufficiency of Counts V, VI, VII, and VIII as pleaded under the statutes of Florida.[6]

a. Count V

Section 726.105(1)(a) of the Florida Statutes provides for the avoidance of transfers by a debtor "made with actual intent to hinder, delay, or defraud any creditor of the debtor" within four years of a bankruptcy petition date. Fla. Stat. § 726.105(a). This is a claim for actual fraud. As noted above, claims of actual fraud must be pleaded with particularity, as required by Rule 9(b) of the Federal Rules of Civil Procedure. For the same reasons the Court dismissed Count III, *supra*, it will dismiss Count V of the Amended Complaint. Plaintiff, however, will be permitted to amend the pleadings, which shall relate back to the filing of the original complaint for the reasons noted above.

b. Counts VI & VII

Sections 726.105(1)(b) and 726.106(1) of the Florida Statutes provides for the avoidance of constructively fraudulent transfers. Whether a creditor's claim arose before or after the subject transfer, section 726.105(1)(b) prohibits those transfers that: (1) were made without reasonably equivalent value; and (2) leave the transferor with either an unreasonably small capital or debts beyond its ability to repay. As to a creditor whose claim arose before the subject transfer, section

[6] The Court would note that a plaintiff is permitted to plead matters in the alternative. Fed. R. Civ. P. 8(d)(2).

726.106(1) prohibits those transfers that were made without reasonably equivalent value when the debtor was either insolvent at the time of the transfer or became insolvent as a result of the transfer.

Sections 726.105(1)(b) and 726.106(1) are similar to section 548(a)(1)(B) of the Bankruptcy Code in that they do not require an element of scienter. Consequently, the Court finds Rule 8(b)(2)'s more liberal standard of notice pleading is applicable to these counts. For the same reasons the Court permitted Plaintiff's constructive fraud claim under the Bankruptcy Code (Count IV) to stand, the Court finds Plaintiff has pleaded the constructive fraud counts under the statutes of Florida (Counts VI and VII) with the requisite sufficiency to place Defendants on notice as to what Plaintiff's claims are and the basis upon which they rest. Accordingly, Defendants' respective motions to dismiss Counts VI and VII will be denied.

c. Count VIII

Count VIII seeks to avoid alleged preferential transfers (Doc. 7 at 28). Pursuant to Florida Statutes, section 726.106(2), any transfer made within one year of the bankruptcy petition date: (1) in payment of an antecedent debt; (2) to an insider; (3) who knew or should have known the debtor was insolvent at the time of payment is deemed fraudulent. Plaintiff's claim in this regard is subject to dismissal for the reasons stated below.

In the Amended Complaint (Doc. 7), Plaintiff alleges no facts in support of the claim that Defendants received transfers on account of antecedent debts. In *In re Caremerica*, the court stated "the trustee must assert the nature and amount of the antecedent debt in order to allege a plausible claim for relief." 409 B.R. at 751. Here, the Amended Complaint makes the conclusory assertion that each preferential transfer was made "on account of antecedent debt" (Doc. 7 at 28). This is insufficient.

In addition, Plaintiff does not even assert that Defendants were "insiders" of the corporate entities that allegedly made the subject transfers. The term "insider," as used in the Code, includes a director, officer, or person in control of the debtor; a general partner of the debtor; or a relative of a director, officer, or person in control of the debtor. 11 U.S.C. § 101(31). Although case law has expanded the definition of an insider to encompass anyone who has a sufficiently close relationship with the debtor such that their conduct is made subject to closer scrutiny than those dealing at arm's length with debtor, *Dixon v. American Cmty. Bank & Trust (In re Gluth Bros. Const., Inc.*), 424 B.R. 379, 393 (Bankr. N.D. Ill. 2009), Plaintiff has not alleged facts in the Amended Complaint to support his claim that Defendants were insiders of the subject entities. Specifically, Plaintiff alleges that "Land Resource Group, Inc. acted as managing member for each of the Debtor Subsidiaries," and that Mr. Ward was an "insider" of the Debtor Subsidiaries (Doc. 7 at 7, 11).[7] There are no allegations in the Amended Complaint that, apart from being part equity owners and receiving equity distributions, Defendants exercised any management or day-to-day control over the Debtors. *See Zucker v. Freeman (In re Netbank, Inc.),* 424 B.R. 568, 572-73 (Bankr. M.D. Fla. 2010) (finding a plaintiff must allege facts to plausibly support that a defendant was an insider or otherwise exercised control over the debtor).

Plaintiff, however, in his Sur-Reply to Reply of Euram Defendants to Plaintiff's Omnibus Response to Motions to Dismiss (Doc. 50), maintains that pursuant to the Amended and Restated Operating Agreement of LR Buffalo Creek, LLC, dated September 28, 2004 ("Amended Operating Agreement"), the Defendant equity owners of LR Buffalo Creek, LLC were classified as "Preferred

[7] In the Amended Complaint, "Debtor Subsidiaries" includes the Defendant entities (Doc. 7 at 7-8). In addition, Mr. Ward is alleged to have been the chief executive officer of Land Resource Group, Inc. (Doc. 7 at 11).

Members" who "had considerable influence and control" over the affairs of the company (Doc. 50 at 9; *see also* Doc. 26-1, Amended Operating Agreement). Plaintiff additionally states that such "Preferred Members participated in the management of LR Buffalo Creek, LLC" (Doc. 50 at 9). Without addressing the merits of these newly-asserted propositions, the Court would note that Plaintiff's contentions in this regard do not comport with allegations contained in the Amended Complaint. At this juncture, the Court is addressing the sufficiency of the pleadings; therefore, it declines to consider the import of the Amended Operating Agreement.

Based on the foregoing, Count VIII will be dismissed for failure to state a claim. Plaintiff, however, shall have leave to amend.

4. *Count IX–Postpetition Transfers*

The Court finds Plaintiff's claim for recovery of postpetition transfers is premature. To illustrate, in addition to asserting no facts to plausibly state a claim for the requested relief, Plaintiff makes his claim conditional by stating "in the event" Defendants have made any postpetition transfers, such transfers are to be avoided (Doc. 7 at 29). Should Plaintiff ultimately discover that Defendants have indeed made postpetition transfers, he may then file an appropriate motion with the Court. For the foregoing reasons, Count IX will be dismissed without prejudice for failure to state a claim.

B. The Avoidance-Related Claims—All Defendants

The second group of Plaintiff's claims, as set forth in Counts I and XI of the Amended Complaint (Doc. 7) seek: (1) a declaratory judgment that any Defendant who received an avoidable transfer be deemed an initial transferee for purposes of sections 544, 548, 549 or 550 of the Code (Count I); and (2) recovery of any avoidable transfers (Count XI).

1. Count I–Declaratory Judgment

By way of Count I, Plaintiff requests that the transfers at issue be collapsed and treated as a single transaction for purposes of the fraudulent conveyance laws (Doc. 7 at 18-19). Pursuant to the doctrine of collapsing, under appropriate circumstances, multiple transactions may be "collapsed" and treated as a single transaction. *M. Farbrikant & Sons, Inc. v. JP Morgan Chase Bank, N.A. (In Re Farbrikant)*, 394 B.R. 721, 731 (Bankr. S.D.N.Y. 2008). A party seeking to collapse a series of transactions, however, must satisfy two prongs. *Id*. First, "the consideration received from the first transferee must be reconveyed by the debtor for less than fair consideration or with an actual intent to defraud creditors." *Id*. Second, the initial transferee must have actual or constructive knowledge of the entire scheme that renders the exchange with the debtor fraudulent. *Id*.

Actual knowledge exists where the parties are intimately involved in the formulation or implementation of the plan. *Id*. at 732. "Constructive knowledge, on the other hand, will be found where the initial transferee became aware of circumstances that should have led it to inquire further into the circumstances of the transaction, but failed to make the inquiry." *Id*.

Here, although conclusory allegations of inadequate consideration may suffice with respect to the first prong, *id*. at 737, with respect to the second prong, Plaintiff has failed to state a claim. More particularly, Plaintiff has not pleaded sufficient facts to present a plausible claim that Defendants knew or should have known of Debtors' alleged ponzi-type scheme. *Id*. Plaintiff neither asserts that Defendants had knowledge of the alleged scheme, nor does he assert that they were made aware of circumstances that should have prompted them to inquire further. Consequently, the Court

finds Plaintiff has failed to state a claim for declaratory judgment in this regard. Thus, Count I will be dismissed with leave to amend.

The Court would note that, under section 550 of the Code, once a trustee proves that a transfer is avoidable, "he [or she] may seek to recover against any transferee, initial or immediate, or an entity for whose benefit the transfer is made." *In re Int'l Admin. Servs.*, 408 B.R. at 706 (quoting *Kendall v. Sorani (In re Richmond Produce Co, Inc.)*, 195 B.R. 455, 463 (N.D. Cal 1996)). "The distinction between initial transferee and mediate transferee for avoidance purposes is irrelevant. The Defendants need only be transferees." *In re Int'l Admin. Servs.*, 408 B.R. at 707.

2. Count XI–Recovery of Property

Section 550 of the Bankruptcy Code provides that once a transfer has been avoided pursuant to, *inter alia*, sections 544, 547, or 548, a trustee may recover the property that was transferred from the party for whose benefit the transfer was made. Here, Plaintiff has alleged that the transfers at issue are avoidable pursuant to the aforementioned Code sections. As the Court has permitted Counts IV, VI, and VII to stand, Plaintiff has alleged sufficient facts to survive Defendants' motions to dismiss with respect to his claim for recovery of avoided transfers. *See Vaughn v. Graybeal, Jr., (In re CM Vaughn, LLC)*, No. 10-06105-MGD, 2010 WL 3397425, at *3 (Bankr. N.D. Ga. June 21, 2010).[8]

C. The Fiduciary Duty Claims—All Defendants

Plaintiff's final group of claims consists of Counts II and X, which respectively seek an accounting and assert a claim for breach of fiduciary duty (Doc. 7 at 19-20, 29-30).

1. Count X–Breach of Fiduciary Duty

[8] Unpublished opinions are not considered binding authority; however, they may be cited as persuasive authority pursuant to the Eleventh Circuit Rules. 11th Cir. R. 36-2.

Plaintiff claims Defendants breached a fiduciary duty owed to the land purchasers and other creditors who were allegedly defrauded (Doc. 7 at 29-30). A trustee has standing to bring a breach of fiduciary claim against a debtor's fiduciaries. *Official Committee of Unsecured Creditors of Toy King Distribs., Inc. v. Liberty Savs. Bank, FSB (In re Toy King Distribs., Inc.)*, 256 B.R. 1, 166-67 (Bankr. M.D. Fla. 2000). In general, an officer or director of a corporation owes fiduciary duties only to shareholders; however, when a company becomes insolvent, "the fiduciary duty of the directors [or officers] shifts from the stockholders to creditors." *Id*. at 167 (internal quotations and citations omitted).

Plaintiff concedes Georgia law applies to the corporate affairs of LR Buffalo Creek, LLC, as it was organized under the laws of Georgia (Doc. 50 at 7 n. 14). Indeed, pursuant to the "internal affairs doctrine," the law of the state of incorporation applies to a corporation's internal affairs (including claims for breach of fiduciary duty). *In re Hydrogen, LLC*, 431 B.R. at 346. Since it is alleged that all the subject entities were incorporated pursuant to the laws of Georgia, the Court will analyze the sufficiency of the pleadings in accordance with Georgia law.

Pursuant to the relevant Georgia case law, after insolvency, only managing officers or directors are charged with the duty of conserving and managing the remaining assets in trust for creditors. *Smith Drug Co. v. Pharr-Luke (In re Pharr-Luke)*, 259 B.R. 426, 431 (Bankr. S.D. Ga. 2000) (citing *Ware v. Rankin*, 97 Ga. App. 837, 837-38 (1958)); *see also Westek Georgia, LLC v. Oglesbee (In re Westek Georgia, LLC)*, 332 B.R. 850, 854 (Bankr. M.D. Ga. 2005). As noted above, in the Amended Complaint, Plaintiff does not allege that Defendants were either managing members, officers, or directors. Although Plaintiff has since averred differently (*see* Doc. 50 at 9), the Amended Complaint fails to allege facts to support a plausible claim for a breach of fiduciary

duty on the part of Defendants. Accordingly, Count X of the Amended Complaint will be dismissed with leave to amend.

2. Count II–Accounting

By way of Count II, Plaintiff brings a separate claim for an accounting (Doc. 7 at 19-20). An accounting is a restitutionary remedy, which the Court has the power to grant under appropriate circumstances. Indeed, section 542 of the Bankruptcy Code expressly provides for an accounting in a turnover action when property of the estate is in the possession of a person or entity who is not a custodian of such property. Plaintiff, however, seeks an equitable accounting (*see* Doc. 22 at 22). In support, Plaintiff avers "[a]s equity owners, Defendants owed a fiduciary duty to the [land] Purchasers" (Doc. 7 at 19).

In order to obtain an equitable accounting, Plaintiff must show: (1) the existence of a fiduciary duty or that the transactions at issue are complex; and (2) that there is no adequate remedy at law. *Kee v. Nat'l Res. Life Ins. Co.*, 918 F.2d 1538, 1540 (11th Cir. 1990). Such a claim is "typically viewed as a remedy rather than an independent cause of action." *Kore Holdings, Inc. v. Rosen (In re Rood)*, 426 B.R. 538, 556 (Bankr. D. Md. 2010). An accounting "is an extraordinary remedy, and like other equitable remedies, is available only when legal remedies are inadequate." *Id*.

As noted above, Plaintiff has not set forth a plausible claim as to the existence of a fiduciary duty. Although Plaintiff asserts the subject transactions are complex (Doc. 7 at 19), the Court is not convinced that there is no adequate remedy at law. More particularly, what Plaintiff seeks by way of an accounting appears to be available through regular discovery channels. *See Cont'l Cas. Co. v. First Fin. Employee Leasing*, 716 F. Supp. 2d 1176, 1194 (M.D. Fla. 2010) ("an equitable

accounting is not a substitute for discovery available and permitted under the Federal Rules of Civil Procedure").

Based on the foregoing, the Court will dismiss Plaintiff's separate claim for an accounting without prejudice. *See In re Rood*, 426 B.R. at 556 (upholding the bankruptcy court's dismissal of the plaintiff's "freestanding" claim for an accounting insofar as it did not properly state a separate cause of action). Plaintiff may either amend his pleading of Count II or otherwise seek equitable relief at any time during the proceedings if he believes such is appropriate under the circumstances.

IV. CONCLUSION

For the foregoing reasons, it is hereby **ORDERED**:

1. The Motion to Dismiss Amended Complaint filed by the Euram Defendants (Doc. 15) is **GRANTED in part** as provided herein.

2. The Motion to Dismiss filed by Defendant Barrington H. Branch (Doc. 16) is **GRANTED in part** as provided herein.

3. The Motion to Dismiss filed by Defendants Realan Investment Partners, LLLP and Weeks-Gray Rock, LLC (Doc. 25) is **GRANTED in part** as provided herein.

4. Plaintiff's unopposed Motion for Voluntary Dismissal of Dinur & Associates, P.C., with Prejudice (Doc. 32) is **GRANTED**.

5. Plaintiff has until **August 26, 2011** within which to file an amended pleading.

6. Plaintiff's unopposed motion to abate the instant adversary proceeding as to Defendant Daniel D. Dinur (Doc. 39) is **GRANTED**. **Defendant Daniel D. Dinur shall have thirty (30) days following service of any amended pleading within which to file a response**.

DATED this 5th day of **August, 2011** in Jacksonville, Florida.

/s/ Jerry A. Funk
Jerry A. Funk
United States Bankruptcy Judge

Copies Furnished To:
Jacob D. Flentke, Attorney for Plaintiff;
All Interested Parties