UNITED STATES BANKRUPTCY COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

In re:
LAND RESOURCE, LLC, et al.,[1]

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

Debtors.
_____/

LEIGH R. MEININGER, Chapter 7 Trustee,

Plaintiff,
v.

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

EURAM, LLC, et al.,

Defendants.
_____/

ORDER GRANTING IN PART MOTION TO DISMISS PLAINTIFF'S SECOND AMENDED COMPLAINT

This proceeding is before the Court on Defendants Realan Investment Partners, LLLP and Weeks-Grey Rock, LLC's Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 67) and Memorandum of Law in Support thereof (Doc. 68, collectively the "Motion to Dismiss"). Defendants Barrington H. Branch and Daniel D. Dinur filed documents indicating their desire to join in the Motion to Dismiss (Docs. 70 and 77).[2] Plaintiff has filed an Omnibus Response to the Motion

[1] The jointly administered cases are listed in footnote one of the Second Amended Complaint (Doc. 56 at 1-2 n.1).

[2] As Defendants Branch and Dinur both filed an answer to Plaintiff's Second Amended Complain (Docs. 71, 73), their joinder in the Motion to Dismiss is procedurally improper. *See* Fed. R. Civ. P. 12(b); Fed. R. Bankr. P. 7012. Nevertheless, the Court will accept their joinder(s) in the Motion to Dismiss.

to Dismiss (Doc. 85). For the reasons stated herein, the Court finds the Motion to Dismiss is due to be granted in part.[3]

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.[4] In the Second Amended Complaint (Doc. 56, hereinafter referred to as the "Complaint"), 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 subsidiary affiliates defrauded land purchasers in North Carolina, Georgia, Tennessee, West Virginia, and Florida (*see* Doc. 56 at 20-27; Doc. 85 at 12). The Complaint collectively refers to Land Resource, Inc., the authorized 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. 56 at 5).[5]

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. 56 at 18-21). The subject land was marketed and sold prior to and during the construction of

[3] Defendants Realan Investment Partners, LLLP, Weeks-Grey Rock, LLC, Barrington H. Branch, and Daniel D. Dinur will hereinafter be collectively referred to as "Defendants."

[4] 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.

[5] It should be noted that Land Resource is not a party to this adversary proceeding.

necessary infrastructure improvements and amenities (Doc. 56 at 25-27). 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. 56 at 4-5). Defendants were part equity owners of one or more of such entities (*see* Doc. 56 at 6-10). One such debtor entity relevant here, 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%);[6] 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. 56 at 6-7).

The causes of action asserted in the Complaint (Doc. 56) can generally be divided into three categories. The first category of claims, set forth in Counts II, III, IV, V, VI, and VII of the Complaint, allege avoidable transfers under both the Bankruptcy Code and various state statutes (the "Avoidance Claims"). The second group of claims, as set forth in Counts I and IX of the 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 IX) (the "Avoidance-Related Claims"). The final category of claims consists of Count VIII, which asserts a claim for breach of fiduciary duty (the "Fiduciary Duty Claim").

Plaintiff alleges that, between March 16, 2005 and June 27, 2006, Debtors made a series of transactions which resulted in the following total amounts being paid to Defendants: (1) $1,940,319.50 to Realan Investment Partners, LLLP; (2) $1,940.319.50 to Weeks-Grey Rock, LLC;

[6] Plaintiff states in Paragraph 51 of the Complaint that "Realan Investment Partners, LLLP was a Preferred Member of LR Buffalo Creek, LLC; thus, it is unclear whether Plaintiff's reference to Realan Capital Corporation includes Realan Investment Partners, LLLP (Doc. 56 at 10; *compare* Doc. 56 at 6).

(3) $1,014,296.39 to Barrington Branch; and (4) $242,539.94 to Daniel Dinur (Doc. 56, Exs. E, F, G, and K).

In general, it is claimed the aforementioned transfers were fraudulent as to the land purchasers and other creditors in that they were made without any reasonably equivalent value or promise to repay (Doc. 56 at 49, 54; Doc. 85 at 12-14). Plaintiff maintains such transfers left the subject companies with unreasonably small capital, rendering them unable to complete the promised infrastructure improvements (Doc. 56 at 25-27; Doc. 85 at 13-14). 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. 85 at 12-14). Plaintiff claims many purchasers were left without access to the land they purchased due to not having access roads or other means of ingress (Doc. 56 at 23).

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.

A. The Avoidance Claims

Counts II, III, IV, V, VI, and VII of the Complaint allege avoidable transfers under the Bankruptcy Code and the statutes of Florida; or, alternatively, under the statutes of Georgia and North Carolina.

1. *Actual and Constructive Fraud Under the Bankruptcy Code*

Counts II and III of the Complaint seek to avoid transfers pursuant to sections 548(a)(1)(A) and (B) of the Bankruptcy Code, which provide for the avoidance of certain transfers of property

of the debtor, made within two years of the petition date. 11 U.S.C. § 548(a)(1)(A) and (B). Debtors filed their respective bankruptcy petitions on October 30, 2008. Thus, in order to state a claim under either of these Code sections, Plaintiff must allege fraudulent transfers occurring on or subsequent to October 30, 2006. Counts II and III claim that, between March 16, 2005 and June 27, 2006, Debtors made fraudulent transfers to Defendants (Doc. 56 at 32-41). The transfers delineated in Exhibits E, F, G, and K occurred more than two years prior to the Debtors' petition date(s).[7] Accordingly, the Motion to Dismiss Counts II and III will be granted.

Acknowledging he has not asserted a claim under Counts II and III, Plaintiff states he expressly reserves the right to further amend the Complaint should he discover additional transfers that occurred within the statutory look-back period of two years (Doc. 85 at 6; Doc. 56 at 33, 38). As Plaintiff has already been granted leave to amend the complaint, to the extent Plaintiff discovers any additional transfers, he should file an appropriate motion with the Court.

2. *Fraudulent Transfers Under State Statutes*

Pursuant to the statutes of Florida; or, alternatively, under the statutes of Georgia and North Carolina, Counts IV, V, and VI assert active and constructive fraud claims, and Count VII asserts a preferential transfer claim (Doc. 56 at 41-59).

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] 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." Here,

[7] As previously noted, the most recent transfer(s) specified on Exhibits E, F, G, and K are alleged to have occurred on June 27, 2006, which is beyond two years from the Debtors' respective petition dates of October 30, 2008.

the alleged injuries occurred in both Georgia and Florida, as well as in several other states, including North Carolina.

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* Doc. 68 at 21-25). 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)).

a. Count IV

Count IV seeks to avoid certain transfers under section 726.105(1) of the Florida Statutes or, in the alternative, under section 18-2-74(a)(l) of the Official Code of Georgia or section 39-23.4(a)(l) of the North Carolina General Statutes. Each of these statutory provisions is substantially similar and provides that either a present or a future creditor may avoid a transfer made by a debtor with intent to hinder, delay, or defraud, made within four years of a bankruptcy petition date. Fla. Stat. § 726.105(1)(a); O.C.G.A § 18-2-74(a)(l); N.C. Gen. Stat. § 39-23.4(a)(l).

In the Motion to Dismiss, Defendants contend the Complaint fails to satisfy the heightened pleading standard for actual fraud pursuant to Rule 9(b) of the Federal Rules of Civil Procedure (Doc. 68 at 25-27). For the reasons that follow, the Court is not persuaded.

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).

The requirements of Rule 9(b) may be relaxed, however, 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*. 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, the Court finds Exhibits E, F, G, and K, taken in conjunction with the allegations in the body of the Complaint, set forth with particularity the circumstances that constitute the alleged fraud. Specifically, Plaintiff describes the alleged fraudulent scheme, identifies its participants, identifies the transferor, the transferee, the specific date of the transfer(s), the check number associated with the transfer(s), the invoice number, and the precise amount of the subject

transfer(s) (*see* Doc. 56, Exs. E, F, G, and K). As such, the Motion to Dismiss Count IV will be denied.

b. Counts V & VI

Count V is brought pursuant to section 726.105(1)(b) of the Florida Statutes or, in the alternative, under section 18-2-74(a)(2) of the Official Code of Georgia or section 39-23.4(a)(2) of the North Carolina General Statutes. Each of these statutory provisions is substantially similar and prohibits those transfers that, whether a creditor's claim arose before or after the subject transfer: (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. Fla. Stat. § 726.105(1)(b); O.C.G.A. § 18-2-74(a)(2); N.C. Gen. Stat. § 39-23.4(a)(2).

Count VI is brought pursuant to section 726.106(1) of the Florida Statutes or, in the alternative, section 18-2-75(a) of the Official Code of Georgia or section 39-23.5(a) of the North Carolina General Statutes. Each of these statutory provisions is substantially similar and prohibits those transfers, as to a creditor whose claim arose before the subject transfer, 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. Fla. Stat. § 726.106(1); O.C.G.A § 18-2-75(a); N.C. Gen. Stat. § 39-23.5(a).

All of these state statutory provisions, *supra*, are similar to section 548(a)(1)(B) of the Bankruptcy Code in that they do not require an element of scienter. 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:

> 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 constructively fraudulent transfer claims.

In applying the aforementioned principals, the Court finds Plaintiff has met the minimal pleading requirements as to Counts V and VI. More particularly, Plaintiff describes the alleged fraudulent scheme, identifies its participants, identifies the transferor, the transferee, the specific date of the transfer(s), the check number associated with the transfer(s), the invoice number, and the precise amount of the subject transfer(s) (*see* Doc. 56, Exs. E, F, G, and K).

In addition, Plaintiff pleads facts in support of the claim that such transfers were made while the Debtors were either insolvent or rendered insolvent thereby (Doc. 56 at 15-27, 47-56). *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 Complaint balance-sheet information and income statements which, taken together, lend factual support to Plaintiff's claim(s) of insolvency (*see, e.g.*, Doc. 56, Exs. L, M, N, and O). Plaintiff additionally alleges that the subject transfers were made without any reasonably equivalent value or promise to repay (Doc. 56 at 49, 54; Doc. 85 at 12-14). *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 Counts V and VI assert plausible claims for constructive fraud. Moreover, the pleadings in this regard adequately place Defendants on notice as to what Plaintiff's constructive fraud claims are and the basis upon which they rest. Accordingly, the Motion to Dismiss Counts V and VI of the Complaint for failure to state a claim will be denied.[8]

c. Count VII

Count VII seeks to avoid alleged preferential transfers under section 726.106(2) of the Florida Statutes or, alternatively, under section 18-2-75(b) of the Official Code of Georgia or section 39-23.5(b) of the North Carolina General Statutes. Each of these code sections is substantially similar and prohibit transfers 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.

In this instance, Plaintiff's claim is subject to dismissal because none of his asserted transfers occurred within the statutory look-back period of one year of the Debtors' respective petition dates. Acknowledging he has not asserted a claim under Count VII, Plaintiff states he expressly reserves the right to further amend the Complaint should he discover additional transfers that occurred within the statutory look-back period (Doc. 56 at 57-58). Plaintiff has already been granted leave to amend the complaint; therefore, to the extent he discovers additional transfers and wishes to amend the complaint for a third time, he shall file an appropriate motion with the Court.

B. The Avoidance-Related Claims

[8] Defendants assert that they may have a contractual right to indemnity against the Debtors (Doc. 68 at 29-30). This assertion, however, is in the nature of an affirmative defense which is inappropriate for resolution at the motion to dismiss stage of the proceedings.

The second group of Plaintiff's claims, set forth in Counts I and IX of the Complaint (Doc. 56) 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 Bankruptcy Code (Count I); and (2) recovery of any avoidable transfers (Count IX).

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. 56 at 27-31). 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, conclusory allegations of inadequate consideration may suffice with respect to the first prong. *Id*. at 737. With respect to the second prong, Plaintiff has pleaded sufficient facts to present a plausible claim that Defendants knew or should have known of the Debtors' alleged ponzi-type

scheme. Specifically, Plaintiff asserts Defendants either had knowledge of the alleged scheme, or were made aware of circumstances that should have prompted them to inquire further (Doc. 56 at 28-31). In the Complaint, Plaintiff describes the alleged ponzi-type scheme, identifies its participants, and provides documentary support for his assertion that Defendants accepted large distributions at a time when the Debtors were insolvent (*see* Doc. 56, Exs. L, M, N, and O).[9] Consequently, the Court finds Plaintiff has stated a claim for declaratory judgment. Thus, the Motion to Dismiss Count I will be denied.

2. Count IX–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 the transfers at issue are avoidable pursuant to the aforementioned Code sections. As the Court has permitted Counts IV, V, and VI to stand, Plaintiff has alleged sufficient facts to survive Defendants' Motion to Dismiss with respect to his claim for recovery of any 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).[10] Accordingly, Defendants' Motion to Dismiss Count IX is denied.

C. The Fiduciary Duty Claim

Count VIII asserts a claim for breach of fiduciary duty (Doc. 56 at 59). Plaintiff claims Defendants breached a fiduciary duty owed to the land purchasers and other creditors who were

[9] Typically, a defendant may not assume the position of an ostrich with its head buried in the sand and ignore facts which were readily available to it. *See Lyon v. Eiseman (In re Forbes)*, 372 B.R. 321, 334 (6th Cir. BAP 2007).

[10] 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.

allegedly defrauded (Doc. 56 at 59-64). 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 appears to concede that Georgia law applies to the corporate affairs of LR Buffalo Creek, LLC, as it was organized under the laws of Georgia (Doc. 85 at 17-20). 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). *Official Comm. of Unsecured Creditors of Hydrogen, L.L.C. v. Blomen (In re Hydrogen, L.L.C.)*, 431 B.R. 337, 346 (Bankr. S.D.N.Y. 2010). 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, members, 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).

In the Complaint, Plaintiff asserts Defendants were "insiders" who actively managed the affairs of LR Buffalo Creek, LLC (Doc. 56 at 62). The term "insider," as used in the Official Code of Georgia, includes a director, officer, or "[a] *person in control of the debtor*." O.C.G.A. § 18-2-71(7)(B)(iii) (*emphasis added*). In support, Plaintiff states Defendants participated in weekly

meetings and were actively involved in the management and control of LR Buffalo Creek, LLC (Doc. 56 at 62). *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). Defendants counter that, pursuant to the Amended & Restated Operating Agreement of LR Buffalo Creek, LLC, dated September 28, 2004 ("Amended Operating Agreement"), they were merely "Preferred Members" with no management authority (Doc. 68 at 36; *see also* Ex. P, Amended Operating Agreement).

Whether Defendants were actively involved in management, or were otherwise in control of LR Buffalo Creek, LLC, is a question of fact inappropriate for resolution at the motion to dismiss stage of the proceedings. *See Randall & Neder Lumber Co., Inc. v. Randall*, 414 S.E.2.d 718, 719-20 (Ga. Ct. App. 1992) (finding, even where a corporate resolution provided it may not be changed except by writing, the parties could, by mutual consent, enter into a new agreement at variance with the prior resolution).[11] In this instance, Plaintiff has alleged facts that at least raise a question of fact as to whether Defendants exercised control over LR Buffalo Creek, LLC. Therefore, the Motion to Dismiss Count VIII will be denied.

IV. CONCLUSION

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

1. Realan Investment Partners, LLLP and Weeks-Gray Rock, LLC's Motion to Dismiss Plaintiff's Second Amended Complaint (Doc. 67) is granted in part as provided herein.

[11] The *Randall* court also found such matters were generally a question of fact for the fact-finder to determine. *Id.* at 720.

2. Defendant Barrington H. Branch and Daniel D. Dinur's joinder(s) in the Motion to Dismiss (Docs. 70, 77) are granted in part as provided herein.

3. Counts II, III, and VII of the Second Amended Complaint (Doc. 56), to the extent they relate to Defendants Realan Investment Partners, LLLP, Weeks-Gray Rock, LLC, Barrington H. Branch, and Daniel D. Dinur, are dismissed.

4. Counts I, IV, V, VI, VIII, and IX of the Second Amended Complaint (Doc. 56) are sustained.

5. Defendants Realan Investment Partners, LLLP and Weeks-Grey Rock, LLC shall file a responsive pleading within twenty-one (21) days of the date of this Order.[12]

DATED this 5th day of April, 2012 in Jacksonville, Florida.

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

Copies to:

Counsel of Record

[12] As previously noted, Defendants Branch and Dinur have already filed answers to the Second Amended Complaint (Docs. 71, 73).