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.

SARAH CAITLIN WARD,
et al.,

Defendants.

_____/

Adversary No. 6:10-ap-275-JAF

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

This proceeding is before the Court on Defendants' Motion to Dismiss the Second Amended Complaint (Doc. 41; *see also* Doc. 40, Second Amended Complaint) and the Trustee's Response in opposition thereto (Doc. 45). For the reasons stated herein, the Court finds the Motion to Dismiss is due to be granted in part.

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.

[1] The jointly administered cases are listed in footnote one of the Second Amended Complaint (Doc. 40 at 2 n.1).

Meininger, is the Trustee for the jointly administered cases.[2] In the Second Amended Complaint (Doc. 40, the "Complaint"), Plaintiff maintains Defendants[3] were parties to transactions that are alleged to have been conducted in a fraudulent manner. More particularly, it is alleged that various transfers were made in relation to a ponzi-type scheme, in which 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. 40 at 13-23; Doc. 45 at 22). 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. 40 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. 40 at 4). The subject land was marketed and sold prior to and during the construction of necessary infrastructure improvements and amenities (Doc. 40 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. 40 at 5-12).

[2] 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.

[3] Collectively, the Defendants are Sarah Caitlin Ward, an individual, Mallory Elizabeth Ward, an individual, the Sarah Caitlin Ward Trust ("SCW Trust"), the Mallory Elizabeth Ward Trust ("MEW Trust"), Paula Cardinale Saare, individually, and in her capacity as Trustee of the SCW Trust and the MEW Trust, the J. Robert Ward Irrevocable Life Insurance Trust No. 1, the J. Robert Ward Irrevocable Life Insurance Trust No. 2, the Mallory Ward and Descendants Trust, the Robert Ward Family Trust, Ward Family, PLLC, Ward Family Investment, LLC, Ward Family Investment, PLLC, John Doe Trust, and Jane Doe Beneficiaries.

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

Generally, it is alleged that Defendants were "insiders" of one or more of the aforementioned entities, and that they received fraudulent transfers from such entities (*see* Doc. 40 at 12-23).

The causes of action asserted in the Complaint (Doc. 40) can be divided into three categories. The first category of claims, set forth in Counts III, IV, V, VI, VII, VIII, and IX of the 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 X 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 X) (the "Avoidance-Related Claims"). The final group of claims consists of Counts II and XI, which respectively seek an accounting (Count II) and assert a claim for breach of contract, or promissory note (Count XI) (the "Remaining Claims").

Plaintiff alleges that, on December 29, 2005, Defendant Sarah Caitlin Ward received a transfer from the Land Resource Companies, LLC operating account in the amount of $50,000.00 (Doc. 40 at 22). Plaintiff states the check number for this transfer is 11178 and that it is identified by Debtors' invoice number 122905 (*id*.). Plaintiff alleges the Debtors did not receive anything of value in exchange for this transfer (*id*.). Plaintiff additionally alleges that, on December 29, 2005, Defendant Mallory Elizabeth Ward received a transfer from the Land Resource Companies, LLC operating account in the amount of $50,000.00 (*id*.). The check number for said transfer is 11177 and the transfer is identified by Debtors' invoice number 122905 (*id*.). Plaintiff alleges the Debtors did not receive anything of value in exchange for this transfer (*id*.).[5]

[5] Defendants Sarah Caitlin Ward and Mallory Elizabeth Ward are Mr. Ward's daughters.

Plaintiff also claims that, for value received on or about September 20, 2005, the Sarah Caitlin Ward Irrevocable Trust executed and delivered to Land Resource a Promissory Note in the principal sum of $12,300,000.00 (*id*.). In support of this assertion, Plaintiff has attached to the Complaint a copy of the subject promissory note (Doc. 40, Exhibit E). In addition, Plaintiff maintains that, for value received on or about September 20, 2005, the Mallory Elizabeth Ward Irrevocable Trust executed and delivered to Land Resource a Promissory Note in the principal sum of $12,300,000.00 (Doc. 40 at 23). This assertion is based upon Plaintiff's "information and belief" (*id*.). Plaintiff further claims that funds from the Debtors were used to purchase personal airline tickets, personal vehicles, and personal computers for both Sarah and Mallory Ward (Doc. 40 at 21). Additionally, Plaintiff asserts the Debtors purchased "whole life" insurance policies, and that "Defendant" is the owner and/or beneficiaries [sic] of these life insurance policies" (Doc. 40 at 21).[6] Plaintiff maintains: "Mr. Ward testified that he has been withdrawing funds from [these insurance policies]" (Doc. 40 at 21).

In general, it is claimed that the subject transfers, *supra*, were fraudulent as to the land purchasers and other creditors in that they were made in exchange for little or no value, or wherewithal to repay (Doc. 40 at 22-23). Plaintiff maintains such transfers left the subject companies with unreasonably small capital, rendering them unable to complete the promised infrastructure improvements (Doc. 40 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. 40 at 14, 16; *see also* Doc. 45 at 3-5, 12-13, 22). Plaintiff claims many

[6] The Court would note it is unclear as to which Defendant Plaintiff refers.

purchasers were left without access to their purchased land as there are no roads or other means of ingress to such properties (Doc. 45 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

A. The Avoidance Claims

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

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

Count III of the 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). Count IV of the Complaint seeks to avoid certain transfers pursuant to section 548(a)(1)(B) of the Bankruptcy Code, which provides for the avoidance of transfers made within two years of the petition date for less than reasonably equivalent value while the transferor was insolvent or was rendered insolvent thereby (*i.e.,* constructively fraudulent transfers).

In this instance, Debtors filed their respective bankruptcy petitions on October 30, 2008. Thus, in order to state a claim under either section 548(a)(1)(A) or section 548(a)(1)(B), Plaintiff must allege fraudulent transfers occurring on or subsequent to October 30, 2006. Plaintiff's Complaint, however, is deficient in this regard. Although Plaintiff asserts, in a conclusory fashion, that transfers were made to the Defendants within two years of the petition date, the only transfers specified by Plaintiff occurred more than two years prior to the petition date. Specifically, Plaintiff alleges that on December 29, 2005, Defendants Sarah and Mallory Ward each received transfers

from the Land Resource Companies, LLC operating account in the amount of $50,000.00 (Doc. 40 at 22). Plaintiff further alleges that or about September 20, 2005, for value received, the Mallory Elizabeth Ward Irrevocable Trust and the Sarah Caitlin Ward Irrevocable Trust executed and delivered to Land Resource promissory notes in the principal sum of $12,300,000.00 each (Doc. 40 at 23). These transfers occurred outside the two year look-back period provided for in sections 548(a)(1)(A) and 548(a)(1)(B). Consequently, Plaintiff has failed to assert a cause of action with respect to these transfers.

While Plaintiff alleges generally that, within the two year look-back period, various transfers and distributions were made to the remaining Defendants (Doc. 40 at 28, 30, 32, 34), such allegations are not adequately pleaded. By way of example, Plaintiff claims that funds from the Debtors were used to purchase personal airline tickets, personal vehicles, and personal computers for both Sarah and Mallory Ward (Doc. 40 at 21); however, Plaintiff does not provide any dates with respect to these alleged purchases. Plaintiff asserts that the Debtors purchased "whole life" insurance policies, and that "Defendant" is the owner and/or beneficiaries [sic] of these life insurance policies" (Doc. 40 at 21); however, it is not clear as to which Defendant Plaintiff refers. Moreover, Plaintiff maintains that Mr. Ward (who is not a party to this proceeding) testified to withdrawing funds from these insurance policies (Doc. 40 at 21). Plaintiff neither specifies which, if any, of the Defendants withdrew funds or otherwise received a benefit from said policies, nor does he identify any dates with respect to the putative transfers. The Court would note that Plaintiff also filed suit against Paula Cardinale Saare, individually, and in her capacity as trustee of the Sarah Caitlin Ward Trust and Mallory Elizabeth Ward Trust. Plaintiff, however, fails to assert facts that would support a plausible claim against Ms. Saare.

Although pleading requirements 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), to bring a claim under section 548, Plaintiff must still identify a specific transfer made to each defendant, occurring on or subsequent to the two year look-back period, in order to satisfy the limitations period and place each defendant on notice as to the precise misconduct with which they are charged. In addition, even though claims of constructive fraud may be pleaded with less specificity than claims of actual fraud,[7] the Court nevertheless finds Plaintiff's Complaint fails to place each Defendant on notice as to the basis of the claim(s) against them as it does not connect them to the transfers sought to be avoided.

Accordingly, Counts III and IV will be dismissed. Plaintiff, however, shall have leave to amend the pleadings in this regard.

2. *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. 40 at 35-50). In pertinent part, 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 allowable unsecured claim.

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

[7] 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).

years of a bankruptcy petition date. Fla. Stat. § 726.105(a). This is a claim for actual fraud. Rule 9(b) of the Federal Rules of Civil Procedure, 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 "must satisfy the particularity requirement of Rule 9(b)." *See 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 alleging a fraudulent transfer based on actual fraud).

With respect to Defendants Sarah Caitlin Ward, Mallory Elizabeth Ward, the Sarah Caitlin Ward Trust, and the Mallory Elizabeth Ward Trust, the Court finds Plaintiff has adequately pleaded a plausible claim for actual fraud pursuant to Section 726.105(1)(a) of the Florida Statutes. In this regard, Plaintiff's allegation that the aforementioned Defendants received transfers on or about December 29, 2005 and September 20, 2005 adequately asserts that such transfers occurred during the limitations period (*i.e.*, within four years prior to the petition date). With respect to these Defendants, *supra*, Plaintiff specifies the transferor, the transferee, and identifies both the check and invoice numbers of such transfers. In addition, Plaintiff: (1) provides details with respect to the alleged ponzi-type scheme; (2) alleges the Debtors received little or no value in exchange for the subject transfers; and (3) attaches to the Complaint financial documentation which supports

Plaintiff's allegations of insolvency (Doc. 40, Exhibits A, B, C, D).[8] While the asserted "badges of fraud" may help to establish fraudulent intent, "it is not the fraudulent intent of the [party] that must be pled with particularity; rather it is the 'circumstances constituting fraud.'" *In re NM Holdings Co., LLC,* 407 B.R. at 262. Such alleged circumstances, at a minimum, must identify the transferor the transferee, the date of the transfer, and the amount of the transfer. *See id.; see also In re Caremerica, Inc.*, 409 B.R. at 755. In accordance with these principles, the Court finds Plaintiff has adequately asserted a plausible claim against Defendants Sarah Caitlin Ward, Mallory Elizabeth Ward, the Sarah Caitlin Ward Trust, and the Mallory Elizabeth Ward Trust. Applying the same principles, however, the Court finds Plaintiff has failed to assert a plausible claim against the remaining Defendants.

Specifically, with respect to the remaining Defendants, Plaintiff does not identify the transferor and transferee, the date of the transfer, or the amount of the transfer. Plaintiff alleges generally that Mr. Ward made transfers to the remaining Defendants; however, he fails to identify even a single specific transfer to these Defendants made within the limitations period. The Court thus finds Plaintiff has failed to allege fraud with particularity and that he has not placed each of these Defendant on notice as to the precise misconduct with which they are charged.

Based on the foregoing, Count V will be sustained with respect to Defendants Sarah Caitlin Ward, Mallory Elizabeth Ward, the Sarah Caitlin Ward Trust, and the Mallory Elizabeth Ward Trust. Count V, however, will be dismissed with respect to the remaining Defendants. Plaintiff, however, will be permitted leave to amend the Complaint.

[8] These exhibits correspond to the Debtors' audited Consolidated and Combined Financial Statements for the years 2004, 2005, 2006, and 2007. It should be noted that the financial statement for the year 2007 is incomplete.

b. Counts VI & VII

Sections 726.105(1)(b) and 726.106(1) of the Florida Statutes provide 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 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. Therefore, 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 claim for actual fraud under section 726.105(1)(a) of the Florida Statutes (Count V) to stand, the Court finds Plaintiff has pleaded the instant constructive fraud counts with the requisite sufficiency to place Defendants Sarah Caitlin Ward, Mallory Elizabeth Ward, the Sarah Caitlin Ward Trust, and the Mallory Elizabeth Ward Trust on notice as to what Plaintiff's claims are and the basis upon which they rest. Accordingly, as to them, the Motion to Dismiss Counts VI and VII will be denied.

With respect to the remaining Defendants, however, the Court finds Plaintiff has not pleaded sufficient facts to place such Defendants on notice as to the basis of Plaintiff's claims. Specifically, even though Plaintiff has reviewed the Debtors' audited Consolidated and Combined Financial Statements for the years 2004, 2005, 2006, and 2007 (Doc. 40 at 17), Plaintiff has failed to identify transfers to the remaining Defendants. It is axiomatic that in order to assert a claim for the avoidance

of an allegedly fraudulent transfer, one must at least identify the transfer to be avoided. The Court understands that the alleged fraudulent scheme was complex and that the rules of pleading may be relaxed with respect to a trustee plaintiff; nevertheless, Defendants are entitled to have notice of the wrongdoing for which they are being charged. Should discovery later reveal that suspicious transfers were made to these Defendants, then Plaintiff may seek leave to amend the pleadings. As it stands, however, the Complaint fails to connect the remaining Defendants to the alleged fraudulent distributions.[9]

Based on the foregoing, the claims against the remaining Defendants will be dismissed. Plaintiff, however, will be permitted leave to amend the Complaint.

c. Count VIII

Count VIII seeks to avoid alleged preferential transfers (Doc. 40 at 47-50). Pursuant to Florida Statutes, section 726.106(2), transfers made: (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 are deemed fraudulent. Plaintiff's claim in this regard is subject to dismissal for the reasons stated below.

In the Complaint (Doc. 40), Plaintiff alleges no facts in support of the claim that Defendants received transfers on account of antecedent debts. With respect to preferential transfers, 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 Complaint does not even assert that the putative preferential transfer(s) were made on account of antecedent debt(s) (*see* Doc. 40 at 47-50).

[9] While the attached financial records of the Debtors reference large distributions, it is unclear as to whom such distributions were made (*see* Docs. 40-1 at 9, 40-2 at 8, 40-3 at 8, 40-4 at 9).

In support of Count VIII, Plaintiff states he "reserves [his] rights under section 726.106(2) to the extent *Defendant* asserts that the transfers were for an antecedent debt" (Doc. 40 at 50) (*emphasis added*). Apart from being confusing, this statement fails to satisfy the requirement that the nature and amount of the antecedent debt be alleged in order to state a plausible claim for relief. Accordingly, Count VIII will be dismissed for failure to state a claim. Plaintiff, however, is permitted to amend the pleadings in this regard.

3. *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, Plaintiff reserves the right to avoid and recover such transfers (Doc. 40 at 50). 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

The second group of claims, as set forth in Counts I and X of the Complaint (Doc. 40) 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 X).

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. 40 at 23-25). 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, *see 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." *IBT Int'l, Inc. v. Northern (In re Int'l Admin.*

Servs.), 408 F.3d 689, 706 (11th Cir. 2005) (*quoting Kendall v. Sorani (In re Richmond Produce Co, Inc.)*, 195 B.R. 455, 463 (N.D. Cal 1996)).

2. *Count X–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. As the Court has permitted Counts V, VI, and VII to stand (with respect to Defendants Sarah Caitlin Ward, Mallory Elizabeth Ward, the Sarah Caitlin Ward Trust, and the Mallory Elizabeth Ward Trust), Plaintiff has alleged sufficient facts to survive the motion to dismiss the claim for recovery of avoided transfers (Count X). *See Vaughn v. Graybeal, Jr., (In re CM Vaughn, LLC)*, 2010 WL 3397425, at *3 (Bankr. N.D. Ga. 2010).[10] As to the other Defendants, however, this claim will be dismissed without prejudice.

C. The Remaining Claims

Plaintiff's final group of claims consists of Counts II and XI, which respectively seek an accounting and assert a claim for breach of promissory note(s) (Doc. 40 at 25-26, 51-53).

1. *Count II–Accounting*

By way of Count II, Plaintiff brings a separate claim for an accounting (Doc. 40 at 25-26). 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. 40 at 26-

[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.

26). In support, Plaintiff avers "[a]s insiders, Defendants owed a fiduciary duty to the Debtors [and land purchasers]" (*id.*).

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*.

While Plaintiff asserts a fiduciary duty and that the subject transactions were complex, 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.

2. *Count XI–Breach of Promissory Note(s)*

In Count XI, Plaintiff asserts a breach of contract, or promissory note, claim against the Sarah Caitlin Ward Irrevocable Trust and the Mallory Elizabeth Ward Irrevocable Trust (collectively, the "Trusts") (Doc. 40 at 51-53).

In support of this claim, Plaintiff alleges that, for value received on or about September 20, 2005, the Sarah Caitlin Ward Irrevocable Trust executed and delivered to Land Resource a Promissory Note in the principal sum of Twelve Million Three Hundred Thousand Dollars ($12,300,000.00) (Doc. 40 at 22). Plaintiff attached to the Complaint a copy of the promissory note (Doc. 40, Exhibit E). With respect to the Mallory Elizabeth Ward Irrevocable Trust, Plaintiff states that "[u]pon information and belief," for value received on or about September 20, 2005, the Mallory Elizabeth Ward Irrevocable Trust executed and delivered to Land Resource a Promissory Note in the principal sum of Twelve Million Three Hundred Thousand Dollars ($12,300,000.00) (Doc. 40 at 23). Plaintiff does not attach a copy of this promissory note.

Plaintiff claims the Trusts have defaulted on the terms of the notes and that, in accordance with the terms of the notes, their respective debts have been accelerated (Doc. 40 at 52). Plaintiff states that, pursuant to the terms of the notes, a default exists thereunder if, among other events, the Trusts become insolvent as defined in the Uniform Commercial Code ("U.C.C."). Section 1-201 of the U.C.C. defines insolvency as either ceasing to pay debts in the ordinary course of business or not having the ability to pay debts as they become due. U.C.C. § 1-201. Plaintiff maintains the Trusts have defaulted on the notes due to their insolvency as defined by the U.C.C. (Doc. 40 at 52).

The Trusts, on the other hand, argue that "the Promissory Notes were never funded" and "were cancelled pursuant to the Memorandum of Understanding dated December 29, 2005" (Doc.

41 at 10). This assertion, however, raises a factual question that is not appropriate for resolution on a motion to dismiss. Thus, the Court finds Plaintiff has adequately stated a claim for breach of promissory note against the Trusts. As such, Count XI will be sustained.

IV. CONCLUSION

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

1. Defendants' Motion to Dismiss the Second Amended Complaint (Doc. 41) is **GRANTED in part** as provided herein.

2. Plaintiff has until **December 14, 2011** within which to file an amended pleading.

DONE AND ORDERED this 14th day of **November, 2011** in Jacksonville, Florida.

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

Copies Furnished To:
All Interested Parties