

debtor's creditors. The Receiver has done so here, alleging more than enough facts to state a claim for relief against both Barnes and BBG. The Defendants' arguments are premature at the motion to dismiss stage and reflect a misapprehension of the requirements of Rule 8 and of the Rule 12(b)(6) standard. Defendants' motion should be denied.

ARGUMENT & AUTHORITIES

A. The Receiver has alleged facts sufficient to state a claim for relief.

The Receiver's Complaint sufficiently states a fraudulent transfer claim pursuant to the Texas Uniform Fraudulent Transfer Act ("TUFTA"). The Receiver's Complaint alleges that Ben Barnes and BBG received substantial payments from the Stanford Ponzi scheme. *See* Complaint, Doc. 1 at ¶¶ 3, 30. Further, the Complaint alleges the existence of the Stanford Ponzi scheme and describes the scheme in great detail; it also alleges that the transfers to Barnes and BBG were made with actual intent to defraud creditors. *See id.* at ¶¶ 19-29, 35-36 (citing *Quilling v. Schonsky*, No. 07-10093, 2007 WL 2710703, at *2 (5th Cir. Sept. 18, 2007) ("[T]ransfers made from a Ponzi scheme are presumptively made with intent to defraud, because a Ponzi scheme is, as a matter of law, insolvent from inception.") and *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006) ("... [the debtor] was a Ponzi scheme, which is, as a matter of law, insolvent from its inception. . . . The Receiver's proof that [the debtor] operated as a Ponzi scheme established the fraudulent intent behind transfers made by [the debtor].")). The combination of these allegations is sufficient to state a claim for relief against both Barnes and BBG that is plausible on its face, and nothing more is required by the Rules of Civil Procedure or the cases interpreting them. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (complaint need only allege enough facts to state a claim that is plausible on its face to survive motion to dismiss); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007) (same).

B. The Receiver has complied with Rule 8.

The Defendants erroneously contend that the Complaint should be dismissed because the Receiver has failed to meet the basic pleading requirements of Rule 8, which states, in relevant part:

A pleading that states a claim for relief must contain: (1) a short and plain statement of the grounds for the court's jurisdiction, unless the court already has jurisdiction and the claim needs no new jurisdictional support; (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought, which may include relief in the alternative or different types of relief.

FED. R. CIV. P. 8(a).

Defendants' contention is without merit. In his Complaint, the Receiver has alleged the grounds for the Court's jurisdiction (Doc. 1 at ¶¶ 10-13); included state-law claims showing that he is entitled to relief (*id.* at ¶¶ 35-41); and requested such relief (*id.* at ¶¶ 9, 41-42). Specifically, he has alleged that Barnes and BBG received the transfers from the Stanford Ponzi scheme; that the Stanford fraud was a Ponzi scheme from the beginning and, therefore, insolvent from the start; and that the burden is upon the Defendants to show both reasonably equivalent value and good faith. As a result, the Receiver's Complaint is specific enough for the Defendants to answer the claims against them.

In a case very similar to the instant one, *Wing v. Kendrick*, a Ponzi-scheme receiver brought fraudulent-transfer claims seeking the return of purported consulting fees and other payments, and the defendants filed a motion to dismiss pursuant to Rule 12(b)(6). *See Wing v. Kendrick*, No. 2:08-CV-01002-DB, Slip Copy, 2009 WL 1362383, at *1 (D. Utah May 14, 2009). The court rejected the defendants' argument that the Receiver had failed to adequately plead his fraudulent-transfer claims. *Id.* at *3. The court held that the receiver had sufficiently alleged the existence of the Ponzi scheme by providing a history and overview of the

Ponzi scheme, and noting the conviction of the Ponzi scheme's operator for securities fraud violations. *Id.* at *2. The court further noted that the "extraordinary remedy" of the appointment of the receiver was itself support for the allegation that the Ponzi scheme existed. *Id.* Because the receiver had alleged that the defendants received transfers from the Ponzi scheme, and the inference of fraudulent intent applied to those transfers, the court held that the receiver had sufficiently alleged his fraudulent-transfer claims. *Id.*

In this case, the Receiver's Complaint makes all the same allegations that the receiver in *Wing* made, and more.¹ Therefore, the Receivers' Complaint states a claim as a matter of law, and Defendants' motion to dismiss should be denied.

C. The Receiver's claims against Ben Barnes have been adequately pled.

The Defendants also argue that the Receiver has failed to comply with Rule 8 because the Receiver has not separated the allegations against BBG from the allegations against Ben Barnes. Rule 8, however, requires no such separation, nor have Defendants cited any authority holding that it does. In a recent Florida case quite similar to this case, a receiver sued several defendants under fraudulent-transfer and unjust-enrichment theories. *See Court-Appointed Receiver for Lancer Mgmt. Group LLC v. 169838 Canada, Inc.*, No. 05-60235-CIV, 2008 WL 2262063, at *3 (S.D. Fla. May 30, 2008). Like the Defendants here, the *Lancer* defendants argued that the receiver had not satisfied the pleading requirements of Rule 8, because the receiver had not alleged which contributions and redemptions were attributable to

¹ The defendants in *Wing* claimed that some of the transfers at issue were made in exchange for reasonably equivalent value, based on the fact that they were made pursuant to a settlement agreement. 2009 WL 1362383, at *2. The court held that this allegation was irrelevant at the motion to dismiss stage. *Id.* Similarly, the Defendants' arguments here regarding the nature of the services provided to Stanford and the market rate for such services are simply irrelevant for the purposes of Defendants' motion to dismiss. *Hahn v. Love*, --- S.W.3d ---, No. 01-07-00096-CV, 2009 WL 793637, at *6 (Tex. App.—Houston [1st Dist.] March 26, 2009, pet. denied) (a defendant who invokes an affirmative defense under § 24.009(a) has "the burden of establishing good faith and the reasonable equivalence of the consideration obtained.") (citing *Flores v. Robinson Roofing & Const. Co., Inc.*, 161 S.W.3d 756 (Tex. App.—Fort Worth 2005, pet. denied)).

each defendant and in what capacity the defendants had received the transfers. *See id.* The Court held that the defendants' arguments were "misplaced" because the receiver had satisfied Rule 8. *Id.* at *2-3. In particular, the court stated:

Rule 8(a)'s pleading standard does not require the Receiver to allege the particular transfers which each of the [defendants] received, nor does it require the Receiver to allege the "capacity" . . . in which the [defendants] received the transfers. The Receiver's claims that the [defendants] received the transfers, the insolvency of the Funds, the inadequate capitalization of the Funds, and the lack of reasonably equivalent value given by the [defendants] in exchange for the transfers is enough specificity to allow the [defendants] to formulate an answer, as required by Rule 8(a).

Id. at *3; *see also GE Capital Commercial, Inc. v. Wright & Wright, Inc.*, Civil Action No. 3:09-CV-572-L, 2009 WL 5173954, at *10 (N.D. Tex. Dec. 31, 2009) (plaintiff satisfied Rule 8 where it was alleged that defendant was transferee under fraudulent-transfer law and that defendant received funds). Similarly, the Receiver is not required to make separate allegations about Barnes and BBG. The Receiver has adequately pled his claim pursuant to Rule 8.

Moreover, Defendants' argument about Barnes' personal liability rests on the erroneous assumption that there can only be one defendant per transfer in a TUFTA claim. In fact, a TUFTA plaintiff can assert a claim against a "transferee" or a "person for whose the benefit the transfer was made." TEX. BUS. & COMM. CODE § 24.009(b)(1); *see also Eagle Pacific Ins. Co. v. Christensen Motor Yacht Corp.*, 85 Wash. App. 695, 705, 934 P.2d 715 (1997), *aff'd* 135 Wash. 2d 894, 959 P.2d 1052 (1998) (in UFTA action, shareholder of transferees constituted person benefited by disputed transfer). Further, a transferee is "one that is entitled to exercise legal dominion and control over funds, to put the money to one's own use." *See Matter of Coutee*, 984 F.2d 138, 141 (5th Cir. 1993) ("TUFTA does not define the term 'transferee,' but the Fifth Circuit sets forth a dominion or control test, categorizing a transferee

as one that is entitled to exercise legal dominion and control over funds, to put the money to one's own use.”).

The over \$5 million paid by Stanford to Defendants was placed into accounts owned by BBG and controlled by Barnes. Further, Stanford characterized many of the payments made to these BBG accounts as having been made to “Ben Barnes,” *see* Allen Stanford Email to Yolanda Suarez, Ex. 1 (instructing Suarez to “negotiate a success fee for getting new VI legislation passed in 2008 with Ben Barnes”); Allen Stanford Email to Gil Lopez, Ex. 2 (requesting report on “any amounts sent/paid to Ben Barnes this year”); Allen Stanford Email to Ben Barnes, Ex. 3 (“Ben as you know I have been paying the \$265k personally each month as this is not a budgeted amount for any Stanford company and did not want to burden any company's financial performance with a \$3,180,000 per annum expense.”), and there is no services agreement between Stanford and BBG to dispute this characterization. Thus, Barnes is both a person for whose benefit the transfers were made and a transferee under applicable law.

D. Defendants' other complaints about the Receiver's allegations are without merit.

Defendants argue that the Complaint should be dismissed because the Receiver has not provided adequate notice of which state's law he contends applies to his claims. On the contrary, the Receiver has made plain in the Complaint that Texas law applies.² *See* Doc. 1 at ¶ 40 (citing Texas statute for rule that claims may be brought within one year after transfers were discovered under Texas fraudulent-transfer statutes). In any event, if there were any ambiguity

² Texas law applies because it bears the most significant relationship to the occurrences and the parties to this case. *See Duncan v. Cessna Aircraft Co.*, 665 S.W.2d 414, 420-21 (Tex. 1984); *see also* RESTATEMENT (SECOND) CONFLICT OF LAWS § 145(2) (1971) (describing the factors relevant to determining the most significant relationship). Among other reasons, Texas law applies because: (a) Stanford's principal place of business was in Texas; (b) the transfers to the Defendants originated from banks in Texas (or Antigua) (*see* Doc. 1 at ¶ 3); and (c) Barnes and BBG reside and work in Texas (*see id.* at ¶15-16).

as to the law to be applied, Defendants could seek that information in discovery. It is certainly not a reason to dismiss the complaint, and Defendants cite no case holding that it is.

Defendants also argue for dismissal based on their assertion that 18 categories of allegations or information require further factual support. *See* Br. in Support of Mot. to Dismiss, Doc. 9, at 8-9. Defendants' argument, however, does not justify dismissal at the 12(b)(6) stage. The issues identified by Defendants deal almost exclusively with the services Defendants purportedly provided to Stanford—issues which are not part of the Receiver's *prima facie* case but instead which relate to Defendants' affirmative defense of reasonably equivalent value. *See Hahn v. Love*, --- S.W.3d ---, No. 01-07-00096-CV, 2009 WL 793637, at *6 (Tex. App.—Houston [1st Dist.] March 26, 2009, pet. denied) (a defendant who invokes an affirmative defense under § 24.009(a) has “the burden of establishing good faith and the reasonable equivalence of the consideration obtained.”). Further, the Defendants' objection that the Receiver has failed to explain his “methodology” for reaching certain factual conclusions is simply not an appropriate objection at the motion to dismiss stage, where the plaintiff's factual allegations are to be taken as true. *See Iqbal*, 129 S. Ct. at 1949-50; *Twombly*, 550 U.S. at 555. Even after *Twombly* and *Iqbal*, it remains true that the “court's function on a Rule 12(b)(6) motion is not to weigh potential evidence that the parties might present at trial, but to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted” and that “all facts alleged in the complaint are taken as true and all reasonable inferences are indulged in favor of the plaintiffs.” *Wing*, 2009 WL 1362383, at *2.

E. The Receiver is entitled to leave to amend the Complaint if the Court finds that the Complaint lacks sufficient specificity.

Finally, the Receiver is entitled to leave to amend the Complaint if the Court finds that the Complaint fails to meet the standards of Rule 12(b)(6) and Rule 8. Fifth Circuit case law

uniformly supports the premise that “[g]ranted leave to amend is especially appropriate . . . when the trial court has dismissed the complaint for failure to state a claim.” *Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co.*, 313 F.3d 305, 329 (5th Cir. 2002) (quoting *Griggs v. Hinds Junior College*, 563 F.2d 179, 180 (5th Cir.1977) (per curiam) (addressing Rule (12)(b)(6) dismissal). Further, where a Rule 12 dismissal is based on a failure to comply with Rule 8, leave to amend is routinely granted in this district. *See Redden v. Smith & Nephew, Inc.*, 2010 WL 184428, at *5 (N.D. Tex. Jan. 19, 2010) (granting leave to amend to cure pleading deficiencies and ordering plaintiff to replead breach of contract claim to comply with Rule 8); *Vetco Sales, Inc. v. Vinar*, 2003 WL 21488629, at *4 (N.D. Tex. Apr. 23, 2003) (addressing 12(b)(6) motion based on counterclaim’s violation of Rule 8 and concluding that “dismissal should be avoided until the defendants have been afforded an opportunity to file an amended complaint”)

Accordingly, the Receiver respectfully requests that, if the Court concludes there is any deficiency in the Complaint, the Court grant the Receiver leave to amend the Complaint. The Receiver also requests any further relief to which he may be entitled.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court deny the motion to dismiss filed by Defendants Ben Barnes and Ben Barnes Group, L.P. In the alternative, the Receiver requests leave to amend the Complaint should the Court find that the Receiver’s complaint is deficient in any way. The Receiver also requests any further relief to which he may be entitled.

Dated: May 3, 2010

Respectfully submitted,

BAKER BOTTS L.L.P.

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CERTIFICATE OF SERVICE

On May 3, 2010, I electronically submitted the foregoing document with the clerk of the court of the U.S. District Court, Northern District of Texas, using the electronic case filing system of the Court. I hereby certify that I will serve Ben Barnes and Ben Barnes Group, L.P. individually or through their counsel of record, electronically, or by other means authorized by the Court or the Federal Rules of Civil Procedure.

/s/ Kevin M. Sadler
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