

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

RALPH S. JANVEY, IN HIS
CAPACITY AS COURT-APPOINTED
RECEIVER FOR THE STANFORD
INTERNATIONAL BANK, LTD., et al
Plaintiff,

v.

BEN BARNES AND BEN BARNES
GROUP, L.P.,
Defendants.

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Civil Action No.
3:10-cv-527

**DEFENDANTS' BRIEF IN SUPPORT OF THEIR MOTION TO DISMISS FOR FAILURE
TO STATE A CLAIM PURSUANT TO FED. R. CIV. P. 12(B)(6)**

Respectfully submitted

WINSTEAD PC

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TO THE HONORABLE DAVID C. GODBEY, UNITED STATES DISTRICT JUDGE:

I. SUMMARY OF MOTION

This motion is made pursuant to Federal Rule of Civil Procedure 12(b)(6) as Plaintiff Ralph S. Janvey, in his capacity as the court-appointed receiver for the Stanford International Bank, Ltd., et al., ("Plaintiff" or "Receiver") has failed to state a claim against Defendant Ben Barnes ("Barnes") and Defendant Ben Barnes Group, L.P. ("BBG, L.P."). Plaintiff has not alleged any facts in its Original Complaint (the "Complaint") giving rise to a cause of action against Barnes – Plaintiff merely makes broad assertions against Barnes, individually, in conjunction with sweeping allegations against Defendant BBG, L.P., a Texas Limited Partnership. Pleading with a broad brush, Plaintiff collectively refers to Barnes, and BBG, L.P. as the "Barnes Defendants"¹ and simply, in conclusory fashion, states that the Receiver has identified "payments from the Stanford Parties to [Barnes] and the [BBG, L.P.] . . ." Plaintiff provides no further allegations against Barnes, individually. Rather, all claims and allegations are made against the so-called Barnes Defendants.² Additionally, Plaintiff has not alleged that Barnes, individually, received any payment that would warrant disgorgement nor has Plaintiff

¹ See Complaint ¶3 (defining Barnes Defendants).

² Samples of Plaintiff's broadly plead allegations include:

"The payments from the Stanford Parties to the Barnes Defendants totaled over \$5 million."

"At least as early as 2005, the Stanford Parties began a business relationship with the Barnes Defendants, with the Barnes Defendants ostensibly providing various consulting, lobbying and related services for the above-referenced payments."

"The Barnes Defendants' work for the Stanford Parties included (a) consulting and lobbying in connection with the United States Virgin Islands ("USVI") tax incentive laws to assist Allen Stanford's efforts to reduce his personal federal income tax liability; (b) consulting and lobbying in connection with the annual "20/20" cricket tournament held in Antigua . . . (c) consulting regarding political contributions; and (d) advice regarding various investments the Stanford Parties made using investor funds, including Caribbean airlines, alternative energy investments, and the proposed development of an island near Antigua."

Complaint ¶¶ 3, 4, 5.

alleged any facts against BBG, L.P. that would give rise to a cause of action against Barnes in his individual capacity.

The only remedy Plaintiff seeks in this litigation is disgorgement of funds the Receiver alleges were fraudulently transferred from the Stanford Defendants and the many related Stanford entities, purportedly to Barnes and BBG, L.P. However, in pleading its fraudulent transfer/disgorgement claim, Plaintiff fails to identify the law pursuant to which he is seeking such relief.³ Plaintiff's failure to provide this basic information is indicative of the vagueness with which Plaintiff has plead his Complaint. Furthermore, such vagueness prohibits Plaintiff from establishing that he is entitled to relief as required under Fed. R. Civ. P. 8(a)(2) and accordingly, requires dismissal of all claims against Barnes and BBG, L.P. Additionally, Plaintiff has failed to plead its fraudulent transfer claim against Barnes and BBG, L.P. with specificity. Plaintiff makes numerous accusations which are not substantiated with essential facts as is required under Fed. R. Civ. P. 8(a)(2) and case law interpreting Rule 8.

For all of these reasons the Court should dismiss Plaintiff's claims against Barnes for failure to state a claim upon which relief can be granted and should further dismiss Plaintiff's claims against BBG, L.P. and/or require Plaintiff to plead with greater specificity.

II. FACTUAL BACKGROUND

In 2005, Allan Stanford ("Stanford") sought out BBG, L.P., for guidance and advice concerning various complex issues facing Stanford. At the time, Stanford had all of the characteristics of a successful businessman and entrepreneur. His business interests, all apparently legitimate, ranged from real estate to airlines to hotels and banking. Even a careful background check confirmed Stanford's legitimacy. Over the next five years, BBG, L.P. was

³ Plaintiff merely pleads that the "payments to the Stanford Parties to the Barnes Defendants constitute fraudulent transfers under applicable law." Complaint ¶41.

engaged on a number of consulting matters by Stanford, each with its own degree of complexity and each requiring the skills, strong relationships and prestige of BBG , L.P.

During that five year period, BBG, L.P. rendered valuable services to various Stanford entities. Comparatively speaking, the fees charged by BBG, L.P. and paid to it by Stanford entities were not only reasonable, but were in most cases below market. Work was performed either directly by BBG, L.P. employees or by third parties engaged by BBG, L.P. for assistance on Stanford related projects. Fully 30% of fees paid by the Stanford entities actually went to third party contract vendors, with BBG, L.P. acting as general contractor. In short, though funds may have actually come first to BBG, L.P. they were destined for third parties who had provided the actual services.

It was only after the Receiver was appointed that BBG, L.P. became aware of the far-reaching allegations of wrongdoing that resulted in the Receivership as well as criminal charges against Stanford and others. Prior to that time, the Stanford entities were viewed by BBG, L.P. and obviously by many others, as successful legitimate business enterprises.

III. ARGUMENT & AUTHORITIES

A. STANDARDS GOVERNING MOTIONS TO DISMISS UNDER FED. R. CIV. P. 12(B)(6)

Rule 12(b)(6) authorizes dismissal of a complaint for "failure to state a claim upon which relief can be granted."⁴ In deciding a motion to dismiss for failure to state a claim, the Court must look only to facts stated in the complaint and in documents attached to or incorporated in the complaint.⁵

⁴ FED. R. CIV. P. 12(b)(6).

⁵ See *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996).

Plaintiffs' Complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief."⁶ As the U.S. Supreme Court explained in *Bell Atlantic Corp. v. Twombly*,⁷ and reaffirmed in *Ashcroft v. Iqbal*,⁸ the pleading standard established in Rule 8 does not require "detailed factual allegations," but it does demand more than an unadorned accusation devoid of factual support.⁹ "A pleading that offers "labels and conclusions" or a "formulaic recitation of the elements of a cause of a cause of action will not do. Nor does a complaint suffice if it tenders 'naked assertions" devoid of "further factual enhancement."¹⁰ While the Court must accept all of Plaintiffs' allegations as true, it is not bound to accept as true "a legal conclusion couched as a factual allegation."¹¹

To survive a motion to dismiss, Plaintiffs' Complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.¹² A claim has facial plausibility when the plaintiff pleads factual content that permits the court to draw the reasonable inference that defendant is liable for the misconduct alleged.¹³ Where the facts do not permit the Court to infer more than the mere possibility of misconduct, the Complaint has stopped short of showing that Plaintiffs are plausibly entitled to relief.¹⁴

⁶ See FED. R. CIV. P. 8(a)(2).

⁷ 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

⁸ 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009).

⁹ *Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

¹⁰ *Iqbal*, 129 S.Ct. at 1949 (quoting *Twombly*, 550 U.S. at 555, 557).

¹¹ *Iqbal*, 129 S.Ct. at 1949-50; *Twombly*, 550 U.S. at 555.

¹² *Iqbal*, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 570.

¹³ *Iqbal*, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 556.

¹⁴ *Iqbal*, 129 S.Ct. at 1950 (citing *Twombly*, 550 U.S. at 557); FED. R. CIV. P. 8(a)(2).

In *Iqbal*, the Supreme Court established a two-step approach for assessing the sufficiency of a complaint in the context of a Rule 12(b)(6) motion. First, the court identifies conclusory allegations and proceeds to disregard them, for they are not entitled to the presumption of the truth.¹⁵ Second, the court "consider[s] the factual allegations in [the complaint] to determine if they plausibly suggest an entitlement to relief."¹⁶ This evaluation will "be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense."¹⁷

B. PLAINTIFF'S ORIGINAL COMPLAINT MUST BE DISMISSED AGAINST BARNES BECAUSE THE COMPLAINT ONLY CONTAINS CONCLUSORY ALLEGATIONS AS TO HIS INDIVIDUAL LIABILITY

Plaintiff's claims asserted against Barnes must be dismissed because of the vagueness with which Plaintiff has pled the Complaint. In the Complaint, the Receiver makes expansive, but conclusory, allegations against Barnes by asserting that Barnes and a Texas limited partnership, BBG, L.P., committed identical acts. Plaintiff makes no claims against Barnes that he does not also make against BBG, L.P., and in fact, Plaintiff refers to Barnes and BBG, L.P. as one entity – the Barnes Defendants – throughout the Complaint. Some of these wide-ranging accusations made in the Complaint against both Barnes and BBG, L.P. include:

- "The Receiver has identified substantial payments from the Stanford Parties to Ben Barnes and Ben Barnes Group, LP The payments from the Stanford Parties to the Barnes Defendants totaled over \$5 million. . . ."
- "At least as early as 2005, the Stanford Parties began a business relationship with the Barnes Defendants, with the Barnes Defendants ostensibly providing various consulting, lobbying and related services for the above-referenced payments."
- "The Barnes Defendants' work for the Stanford Parties included (a) consulting and lobbying in connection with the United States Virgin Islands ("USVI") tax

¹⁵ *Iqbal*, 129 S.Ct. at 1951.

¹⁶ *Id.*

¹⁷ *Id.* at 1950.

incentive laws to assist Allen Stanford's efforts to reduce his personal federal income tax liability; (b) consulting and lobbying in connection with the annual "20/20" cricket tournament held in Antigua . . . (c) consulting regarding political contributions; and (d) advice regarding various investments the Stanford Parties made using investor funds, including Caribbean airlines, alternative energy investments, and the proposed development of an island near Antigua."

- "The Barnes Defendants' work for the Stanford Parties (such as the marketing of the cricket tournament) had the unfortunate effect of attracting new victims to the Stanford Parties' fraudulent investment scheme. The Barnes Defendant's services provided no reasonably equivalent value to the creditors and victims of the Stanford Parties' Ponzi Scheme"¹⁸

Nowhere in his Complaint does the Receiver make an allegation against Barnes separate and apart from an allegation he makes against BBG, L.P. Additionally, the Receiver provides no basis for his claims against Barnes other than the overly broad and conclusory statement that the amorphous "Stanford Parties" (which includes Stanford companies that operated legitimate businesses, separate and apart from the alleged Stanford Ponzi Scheme)¹⁹ made payments to Barnes.²⁰

Plaintiff's claims against Barnes cannot survive if Plaintiff's sole basis for bringing them is that Barnes is the founder of BBG, L.P.²¹ Ben Barnes is not alleged to be (nor is he) the general partner of BBG, L.P., and under the Texas Business Organizations Code and the Texas Revised Limited Partnership Act (which expired on January 1, 2010, but carried provisions over into the Texas Business Organizations Code) only a general partner of a limited partnership is

¹⁸ Complaint ¶¶ 3, 4, 5, 6.

¹⁹ The "Stanford Parties" is defined by Plaintiffs to mean, not only the "Stanford Defendants," but also the "many related Stanford entities." Complaint ¶2. The term "Stanford Defendants" is not defined anywhere in the Complaint. As such, Plaintiff's Complaint again fails to provide the factual support necessary to survive a Fed. R. Civ. P. 12(b)(6) motion.

²⁰ Complaint ¶3.

²¹ See Complaint ¶3 ("...Ben Barnes Group, L.P., a business consulting and lobbying group founded by Ben Barnes . . .")

liable for the obligations of a limited partnership unless a limited partner operates (with certain exceptions) as the general partner.²² Here, Plaintiff has made no such allegations.

Because Plaintiff's Complaint against Barnes contain only conclusory allegations as to his actions, Barnes Motion to Dismiss must be granted.

C. PLAINTIFF'S ORIGINAL COMPLAINT FAILS TO ALLEGE A COGNIZABLE CLAIM AGAINST BARNES AND BBG, L.P.

Federal Rule of Civil Procedure 8(a)(2) provides that "[a] pleading that states a claim for relief must contain: . . . a short plain statement of the claim showing that the pleader is entitled to relief."²³ Here, Plaintiff seeks "disgorgement of funds transferred from the Stanford Parties to the Barnes Defendants" ²⁴ However, Plaintiff's Complaint is so vague and ambiguous in law and fact that it fails to establish that the Receiver is entitled to the relief it seeks.²⁵

Plaintiff's Complaint wholly fails to provide notice as to the "applicable law" under which it is has filed its claim for fraudulent transfer.²⁶ Accordingly, because Plaintiff has not set

²² TEX. BUS ORG. CODE §§ 153.152(b), 153.102.

²³ FED R. CIV. P. 8(a)(2).

²⁴ Complaint ¶35.

²⁵ Plaintiff prays for the following relief:

"An order providing that: (a) the payments from the Stanford Parties to the Barnes Defendants constitute fraudulent transfers under applicable law; (2) the funds transferred from the Stanford Parties to the Barnes Defendants are the property of the Receivership Estate held pursuant to a constructive trust for the benefit of the Receivership Estate; (3) the Barnes Defendants are liable to the Receivership for an amount equaling the amount of funds transferred from the Stanford Parties to the Barnes Defendants; and (4) the Receiver is entitled to an award of reasonable attorneys' fees, costs and interest.

Complaint ¶42(a)-(d).

²⁶ Throughout the Complaint, the Receiver had the opportunity to provide this information (i.e., ¶¶ 35, 41, and 42 in which Plaintiff merely seeks an order under "applicable law"). In Complaints filed by the Receiver against other entities, such information has been provided. See, e.g., Receiver's Original Complaint Against Political Committees ¶ 36, filed on February 19, 2010 in *Ralph S. Janvey, in his capacity as the court appointed receiver for the Stanford International Bank, Ltd., et al, v. Democratic Senatorial Campaign Comm., Inc., et al*, Cause No. 3:10-cv-00346-N

forth in his Complaint the law which forms the basis for his claims against Barnes and BBG, L.P., Plaintiff has wholly failed to meet his burden under FED. R. CIV. P. 8 to establish that he "is entitled to relief."

Additionally, Plaintiff's Complaint contains nothing more than "unadorned accusation[s] devoid of factual support" that the Supreme Court warned of in *Iqbal* and *Twombly*.²⁷ For example, Plaintiff's Complaint is devoid of any reference to facts which support Plaintiff's bold accusations, including:

1. The name of the alleged "Stanford Defendant" or other "Stanford Entity" to whom Barnes provided services;
2. The name of the alleged "Stanford Defendant" or other "Stanford Entity" to whom BBG, L.P. provided services;
3. Whether the same "Stanford Defendant" or other "Stanford Entity" to whom Barnes provided services submitted payment to Barnes;
4. Whether the same "Stanford Defendant" or other "Stanford Entity" to whom BBG, L.P. provided services submitted payment to BBG, L.P.;
5. The dates on which the alleged payments were made to Barnes and BBG, L.P.;
6. The dates on which the services were provided by Barnes to the "Stanford Defendants" or other "Stanford Entity;"
7. Which "Banes Defendant" provided services to the "Stanford Defendant" or other "Stanford Entity"
8. Which "Barnes Defendant" billed the "Stanford Defendant" or other "Stanford Entity" for the services;
9. The dates on which the services were provided by BBG, L.P. to the "Stanford Defendants" or other "Stanford Entity;"²⁸

("The Receiver is entitled to disgorgement of funds transferred from Stanford, Davis, and the Stanford Financial Group to the Committee Defendants because such payments constitute fraudulent transfers under Texas law and other applicable law. *See e.g.*, Tex. Bus. & Comm. Code § 24.005(a)").

²⁷ *Iqbal*, 129 S.Ct. at 1949; *Twombly*, 550 U.S. at 555.

²⁸ The facts listed in items 1-9 above, are of the kind that if included by Plaintiff in its Complaint would support Plaintiff's vague allegation in Paragraph 3 that "The Receiver has identified substantial payments from the Stanford

10. The manner in which BBG, L.P.'s work for the "Stanford Defendants" or other "Stanford Entity" allegedly attracted new victims to the Stanford Parties' fraudulent investment scheme;
11. The manner in which Barnes's work for the "Stanford Defendants" or other "Stanford Entity" allegedly attracted new victims to the Stanford Parties' fraudulent investment scheme;
12. The methodology used to reach the conclusion that BBG, L.P.'s work for the "Stanford Defendants" or other "Stanford Entity" purportedly attracted new victims to the Stanford Parties' fraudulent investment scheme;
13. The methodology used to reach the conclusion that Barnes' alleged work for the "Stanford Defendants" or other "Stanford Entity" purportedly attracted new victims to the Stanford Parties' fraudulent investment scheme;²⁹
14. The methodology used to reach the conclusion that BBG, L.P.'s work for the "Stanford Defendants" or other "Stanford Entity" purportedly provided no reasonably equivalent value;
15. The methodology used to reach the conclusion that Barnes' alleged work for the "Stanford Defendants" or other "Stanford Entity" purportedly provided no reasonably equivalent value;³⁰
16. Whether the entity for whom either Barnes or BBG, L.P. provided services is an entity alleged to a part of the "Ponzi Scheme;"
17. When and under what circumstances the "Stanford Defendants" and/or "Stanford Entities" to whom BBG, L.P. allegedly provided services were adjudicated to be a Ponzi Scheme;
18. When and under what circumstances the "Stanford Defendants" and/or "Stanford Entities" to whom Barnes allegedly provided services were adjudicated to be a Ponzi Scheme.³¹

Parties [defined to encompass the Stanford Defendants and the many related Stanford entities] to Ben Barnes and Ben Barnes Group, L.P." Without including any of these facts, Plaintiff's accusation in Paragraph 3 of the Complaint is merely a "naked assertion devoid of further factual assertion." *See Iqbal*, 129 S.Ct. at 1949. The same holds true for the facts recited in 10-18 above.

²⁹ The facts listed in items 10-13 above, are of the kind that if included by Plaintiff in its Complaint would support Plaintiffs' uncorroborated allegation in Paragraph 6 of the Complaint that "The Barnes Defendants' work for the Stanford Parties (such as marketing the cricket tournament) had the unfortunate effect of attracting new victims to the Stanford Parties' fraudulent investment scheme"

³⁰ The facts listed in items 14-15 above, are of the kind that if included by Plaintiff in its Complaint would support Plaintiffs' vague and unsubstantiated accusation in Paragraph 6 of the Complaint that "The Barnes Defendants' services provided no reasonably equivalent value . . ."

Because Plaintiff's Complaint lacks all of the above factual support, Plaintiff's claim for relief is not "plausible on its face" and his conclusory allegations which are unsupported by additional operative facts must be disregarded.³² Accordingly, Plaintiff's vague Complaint does not plausibly suggest an entitlement to relief, and therefore, must be dismissed in its entirety under Fed R. Civ. P. 12(b)(6).³³

IV. PRAYER

WHEREFORE, PREMISES CONSIDERED, for all the foregoing reasons, Defendants Ben Barnes and Ben Barnes Group, L.P. respectfully requests that the Court dismiss all of Plaintiffs' claims for failure to state a claim Fed. R. Civ. P. 12(b)(6) and award Defendants such other and further relief to which they may be justly entitled.

³¹ The facts listed in items 16-18 above, are of the kind that if included by Plaintiff in its Complaint would support Plaintiffs' uncorroborated allegation in Paragraph 6 of the Complaint related to the allegation that the Stanford Parties' [defined as the Stanford Defendants and the many related Stanford entities] controlled a ponzi scheme.

³² *Iqbal*, 129 S.Ct. at 1951.

³³ *Id.*

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of April, 2010, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, and that I have served all counsel of record via certified mail, return receipt requested.

 /s/ Jay J. Madrid
Jay J. Madrid