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not apply in this case because the Complaint does not state a cause of action for sounding in fraud.

II. **ARGUMENTS AND ANALYSIS**

A. RELEVANT PLEADING STANDARD

1. The Federal Rules Of Civil Procedure Do Not Require A Complaint To State Detailed Factual Allegations

All that is necessary under the Federal Rules of Civil Procedure is “a short and plain statement of the claim showing that the pleader is entitled to relief” and a “demand for judgment for the relief the pleader seeks.” FED. R. CIV. P. 8(c). In *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court explained the liberal standards of notice pleading:

the Federal Rules do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is “a short and plain statement of the claim” that will give the defendant fair notice of what the plaintiff’s claim is and the grounds upon which it rests. The illustrative forms appended to the Rules plainly demonstrate this. Such simplified “notice pleading” is made possible by the liberal opportunity for discovery and other pretrial procedures established by the Rules to disclose more precisely the basis of both claim and defense and to define more narrowly the disputed facts and issues.

355 U.S. at 47-48 (footnote omitted). In other words, “[a] complaint . . . need not allege all that a plaintiff must eventually prove.” *Atchinson v. Dist. of Columbia*, 73 F.3d 418, 421-22 (D.C. Cir. 1996). Rather, the plaintiff need only allege the factual grounds for his claims sufficient to show that they are “plausible.” *Bell Atlantic Corp. v. Twombly*, 127 S. Ct. 1955, 1960 (2007). Specifics, however, are not required because plaintiff need only give a “short and plain statement of the case” under Rule 8. *Id.* at 1959, 1960 (“the Court is not requiring heightened fact pleading of specifics, but only enough facts to state a claim to relief that is plausible on its face”). Stated another way, the Complaint must only state enough information for the defendant to prepare an

answer—not a defense. *Chao v. Rivendell Woods, Inc.*, 415 F.3d 342, 349 (4th Cir. 2005). Given the liberal standard of notice pleading, it is no surprise that dismissals like the one that Defendants seek are rarely granted. *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir. 1986).

2. Plaintiff Need Not Plead Facts That Are Peculiarly Within The Defendants' Knowledge

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While Federal Rule of Civil Procedure 9(b) typically requires averments of fraud to be stated “with particularity,” less detail is required when—as in this case—the information surrounding the allegations is “peculiarly within the knowledge of the defendant.” *Cadle Co. v. Schultz*, 779 F. Supp. 392, 396 (N.D. Tex. 1991); *Quilling v. Stark*, 2006 WL 1683442, *6 (N.D. Tex. June 19, 2006); *United States v. Home Care Servs., Inc.*, 1999 WL 222356, *2 (N.D. Tex. Apr. 9, 1999); 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 1298 at 192, 232 (2004). This follows the same reasoning that affords bankruptcy trustees latitude in pleading fraud claims under Rule 9(b). *See, e.g., Pardo v. Avanti (In re APF Co.)*, 274 B.R. 634, 638 (Bankr. D. Del. 2001); *Barr v. Charterhouse Group Int’l, Inc. (In re Everfresh Beverages, Inc.)*, 238 B.R. 558, 581 (Bankr. S.D.N.Y. 1999). Like trustees, the Receiver is saddled with the task of reconstructing transactions between ABC and the defendants from only bits and pieces of financial records maintained by a corrupt and mismanaged business. *See id.* Those difficulties are compounded by the fact that ABC’s principals have invoked their Fifth Amendment rights and cannot provide any information. Since only the LaMondas and the Defendants know the specific facts and circumstances surrounding these transactions, the pleading requirements of Rule 9(b) must be relaxed in this case.

3. Rule 9(b) Does Not Apply In This Case Because The Receiver's Claims Do Not Sound In Fraud

Defendants seek dismissal of all but two of the Receiver's claims¹ for failure to allege fraudulent conduct with particularity under Federal Rule of Civil Procedure 9(b). (Mot. to Dismiss [Dkt. No. 10] at 13.)

Rule 9(b) requires that any allegations of or sounding in fraud must be stated with particularity. The Receiver, however, does not state any allegations of fraud in his Complaint. To state an action for fraud, the Receiver would have to allege that Defendants concealed, suppressed, or otherwise misrepresented material facts in communications with ABC or the ABC Investor Trusts. See *Eagle Props. Ltd. v. Scharbauer*, 807 S.W.2d 714, 722-23 (Tex. 1990); *Marketing West, Inc. v. Sanyo Fisher (USA) Corp.*, 6 Cal. App. 4th 603, 612-13 (Cal. Ct. App. 1992). The Receiver, however, does not allege any concealment, suppression, or misrepresentations of material fact by these Defendants in this case.

Instead, the Receiver's causes of action against these Defendants are all based on (1) the Defendants' receipt of funds and assets from ABC and the ABC Investor Trusts and (2) the Defendants' failure to properly manage funds held by or on behalf of ABC and the ABC Investor Trusts. (Compl. at ¶¶21-50.) The Receiver need not allege fraudulent conduct by the Defendants to recover on these causes of action.² In essence, the Defendants try to project a fraud claim into the Receiver's Complaint where none exists in hopes of taking advantage of the heightened pleading standard in Rule 9(b). (Mot. to Dismiss [Dkt. No. 10] at 13.)

¹Defendants do not ask for dismissal of the gross negligence claim or constructive trust and disgorgement claim under Rule 9(b). (Mot. to Dismiss [Dkt. No. 10] at 12.)

²Although a claim for fraudulent transfer does sound in fraud for purposes of Rule 9(b), it relates only to the fraudulent conduct of ABC—not the conduct of the Defendants who received those funds. See *Stark*, 2006 WL 1683442 at *6 (receiver satisfied Rule 9(b) by describing existence of Ponzi scheme underlying his fraudulent transfer claim).. Furthermore, Defendants do not challenge the Receiver's allegations that ABC's principals engaged in fraudulent conduct by operating the company as a Ponzi scheme.

The distinction between this case and those alleging concealment, suppression, or misrepresentation of material facts is underscored by the very cases cited in Defendants' brief. *See, e.g., DiLeo v. Ernst & Young*, 901 F.2d 624, 626 (11th Cir. 1990) (claims based on allegations of "falsity or intent to deceive"); *Ingalls v. Edgewater Private Equity Fund III, L.P.*, 2005 WL 2647962, *3 (S.D. Tex. Oct. 17, 2005) (claims based on allegations of fraudulent statements and nondisclosure); *Linear Tech. Corp. v. Applied Materials, Inc.*, 152 Cal. App. 4th 115, 131 (Cal. Ct. App. 2007) (claims based on allegations of "intentional deceit by way of concealment of material facts"); *Mktg. West, Inc.*, 6 Cal. App. 4th 603 at 610-12 (claims based on allegations of fraudulent representations and fraudulent concealment). Clearly Rule 9(b) does not apply in this case because the Receiver makes no such allegations in his Complaint.

B. THE COMPLAINT STATES THE FACTUAL GROUNDS FOR EVERY ELEMENT OF THE RECEIVER'S CLAIMS

As explained more fully below, the Receiver's Complaint contains an extensive statement of facts that clearly notifies Defendants of the grounds upon which each claim is based. *Conley*, 355 U.S. at 47-48; *Twombly*, 127 S. Ct. at 1959-60. The facts supporting each distinct cause of action are discussed below.³

1. Fraudulent Transfer

Under the Uniform Fraudulent Transfer Act ("UFTA")⁴ the Receiver may recover transfers from a fraudulent investment scheme on behalf of its defrauded investors. *See, e.g.,*

³Defendants boldly assume that California law controls for every claim in this case by virtue of E&J's Escrow Agreement. (Mot. to Dismiss [Dkt. No. 8] at 14 n.9.) Only one of the Receiver's claims, however, is based on that agreement. Other causes of action may be grounded in equity and the federal common law, which is often more expansive than the relief afforded in state court. *See, e.g., U.S. v. McConnell*, 258 B.R. 869, 872-73 n 2 (N.D. Tex. 2001). Nevertheless, the Receiver reserves his right to allege that Texas law governs one or more of his claims for relief.

⁴Both Texas and California have adopted the Uniform Fraudulent Transfer Act. *See* TEX. BUS. & COM. CODE § 24.001 *et seq.*; CAL. CIV. CODE § 3439 *et seq.* Therefore, it does not matter what law governs for purposes of this motion.

SEC v. Cook, 2001 WL 256172, * 2 (N.D. Tex. Mar. 8, 2001). In relevant part, the UFTA provides that:

(a) A transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the creditor's claim arose within a reasonable time before or after the transfer was made or the obligation was incurred, if the debtor made the transfer or incurred the obligation:

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with actual intent to hinder, delay, or defraud any
creditor of the debtor . . .

TEX. BUS. & COM. CODE § 24.005; CAL. CIV. CODE § 3439.04. While creditors must ordinarily prove fraudulent intent to recover under this provision of the UFTA, that element is automatically established for transfers out of a Ponzi scheme. *Quilling v. Stark*, 207 WL 415351, *2 (N.D. Tex. Feb. 7, 2007); *Quilling v. Gilliland*, 2002 WL 373560, *2 (N.D. Tex. Mar. 6, 2002); *Cook*, 2001 WL 256172 at *3. In his Complaint, the Receiver has clearly alleged that ABC was a Ponzi scheme and Defendants do not dispute that conclusion. (Compl. at ¶¶ 20, 48.) The Receiver, therefore, has adequately stated a claim to recover any funds that ABC and the ABC Investor Trusts transferred to E&J. *Stark*, 2006 WL 1683442 at *6.

Defendants erroneously state that ABC and the ABC Investor Trusts had no “creditors” at the time they made those transfers. (Mot. to Dismiss [Dkt. No. 10] at 10.) The UFTA gives “creditors” the broadest possible definition:

‘Creditor’ means a person . . . who has a claim.

* * *

‘Claim’ means a right to payment or property, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

TEX. BUS. & COM. CODE § 24.001 (3), (4); CAL CIV. CODE § 3439.01 (b), (c). At all times, the ABC Investor Trusts were “creditors” of ABC because they had a right to payment of the \$24

million shortfall in their premium escrow reserves. (Compl. at ¶ 19.) At all times, each of the investors were also investors of the ABC Investor Trusts as were each of the insurance companies. In addition, the Receiver himself may represent all creditors' interests in stating a fraudulent transfer claim. *Cook*, 2001 WL 256172 at *3. This is evident in numerous other cases where the receiver has recovered assets from an investment scheme under the UFTA. *See, e.g., Warfield v. Byron*, 2006 WL 118250, (5th Cir. Jan. 17, 2006); *Stark*, 2007 WL 415351; *Gilliland*, 2002 WL 373560; *In re Ramirez Rodriguez*, 209 B.R. 424 (Bankr. S.D. Tex. 1997); *In re Independent Clearing House Co.*, 77 B.R. 843 (Bankr. D. Utah 1987).

While Defendants raise section 24.009 of the UFTA as an affirmative defense to liability, they cannot obtain a dismissal on those grounds. (Mot. to Dismiss [Dkt. No. 10] at 10.) That section sets out the two-part defense of (1) receiving funds in good faith and (2) receiving funds in exchange for reasonably equivalent value. TEX. BUS. & COM. CODE § 24.009; CAL. CIV. CODE § 3439.08; *SEC v. Cook*, 2001 WL 256172 at *3. As an affirmative defense, Defendants have the burden to prove those facts—not the Receiver. *Id.* At the most, Defendants' motion simply raises a question of fact to be proven at trial.

Finally, Erwin claims that he did not act in his individual capacity with respect to any transfers from ABC or the ABC Investor Trusts. (Mot. to Dismiss [Dkt. No. 10] at 10.) That, however, is not a requirement under the UFTA. The Receiver may recover funds or proceeds of funds traceable to ABC and the ABC Investor Trusts no matter the recipient's capacity. *See, e.g., Quilling v. McDuff*, Case No. 3:06-CV-0959 (N.D. Tex. Dec. 13, 2006) (entering judgment against individual who received proceeds of fraudulent transfers washed through numerous entities).

2. Constructive Trust And Disgorgement

The Order Appointing Receiver expressly authorizes the Receiver to state a constructive trust claim against any party holding “assets or funds or proceeds” that can be traced to the receivership estate:

The Receiver is hereby authorized to institute such actions or proceedings to impose a constructive trust, obtain possession and/or recover judgment with respect to persons or entities who received assets or funds or proceeds traceable to investor monies. All such actions shall be filed in this Court. The Receiver is specifically authorized to pursue such actions on behalf of and for the benefit of the constructive trust beneficiaries, including without limitation any and all investors who may be victims of the fraudulent conduct alleged herein by the Commission. The Receiver is hereby appointed as the representative of such investors . . . for the purpose of filing actions to recover such funds wherever the Receiver may deem necessary.

Order Appointing Receiver [Dkt. No. 8] at ¶ 14 (3:06-CV-2136). In this case, the Receiver seeks to recover (1) all of the funds that E&J received directly from ABC or the ABC Investor Trusts and (2) any proceeds of those funds that E&J shared with or forwarded to Erwin individually. (Compl. at ¶ 50.) Defendants do not challenge the Receiver’s factual allegations supporting his claim for constructive trust and disgorgement. (Mot. to Dismiss [Dkt. No. 10] at 3.) Accordingly, this cause of action must be sustained against both Defendants.

3. Professional Malpractice / Negligence / Gross Negligence

The Receiver alleges that one or more of the Defendants’ acts or omissions constitute professional malpractice, negligence, and/or gross negligence.

To state his claim for professional malpractice, the Receiver must allege that (1) Defendants had a duty to use the degree of skill, prudence, and diligence as other attorneys, (2) Defendants breached that duty, and (3) their breach proximately caused damages to ABC and the ABC Investor Trusts. *Budd v. Nixen*, 6 Cal.3d 195, 200 (Cal. 1971).

To state his claim for common law negligence independent of any attorney-client relationship, the Receiver must allege that (1) Defendants owed a duty to ABC and the ABC Investor Trusts, (2) Defendants breached that duty, and (3) their breach proximately caused damages to ABC and ABC Investor Trusts. *Onciano v. Golden Palace Restaurant, Inc.*, 219 Cal. App. 3d 385 (Cal. Ct. App. 1990).

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Finally, the Receiver alleges that Defendants' conduct supports a finding for gross negligence because it reflects an extreme departure from the ordinary standard of conduct. *Eastburn v. Regional Fire Protection Authority*, 31 Cal. 4th 1175, 1185-86 (Cal. 2003).

Without question, Erwin and E&J owed a duty of care to preserve and competently maintain all assets of ABC and the ABC Investor Trusts. Both Erwin and E&J breached their duties by facilitating the transfer of those funds to third parties when they knew or should have known that ABC and the ABC Investor Trusts were already underfunded and effectively insolvent at the time. (Compl. at ¶¶ 14, 16, 18, 19, 48.) Furthermore, E&J directly contributed to the depletion of those assets by continuing to accept retainers from those entities. (Id. at ¶ 16.) As a result, both ABC and the ABC Investor Trusts suffered damages in the form of lost assets that should not have been transferred by Erwin and E&J.

Instead of challenging the sufficiency of these allegations, Defendants claim that the Receiver lacks standing to sue for damages on behalf of the ABC Investor Trusts. (Mot. to Dismiss [Dkt. No. 10] at 8-9.) To the contrary, it is well-settled that a subsequent trustee may sue the previous trustee or any third party who damages the trust assets.⁵ *See Moeller v. Superior Court*, 16 Cal. 4th 1124, 1137 (Cal. 1997) (successor trustee has duty to redress breach

⁵Defendants try to divest the Receiver of his standing to sue by mischaracterizing the claims for negligence and gross negligence as "derivative" claims belonging to ABC's shareholders. This point is addressed more fully in the Response to Defendants' Motion to Dismiss for Lack of Standing, filed simultaneously with this brief.

of trust by former trustee). Accordingly, the Receiver has standing to sue both Erwin and E&J for any injury they caused to ABC and the ABC Investor Trusts.

4. Breach of Contract

The Receiver may also state breach of contract claims against E&J by virtue of its Escrow Agreement and Trust Agreements with ABC and the ABC Investor Trusts. To state a colorable claim for breach of contract, the Receiver need only show: (1) that E&J had one or more contracts with ABC or the ABC Investor Trusts, (2) that those entities performed under the contract, (3) that E&J breached the terms of those contracts, and (4) that damages resulted. *See Poseidon Develop., Inc. v. Woodland Lane Estates, LLC*, 152 Cal. App. 4th 1106, 1112 (Cal. Ct. App. 2007); *Marketshare Telecom, L.L.C. v. Ericsson, Inc.*, 198 S.W.3d 908, 923 (Tex. App.—Dallas 2006, no pet.). As explained in the Receiver’s Complaint, E&J breached its contractual duties by failing to establish separate trust accounts or ensure that they were properly funded. (Compl. at ¶ 13.) Instead, E&J commingled all assets of the separate investor trusts, facilitated improper transfers of trust assets at the LaMondas’ direction, and generally failed to take any steps to ensure that the trusts were adequately funded. (Compl. at ¶¶ 13-16, 48.)⁶ As a result, ABC and the ABC Investor Trusts suffered damages because they had to spend other assets to cover the resulting shortfall in the premium trust account.

Defendants claim that the Receiver lacks standing to state a breach of contract claim because “there is no allegation of an express contract between E&J and the investors.” (Mot. to Dismiss [Dkt. No. 10] at 11.) The Receiver, however, was appointed to represent the interests of ABC and the ABC Investor Trusts. *Order Appointing Receiver* [Dkt. No. 8] (3:06-CV-2136);

⁶Defendants mischaracterize the Receiver’s fraudulent transfer claim as an admission that ABC failed to perform under the Escrow Agreement or Trust Agreements. (Mot. to Dismiss [10] at 11.) To the contrary, the LaMondas’ illicit behavior was a breach of their duties to ABC and its investors—not a breach of ABC’s contractual duties to E&J. In fact, the Complaint clearly alleges that the Defendants assisted the LaMondas in underfunding the escrow account by failing to accurately calculate the necessary premium reserves. (Compl. at ¶¶ 13-15.)

Order Clarifying and Modifying Order Appointing Receiver [Dkt. No. 19] (3:06-CV-2136). E&J does not and cannot deny that it owed contractual duties to one or both of those entities under the Escrow Agreements and the Trust Agreements. To the contrary, it readily admits that “there is an agreement between ABC & E&J” and “E&J entered into one overall escrow agreement and separate trust agreements for each trust.” (Mot. to Dismiss [Dkt. No. 8] at 4, 19.)

Defendants further claim, in conclusory fashion, that “any allegation of breach is fully contradicted by the contracts themselves and the evidence in the underlying SEC Action.” (Mot. to Dismiss [Dkt. No. 10] at 11.)⁷ Once again, Defendants are attempting to make an evidentiary argument that is more properly addressed at trial. The Court cannot dismiss a claim based on Defendants’ unsupported belief that the facts will ultimately fall in their favor.⁸

In their final argument, Defendants ask this Court to substitute their damage calculation in place of the damage calculation offered by the Receiver. (Mot. to Dismiss [Dkt. No. 10] at 11.) The Receiver claims that ABC and the ABC Investor Trusts suffered damages in the form of funds misappropriated to the LaMondas, the Defendants, and others. (Compl. at ¶¶ 18-20, 48, 50.) Defendants, however, believe that ABC suffered no damages because there was “no premium shortfall during E&J’s tenure.” (Mot. to Dismiss [Dkt. No. 10] at 11.) Simply offering a competing damage calculation does not render the Receiver’s claim implausible for purposes

⁷Although it is premature to fully brief the issue at this juncture, the Receiver notes that exculpatory clauses in these contracts may well be void as against public policy. *See, e.g., Health Net of Cal., Inc. v. Dep’t of Health Servs.*, 113 Cal. App. 4th 224, 234 (Cal. Ct. App. 2003).

⁸Furthermore, Defendants are not likely to prevail on their claim that the Escrow Agreement and Trust Agreements required them to commingle the assets of all ABC Investor Trusts and misappropriate those funds at the LaMondas’ direction. (Mot. to Dismiss [Dkt. No. 10] at 11.) To the contrary, this violated Defendants’ fundamental common law duty to preserve and maintain trust assets. *U.S. v. White Mountain Apache Tribe*, 537 U.S. 465, 475 (2003); *see also* RESTATEMENT (THIRD) OF TRUSTS § 72 (“A trustee has a duty not to comply with a provision of the trust that the trustee knows or should know is invalid because the provision is unlawful or contrary to public policy”) (emphasis added).

of a motion for summary judgment. At the most, the question of damages is a fact question to be determined at trial.

Defendants also attempt to disprove the Receiver's damage calculation by taking out of context his statement that ABC's investors "expect to receive a total of \$224,865,285.00 of death benefits" from the portfolio of insurance policies. (Mot. to Dismiss [Dkt. No. 10] at 11). Unfortunately, the investors' expectations are not consistent with reality. Even if all viators were to die during these receivership proceedings, investors would still not recover the full value of their death benefits because the receivership estate must pay its administrative expenses, the loans borrowed to pay insurance premiums, and its obligations to other creditors. In short, recovering the full \$224,865,285.00 is impossible and does not warrant further discussion. (Id.)

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5. Aiding And Abetting Corporate Waste

To state a claim for aiding and abetting corporate waste, the Receiver must allege that (1) Defendants knew the LaMondas were wasting corporate assets, and (2) Defendants gave the LaMondas substantial assistance or encouragement in carrying out those acts. *Neilson v. Union Bank of California, N.A.*, 290 F. Supp. 2d 1101, 1118 (C.D. Cal. 2003) (setting the general standard of liability for one "who aids and abets the commission of an intentional tort"); *see also Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942). The Complaint alleges that both Erwin and E&J aided and abetted the LaMondas in wasting corporate assets by facilitating every transfer of funds from the ABC Investor Trusts, even though they knew or should have known that the trusts were underfunded and effectively insolvent at the time. (Compl. at ¶¶ 14, 16, 18, 19, 48.) This, in turn, necessarily contributed to the waste of ABC's corporate assets because, as trustor of the ABC Investor Trusts, ABC had to cover the perpetual shortfall of premium reserves with funds from new investors. (Compl. at ¶¶ 13-14, 48.) E&J

also directly contributed to corporate waste by continuing to insist upon and accept excessive retainers from ABC and the ABC Investor Trusts. (Id. at ¶ 16.) As a result, both ABC and the ABC Investor Trusts suffered damages in the form lost corporate assets.

Defendants' motion does not challenge the substance or sufficiency of these allegations, but instead challenges the Receiver's standing to bring this claim.⁹ First, they claim that the Receiver failed to observe CAL. CIV. CODE § 1714.10, which requires California litigants to obtain Court permission before filing a civil conspiracy claim against an attorney. (Mot. to Dismiss [Dkt. No. 10] at 5-6.) This challenge is without merit for several reasons. First, section 1714.10 is a procedure reserved for California courts, not federal courts. Second, Defendants fail to appreciate the distinction between a civil conspiracy claim and a common law aiding and abetting claim.¹⁰ Third, Defendants have not offered any case law showing that aiding and abetting claims are subject to the requirements of CAL. CIV. CODE § 1714.10(a). To the contrary, California cases addressing aiding and abetting claims do not mention any such requirement. *See Neilson*, 290 F.Supp.2d at 1118.

Defendants also erroneously state—without legal authority—that only a shareholder has standing to bring a claim for corporate waste.¹¹ (Mot. to Dismiss [Dkt. No. 10] at 6-7.) They point out that corporate waste claims are typically “derivative” claims “reserved for a

⁹The Receiver's standing to bring this claim is more fully addressed in his Response to Defendant's Motion to Dismiss for Lack of Standing, filed simultaneously with this brief.

¹⁰The essential elements of a civil conspiracy cause of action are (1) two or more persons, (2) an object to be accomplished, (3) a meeting of minds on the object or course of action, (4) one or more unlawful, overt acts, and (5) damages as the proximate result of those acts. *Massey v. Armco Steel Co.*, 652 S.W.2d 932, 934 (Tex. 1983); *see also Idema v. Dreamworks, Inc.*, 162 F. Supp. 2d 1129, 1196-97 (C.D. Cal. 2001).

¹¹Defendants attempt to blur the lines between a claim for corporate waste and a claim for aiding and abetting corporate waste. They insist that the Receiver can only state a corporate waste claim against the company's officers or directors. (Mot. to Dismiss [Dkt. No. 10] at 6-7.) Obviously, however, an aiding and abetting claim may be stated against any party who provides substantial assistance in committing that tort. *See Neilson*, 290 F. Supp. 2d at 1118; *Kinzbach Tool Co.*, 160 S.W.2d at 514.

corporation's shareholders." (Mot. To Dismiss [Dkt. No. 10] at 6.) Shareholders, however, only have standing to bring derivative claims on behalf of the corporation when the officers and directors fail to do so. *Corrections USA v. Dawe*, 504 F. Supp. 2d 924 (E.D. Cal. 2007) ("a corporation itself must bring an action for an injury to the corporation."); *In re Sagent Technology, Inc.*, 278 F. Supp. 2d 1079, 1087 (N.D. Cal. 2003) ("the right of a stockholder to prosecute a derivative suit is limited to situations where the stockholder has demanded that the directors pursue the corporate claim and they have wrongfully refused to do so."). Here, the Receiver stands in the shoes of both ABC and the ABC Investor Trusts and has appropriately brought this claim against Erwin and E&J for aiding and abetting the LaMondas in wasting company assets. *Order Appointing Receiver* [Dkt. No. 8] (3:06-CV-2136); *Order Clarifying and Modifying Order Appointing Receiver* [Dkt. No. 19] (3:06-CV-2136).

6. Breach of Fiduciary Duty

To state a claim for breach of fiduciary duty, the Receiver must allege (1) that Defendants owed fiduciary duties to the ABC Investor Trusts; (2) that they breached those duties; and (3) that the breach proximately caused damages to the ABC Investor Trusts. *Brown v. California Pension Administrators & Consultants, Inc.*, 45 Cal. App. 4th 333 (Cal. App. 1996). In carrying out the duties of trustee for the ABC Investor Trusts, both E&J and Erwin may be held personally liable for any breach of that duty. *See F.J. Hanshaw Enters., Inc. v. Emerald River Dev., Inc.*, 244 F.3d 1128, 1142-43 (9th Cir. 2001); Harlon F. Stone, *A Theory of Liability of Trust Estates for the Contracts and Torts of the Trustee*, COLUM. L. REV., Vol. 22, No. 6 (Jun. 1922) at 527-545 (addressing common law principle that trustees and their employees are liable for injuries to the trust); *see also* RESTATEMENT (SECOND) OF TRUSTS § 326 (imposing personal liability on the trustee's employees).

In handling every transfer of trust assets from the ABC Investor Trusts, the Defendants had a fiduciary duty to only perform transfers that were in the trusts' best interests. *See generally*, RESTATEMENT (THIRD) OF TRUSTS § 72. Both Erwin and E&J breached their duties by facilitating excessive and illegitimate transfers from the ABC Investor Trusts, even though they knew or should have known that the trusts were underfunded and effectively insolvent at the time. (Compl. at ¶¶ 14, 16, 18, 19, 48.) Furthermore, E&J directly contributed to the demise of the ABC Investor Trusts by continuing to accept retainers from the trust account even after the LaMondas' criminal troubles surfaced. (Id. at ¶ 16.) As a result, the ABC Investor Trusts suffered damages in the form of lost trust assets that should not have been transferred by Erwin and E&J.

In challenging the Receiver's cause of action, Defendants allege that "there is no basis for contending that E&J breached any fiduciary duty to ABC's investors." (Mot. to Dismiss [Dkt. No. 10] at 4.) The Complaint, however, clearly articulates the factual bases for this claim and Defendants' conclusory statement to the contrary cannot support dismissal.

Defendants also conclude that the ABC Investor Trusts suffered no damages because "all premiums were paid on time and a policy never lapsed during E&J's tenure." (Mot. to Dismiss [Dkt. No. 10] at 5.) Since the Receiver has clearly alleged other financial injury to the ABC Investor Trusts, the question of damages is, at most, a fact issue for this Court to determine at trial.

7. Aiding And Abetting Breach of Fiduciary Duty

To state a claim for aiding and abetting breach of fiduciary duty, the Receiver must allege that (1) Defendants knew or should have known that the LaMondas' conduct constituted a breach of duty and (2) Defendants gave substantial assistance or encouragement to the LaMondas in

their activities. *See Neilson v. Union Bank of California, N.A.*, 290 F. Supp.2d 1101, 1118 (C.D. Cal. 2003); *see also Kinzbach Tool Co. v. Corbett-Wallace Corp.*, 160 S.W.2d 509, 514 (Tex. 1942) (imposing joint liability for one who knowingly aids and assists in the breach of fiduciary duty). Without question, the LaMondas breached their fiduciary duty to act in the best interests of ABC and the ABC Investor Trusts by underfunding the premium reserves and directing Erwin to make excessive distributions to the LaMondas, E&J, and others. As trustee and escrow agent for ABC and the ABC Investor Trusts, Erwin and E&J should have known that the LaMondas' conduct constituted a breach of fiduciary duty.

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Both Erwin and E&J substantially assisted the LaMondas by carrying out every distribution of assets that they requested—even those that were detrimental to ABC and the ABC Investor Trusts. (Compl. at ¶¶ 14, 18, 19.) Erwin also encouraged the LaMondas to make additional distributions to E&J as compensation for continuing to act as ABC's escrow agent and trustee for the ABC Investor Trusts (Compl. at ¶ 16.) Erwin and E&J also assisted the LaMondas in underfunding the premium reserves by failing to accurately calculate the amounts needed to keep those policies in force. (Compl. at ¶ 15.)

Defendants' challenge this cause of action by stating that Receiver has failed to comply with CAL. CIV. CODE § 1714.10.¹² (Mot. to Dismiss [Dkt. No. 10] at 4.) As explained previously, that provision requires California litigants to obtain state permission before filing a civil conspiracy claim against an attorney. Defendants' challenge is meritless because section 1714.10 does not apply to federal litigation or claims for common law aiding and abetting liability.

¹²Defendants erroneously treat this aiding and abetting claim as if it were a claim for breach of fiduciary duty. As explained in the previous section, the Receiver's breach of fiduciary duty claim alleges that the Defendants breached duties they owed to ABC and the ABC Investor Trusts. This cause of action, however, alleges that they also aided and abetted the LaMondas in breaching the LaMondas' duties to the ABC Investor Trusts.

C. DEFENDANTS' REQUEST FOR A MORE DEFINITE STATEMENT UNDER RULE 12(E) IS NOT WARRANTED

When a party moves for a more definite statement under Rule 12(e), the Court must determine whether the complaint is so “vague or ambiguous” that a party cannot reasonably be required to frame a responsive pleading. FED. R. CIV. P. 12(e); *Mitchell v. E-Z Way Towers, Inc.*, 269 F.2d 126, 130 (5th Cir.1959). Motions for a more definite statement are generally disfavored. *Russell v. Grace Presbyterian Village*, 2005 WL 1489579, at *3 (N.D. Tex. June 22, 2005) (Solis, J.); 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 1377 (2d ed. 1990). An order to provide a more definite statement is not warranted when the allegations at issue can be more clearly developed during discovery. *Arista Records LLC v. Greubel*, 453 F. Supp. 2d 961, 972 (N.D. Tex. 2006). Defendants claim that they cannot discern which claims are stated against Erwin and which are stated against E&J. The Receiver contends that all claims are currently stated against both Defendants as permitted by Rule 8(e)(2) until further discovery allows him to more precisely determine his theories of liability. In either case, it appears that Defendants clearly have notice of the claims against them given the extensive factual challenges in their motions to dismiss and, therefore, they would likely have no trouble formulating a response to the Complaint in its current form.

D. THE RECEIVER SHOULD HAVE AN OPPORTUNITY TO AMEND HIS COMPLAINT BEFORE THE CASE IS DISMISSED

The Federal Rules of Civil Procedure “reject the approach that pleading is a game of skill in which one misstep by counsel may be decisive to the outcome and accept the principle that the purpose of pleading is to facilitate a proper decision on the merits.” *Conley v. Gibson*, 355 U.S. 41, 48 (1957). It is the well established policy of the Federal Rules of Civil Procedure that a plaintiff is to be given every opportunity to state a claim. *Hitt v. City of Pasadena*, 561 F.2d 606, 608 (5th Cir. 1977). This Court should, therefore, give the Receiver an opportunity to amend or

supplement his complaint before dismissing the claims complained of by the Defendants. *Czosek v. O'Mara*, 397 U.S. 25, 27 (1970). Accordingly, if the Court concludes that the Complaint and exhibits do not comply with Rule 9(b), then the Receiver should be granted leave to amend.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true and correct copy of this motion shall be served on all interested parties through the Court's electronic filing system.

/s/ Michael J. Quilling