



would entitle him to relief. *Blackburn v. Marshall*, 42 F.3d 925, 931 (5th Cir. 1995). In properly conducting this determination of whether to grant a motion to dismiss under Federal Rule 12(b)(6), district courts have been instructed to take all well-plead factual allegations of the complaint as true and resolve any ambiguities or doubts regarding the sufficiency of the claim in favor of the plaintiff – *however*, “it is not necessary or proper to assume that plaintiff can prove facts that they have not alleged.” *Campbell v. Wells Fargo Bank*, 781 F.2d 440, 443 (5th Cir. 1986) (dismissal affirmed where plaintiff did not allege injuries were direct result of defendants’ alleged antitrust violations); *accord Walker v. South Central Bell Telephone Co.*, 904 F.2d 275, 276 (5<sup>th</sup> Cir. 1990) (court upheld dismissal of complaint which contained bare bones allegation that wrong occurred and which did not plead any facts giving rise to injury).

### **ARGUMENTS IN SUPPORT OF MOTION**

#### **A. Additional Support for Failure to Establish Personal Jurisdiction (FRCP 12(b)(2))**

2. The Complaint does not allege facts sufficient to establish that Plaintiff has properly complied with the requirements of 28 U.S.C. §§ 754 and 1692 to establish jurisdiction over the Defendants and their property. Although the Plaintiff has stated in his Response that he has complied with the requirements of 28 U.S.C. §§ 754 and 1692, the Plaintiff’s Complaint fails to incorporate these allegations to establish appropriate jurisdiction. The Complaint also fails to state that all real, personal, and/or mixed property subject to the Complaint is situated within the United States Central District of California.

3. Further, the addresses included within the Returns of Service filed on the Court’s docket, and attached hereto as Exhibits A and B,<sup>1</sup> do not match the addresses included within the Plaintiff’s Complaint. Compare Complaint at ¶¶ 2, 3 with Exhibits A and B hereto.

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<sup>1</sup> In making a Rule 12(b)(6) determination, courts may consider materials submitted as part of the complaint, items in the record, and public record. *See, e.g., Stangel v. U. S.*, 222 B.R. 289, 292 (Bankr. N.D. Tex. 1998).

Additionally, the Returns of Service appear facially deficient in that the Declaration of Server is executed on November 23, 2005 for service made five days later on November 28, 2005.

4. Accordingly, the Complaint should be dismissed against each of the Defendants unless amended to appropriately establish jurisdiction over the Defendants and the property subject to the Complaint.

**B. Additional Support for Failure to State a Claim (FRCP 12(b)(6))**

5. The claims brought by the Plaintiff in his Complaint are not supported by proper facts sufficient to sustain such claims. Dismissal is, indeed, proper “if the complaint lacks a factual allegation regarding a required element necessary to obtain relief.” *Blackburn v. Marshall*, 42 F.3d at 931 (court properly dismissed plaintiff’s claims where necessary element was not plead); *Norman v. Apache Corp.*, 19 F.3d 1017, 1023 (5th Cir.1994) (court affirmed dismissal of fraud claims for failure to plead all requisite elements); *Kaliner v. Load Rite Trailors, Inc., (In re Sverica Acquisition Corp., Inc.)*, 179 B.R. 457, 473 (Bankr. E.D. Pa. 1995) (motion to dismiss granted where trustee failed to allege facts that were essential elements of claim, e.g., existence of creditors that were harmed by fraudulent transfers to provide basis for trustee’s standing). And, “conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent a motion to dismiss.” *Fernandez-Montes v. Allied Pilots Ass’n*, 987 F.2d 278, 284 (5th Cir. 1993) (court affirmed dismissal of complaint that did not specifically set forth facts to support essential element of claim).

6. In sum, where it appears to a certainty that based on the face of the complaint, no relief could be granted even after assuming all actual facts contained in the complaint to be true, the complaint should be dismissed. *See, e.g., Mason v. F.D.I.C.*, 888 F. Supp. 799, 801 (S.D.

Tex. 1995) (cause of action under DTPA dismissed under 12(b)(6) where allegations in complaint did not establish plaintiff had standing to sue).

7. Plaintiff has failed to plead (a) all elements necessary to obtain relief for his causes of action, and (b) sufficient facts that could, even if taken as true, support the necessary elements. Defendants, therefore, request that the Court dismiss the Plaintiff's causes of action because no relief can be granted based on the inadequate allegations in the Complaint

8. The Plaintiff's Response cites to the Texas Business and Commerce Code §§ 24.001, et seq. to recover on claims for (1) constructive trust and disgorgement, (2) fraudulent transfer, and (3) fees, expenses, costs, and interest. However, the Complaint fails to allege facts sufficient to sustain such claims.

i. Count One - Constructive Trust and Disgorgement

9. To impose a constructive trust under Texas law, the party seeking to impose such trust must prove, *inter alia*, that property can be traced to an identifiable res. *Rosenberg v. Collins*, 624 F.2d 659, 663 (5<sup>th</sup> Cir. 1980) (holding, under Texas law, constructive trust can attach only "to some identifiable property which can be traced back to the original property acquired by fraud"); *see also Wisconsin v. Reese (In re Kennedy & Cohen, Inc.)*, 612 F.2d 963, 966 (5<sup>th</sup> Cir. 1980).

10. Among other missing allegations, the Plaintiff has not sufficiently plead (i) that property could be traced, or (ii) the existence of an identifiable res; and, therefore, the Plaintiff's remedy for imposition of a constructive trust must be denied. The Complaint merely concludes, "The funds paid to and obligations satisfied on behalf of the Defendants constitute and are directly traceable to the funds of the defrauded investors. As such, they are impressed with a

constructive trust and constitute Receivership Assets. The Defendants should be required to disgorge their ill-gotten gains.” Complaint at ¶ 11.

11. It is not clear upon what property, and in relation to what acts, omissions, or breaches, the constructive trust should be imposed. These allegations must be dismissed as inadequate under Federal Rule 12(b)(6).

12. Moreover, the legal conclusion within the Complaint regarding disgorgement – i.e., “The Defendants should be required to disgorge their ill-gotten gains,” is inadequate to sustain the alleged claims for disgorgement without any factual allegations as to any wrongdoing on the part of either of the Defendants. See Complaint at ¶ 11.

ii. Count Two – Fraudulent Transfer

13. The Complaint does little more than make legal conclusions in support of its count for recovery of fraudulent transfers. The Complaint does not even state which sections of Chapter 24 of the Texas Business and Commerce Code the Plaintiff is relying on. The Defendants should not be left to guess-work, conjecture and speculation as to what are the Plaintiff’s causes of action.

14. For example, but without limitation, the Complaint fails to name a creditor(s) who existed either before or within a reasonable time after the alleged transfers to sustain a claim under Texas Business and Commerce Code § 24.005(a). The Complaint also fails to allege that Sardaukar acted with intent to hinder, delay, or defraud any particular creditor(s) of Sardaukar as required by Texas Business and Commerce Code § 24.005(a)(1).

15. Likewise, the Complaint fails to name a creditor(s) who existed before the time of the alleged transfers to sustain a claim under Texas Business and Commerce Code § 24.006(a).

Accordingly, the Complaint fails to allege facts sufficient to sustain the alleged claims brought under the Texas Business and Commerce Code.

iii. Count Three – Fees, Expenses, Costs and Interest

16. For the same reasons that the Complaint should be dismissed for its counts for constructive trust, disgorgement, and fraudulent transfer, the count for fees, expenses, costs and interest should be dismissed as inadequately pled with appropriate factual support.

17. Accordingly, the Complaint should be dismissed for failure to sufficiently and properly state claims for which relief may be granted.

**C. Additional Support for Failure to State Claims with Particularity (FRCP 9(b))**

18. Plaintiff's causes of action alleging constructive trust and disgorgement, fraudulent transfer, and fees, expenses, costs, and interest should be dismissed for failure to meet the requirements of Federal Rule of Civil Procedure 9(b). Pursuant to Federal Rule 9(b), the Plaintiff is required to allege *with particularity*, but has not so alleged, all averments of fraud, including the circumstances constituting fraud, and, consequently, Plaintiff's fraud-based claims and remedies should be dismissed.

19. The Fifth Circuit has interpreted Federal Rule 9(b) to require that a plaintiff allege "the existence of facts and circumstances sufficient to warrant the pleaded conclusion that fraud ha[s] occurred" or face dismissal of his claim. *Norman v. Apache Corp.*, 19 F.3d 1017, 1022 (5th Cir. 1994)(citing *Haber Oil Co. v. Swinehart (In re Haber Oil Co.)*, 12 F.3d 426, 439 (5th Cir. 1994)).

20. Allegations of fraud must meet "a higher, or more strict, standard than the basic notice pleading required by Rule 8." *Shushany v. Allwaste, Inc.*, 992 F.2d 517, 521 (5<sup>th</sup> Cir.

1993). Accordingly, fraud is not to be plead by means of conclusory allegations only. *Segal v. Gordon*, 467 F.2d 602, 606 (2d Cir. 1972).

21. Accordingly, Defendants hereby respectfully move that the Complaint be dismissed in its entirety as against each of the Defendants.

WHEREFORE, PREMISES CONSIDERED, the Defendants request that the Court dismiss all claims allegedly brought against the Defendants in this case for lack of jurisdiction under Federal Rule 12(b)(2), and, alternatively, for cause as not being adequately pled and supported by sufficient facts under Federal Rules 12(b)(6) and 9(b).

Dated: January 19, 2006

Respectfully submitted,

**THE CURTIS LAW FIRM, PC**

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**COUNSEL FOR DEFENDANTS**

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that on January 19, 2006, a true and correct copy of the foregoing document was served via electronic mail through the Court's electronic service, if available, or otherwise by first-class United States mail, postage prepaid, on the following:

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ATTORNEYS FOR RECEIVER

/s/ Mark A. Castillo

Mark A. Castillo