UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GRYPHON INVESTMENTS III, LLC,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	Case No. 4:15-CV-00464
	)	
JOHN S. WEHRLE, et al.,	)	
	)	
Defendants.	)	

JOHN S. WEHRLE'S MOTION TO DISMISS COUNTS I, III, VI AND VII AND MOTION TO STRIKE PARAGRAPH 35 OF PLAINTIFF'S COMPLAINT

Defendant John S. Wehrle, by and through his attorneys, respectfully moves this Court:

1. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order dismissing Counts I (breach of contract), III (fraudulent transfer), VI (conversion) and VII (replevin) of the Complaint filed against him herein by Plaintiff, on the grounds that each of those Counts fails to state a claim upon which relief can be granted; and

2. Pursuant to Rule 12(f) of the Federal Rules of Civil Procedure, for an order striking Paragraph 35 of the Complaint, as that paragraph sets forth matters that are immaterial, impertinent and scandalous; makes allegations that are utterly irrelevant to this suit; and has no purpose other than to inflame and prejudice the Court against Defendant Wehrle.

Defendant Wehrle files contemporaneously herewith his memorandum of law in support of this motion.

CAPES, SOKOL, GOODMAN, & SARACHAN, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2015, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon all counsel of record.

/s/ Sanford J. Boxerman

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

GRYPHON INVESTMENTS III, LLC,	)	
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Plaintiff,	)	Case No. 4:15-CV-00464
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	)	
vs.	)	**JURY TRIAL DEMANDED**
	)	
JOHN S. WEHRLE, et al.,	)	
	)	
Defendants.	)	

MEMORANDUM IN SUPPORT OF JOHN S. WEHRLE'S MOTION TO DISMISS COUNTS I, III, VI AND VII AND MOTION TO STRIKE PARAGRAPH 35 OF PLAINTIFF'S COMPLAINT

On March 13, 2015, Gryphon Investments III, LLC ("Gryphon III") filed its Complaint herein ("Complaint") (Doc. #1) against Defendants John S. Wehrle ("Wehrle"), Gryphon Investments II, LLC ("Gryphon II") and Cirqit.com, Inc. ("Cirqit") (collectively "Defendants"). The Complaint alleges that investor contributions to Gryphon III were improperly comingled with funds of Gryphon II and transferred to the various Defendants. Gryphon III attempted to set forth eight (8) causes of action against Defendants arising out of the same general set of facts: breach of contract (Count I); breach of fiduciary duty (Count II); fraudulent transfers (Count III); unjust enrichment (Count IV); money had and received (Count V); conversion (Count VI); replevin (Count VII) and action for an accounting (Count VIII). For the reasons stated below, Counts I, III, VI and VII fail to state a claim upon which relief may be granted and should be dismissed. Further, paragraph 35 should be stricken from the Complaint pursuant to Fed.R.Civ.P Rule 12(f) as it is immaterial, impertinent and unduly prejudicial.

ARGUMENT

A. Gryphon III Has Not, and Cannot, Satisfy the Federal Pleading Standards With Respect to Counts I, III, VI and VII.

Under Rule 8(a)(2), Fed.R.Civ.P., a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009). "[T]he pleading standard Rule 8 announces does not require 'detailed factual allegations,' but it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Id*. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). To survive a motion to dismiss, a complaint must contain sufficient factual matter to "state a claim to relief that is plausible on its face." *Id*. (quoting *Twombly*, 550 U.S. at 570). "A claim has special plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. A complaint does not "suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id*. (quoting *Twombly*, 550 U.S. at 557).

Here, Gryphon III's counts for breach of contract, fraudulent transfer, conversion and replevin all fail because Gryphon III cannot establish certain key aspects of those claims for relief.

1. Count I of the Complaint fails because Wehrle was not a party to the Operating Agreement.

The crux of a claim for breach of contract is the existence of a valid contract between the parties. *See Hanna v. Darr*, 154 S.W.3d 2, 5 (Mo. Ct. App. 2004). Here, Wehrle, individually, was not a party to the Operating Agreement of Gryphon III ("Operating Agreement"), which Plaintiff attached to and incorporated in the Complaint. John S. Wehrle, individually, did not sign the Operating Agreement. Rather, Wehrle signed the Operating Agreement in his capacity as trustee of the "John S. Wehrle Revocable Living Trust" ("Trust"), a Class B Member of

Gryphon III. An individual signing on behalf of a principal is not liable for the principal if the capacity in which the individual signs is evident and the principal is disclosed. *See Lafarge N. Am., Inc. v. Miller*, 375 S.W.3d 852, 854 (Mo. Ct. App. 2012) (quoting *Capitol Group, Inc. v. Collier*, 365 S.W.3d 644, 648 (Mo. Ct. App. 2012). Here, "trustee" is printed immediately next to Wehrle's name, and his signature falls directly under the name of the Trust. *See* Operating Agreement at p. 37.

Wehrle clearly signed the Operating Agreement not in his individual capacity but in his capacity as trustee of the Trust. Thus, the Trust is party to the Operating Agreement but Wehrle, individually, is not. Gryphon III has not sufficiently stated a claim for a breach of contract because the Complaint, including incorporated attachments, does not set forth a contract binding Wehrle, individually. Count I, therefore, must be dismissed.

2. Count III of the Complaint fails to state a claim for fraudulent transfer under Missouri law and does not meet the heightened pleading standards of Federal Rule 9(b).

a. Gryphon III has failed to sufficiently plead a claim for fraudulent transfer under Missouri law.

Causes of action for fraudulent transfer are governed by Missouri's Uniform Fraudulent Transfer Act, R.S.Mo. §§ 428.005 et seq. ("MUFTA"). The statute imposes varying requirements based upon the class of creditor attempting to bring the claim. Section 428.024 covers creditors whose claims were in existence at the time the transfer was made (present creditors), as well as creditors whose claims arose thereafter (future creditors). Section 428.029 covers only creditors whose claims were in existence at the time of the transfer in question.

Section 428.024.1(2) relates to transactions where the debtor did not receive reasonably equivalent value in exchange for the transfer and the debtor was insolvent or nearly insolvent. The Complaint does not allege insolvency and, therefore, does not state a claim under subsection

(2) of Section 428.024.1. Nor does the Complaint state a claim under Section 428.029.1, which also requires an allegation of insolvency. Accordingly, the only provision of MUFTA possibly implicated by the Complaint is Section 428.024.1(1) – actual fraud.

Among the essential elements of a claim for fraudulent transfer under Section 428.024.1(1) are (1) a debtor's conveyance or assignment of goods or chattels, (2) with the intent to hinder, delay or defraud creditors. *Fischer v. Brancato*, 147 S.W.3d 794, 799 (Mo. Ct. App. 2004). In Count III, Gryphon III alleges a morass of facts in the vain hope that a cognizable claim for fraudulent transfer will emerge. Gryphon III, for example, pleads that Wehrle transferred investor contributions "with actual intent to hinder, delay and defraud" Gryphon III investors. Complaint, ¶ 47. Yet, the Complaint alleges that Gryphon II received funds contributed by Gryphon III investors, which were meant for deposit in a Gryphon III account, but were subsequently transferred *by Gryphon II* to Wehrle, Cirqit and other entities. Complaint ¶¶ 47-50. It is not pleaded that Gryphon II (one of the purported transferors) conveyed or assigned the investor funds with any wrongful or fraudulent intent.

Similarly, Gryphon III alleges that Wehrle "improperly and fraudulently transferred Gryphon III investor contributions to himself and other entities" (Complaint ¶ 47), and that "every transfer by Wehrle was based upon fraudulent documents and financial transactions" (Complaint ¶51) and that "Wehrle concealed his fraud from investors" (Complaint ¶53). On the face of the Complaint, however, the transfers in question were made by Gryphon II. Indeed, "Gryphon II received all funds contributed by Gryphon III investors, some of which it then fraudulently transferred…." Complaint ¶ 48.

Gryphon III further confuses matters by alleging that, in addition to being the purported "transferors," Wehrle and Gryphon II were subsequent "transferees" in that they received the

investor contributions. Complaint ¶¶ 47, 52. Additionally, the Complaint seems to allege that the initial transfers from investors to Gryphon II where improper because "Gryphon III did not receive fair value in exchange for the transfers." Complaint ¶ 49. However, according to the Complaint, Gryphon III was never in possession of any money and, does not seem to be a purported transferor or transferee. From the face of the Complaint, it is impossible to determine which parties were transferors, transferees or both.

In addition, the allegation related to Wehrle's "actual intent to hinder, delay or defraud" is a bare conclusory allegation with no effort to set forth any facts supporting such intent. Because intent is difficult to prove, MUFTA enumerates eleven non-exclusive factors, or "badges of fraud," to be considered by a court in determining whether there was fraudulent intent on the part of the debtor.[1] The Complaint does not specifically allege *any* of these badges of fraud and, accordingly, must be dismissed. *See Birkenmeier v. Keller Biomedical, LLC,* 312 S.W.3d 380, 389-90 (Mo. Ct. App. 2010) (allegations of fraud and fraudulent conveyance must be pled with particularity, and no claim is stated where the allegations only mirror the badges of fraud; more than one badge of fraud must be present).

[1] These eleven factors are whether:

> (1) The transfer or obligation was to an insider;
> (2) The debtor retained possession or control of the property transferred after the transfer;
> (3) The transfer or obligation was disclosed or concealed;
> (4) Before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit;
> (5) The transfer was of substantially all the debtor's assets;
> (6) The debtor absconded;
> (7) The debtor removed or concealed assets;
> (8) The value of the consideration received by the debtor was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred;
> (9) The debtor was insolvent or became insolvent shortly after the transfer was made or the obligation was incurred;
> (10) The transfer occurred shortly before or shortly after a substantial debt was incurred; and
> (11) The debtor transferred the essential assets of the business to a lienor who transferred the assets to an insider of the debtor.

R.S.Mo. § 428.024.2.

b. Gryphon III has failed to satisfy the heightened pleading requirement of Federal Rule 9(b).

In the unlikely event that Count III is deemed to contain the elements necessary to plead a claim for fraudulent transfer, the theory falls short of the requirements of Federal Rule of Civil Procedure 9(b). Because the crux of Gryphon III's fraudulent transfer claim is actual fraud, that count must meet the heightened pleading standard of Rule 9(b). *C. Coyle Packaging, LLC v. GRM Packaging, Inc.*, No. 4:10 CV 462 HEA, 2012 WL 1684535, at *6 (E.D. Mo. May 15, 2012) (claim alleging transfers made with actual intent to hinder, delay and defraud Plaintiff dismissed for failure to satisfy Rule 9(b)); *DLJ Mortgage Capital, Inc. v. Kontogiannis*, 594 F. Supp. 2d 308, 331 (E.D.N.Y. 2009) (to adequately plead a state law fraudulent transfer claim involving "actual intent to hinder, delay, or defraud" plaintiff must plead its claim with the particularity required by Rule 9(b)).

A complaint containing general allegations that does not state with particularity the circumstances constituting fraud does not meet the Rule 9(b) requirement. *U.S. ex rel. Joshi v. St. Luke's Hosp., Inc.*, 441 F.3d 552, 556 (8th Cir. 2006) (False Claims Act case dismissed for failure to satisfy Rule 9(b)). In *Joshi*, the Court explained:

> Under Rule 9(b), 'the circumstances constituting fraud … shall be stated with particularity.' Rule 9(b)'s 'particularity requirement demands a higher degree of notice than that required for other claims,' and 'is intended to enable the defendant to respond specifically and quickly to the potentially damaging allegations.' To satisfy the particularity requirement of Rule 9(b), the complaint must plead such facts as the time, place and context of the defendant's false representations, as well as the details of the defendant's fraudulent acts, including when the acts occurred, who engaged in them, and what was obtained as a result. Put another way, the complaint must identify the "who, what, where, when and how of the alleged fraud.'

Joshi, 441 F.3d at 556 (internal citations omitted).

In order to state a claim under Rule 9(b), Gryphon III is therefore required to state the time, place and context of the fraudulent conduct alleged, as well as the identity of the particular person committing the wrongful acts. The Complaint plainly fails to meet the Rule 9(b) requirement.

As set forth above, Gryphon III fails to plead with particularity what specific improper transfers were attributable to Wehrle and what transfers he improperly received. More generally, from the face of the Complaint, it is impossible to determine which parties were purportedly creditors, debtors, transferors, or transferees, and, therefore, which parties are responsible for the wrongful conduct alleged. "Rule 9(b) 'does not allow a complaint to … lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant.'" *Destfino v. Reiswig*, 630 F.3d 952, 958 (9th Cir. 2011) (internal citation omitted) (confirming dismissal where plaintiffs lumped several defendants together in their "shotgun pleading" that alleged "everyone did everything"); *see also Jepson v. Makita Corp.*, 34 F.3d 1321, 1328 (7th Cir. 1994) (dismissal upheld for failure to satisfy 9(b) requirement; "[w]hen the complaint accuses multiple defendants of participating in the scheme to defraud, the plaintiffs must take care to identify which of them was responsible for the individual acts of fraud.").

The Complaint does not appropriately identify the "who" – *i.e.* the parties accused of transferring funds with fraudulent intent, the parties who received those monies, and the parties in the role of "debtor" and "creditor" as set forth under MUFTA. Moreover, the property purportedly transferred, or the "what" of the claim for fraudulent transfer, is not adequately identified but is only referred to as "investor funds," in unnamed amounts, belonging to unidentified "investors" of Gryphon III. Similarly, no specific information is provided regarding

where the monies were transferred, the dates on which the transfers occurred, or how the purported fraud was carried out.

In paragraph 50, Gryphon III asserts that "to the extent that Defendants are not initial transferees of Gryphon III contributions, they are subsequent transferees, and upon information and belief, they cannot satisfy their burden that they took Gryphon III assets for value and in good faith or are the entities or individuals for whose benefit such Gryphon III contributions were made." Complaint ¶ 50. Rule 9(b) generally does not permit allegations based on "information and belief." *Woodruff v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. CV88–L–314, 1990 WL 124996, at *4 (D. Neb. Jan. 22, 1990). The rule is sometimes relaxed for matters peculiarly within the adverse party's knowledge, in which case the allegations must then be accompanied by a statement of the facts upon which the belief is founded. *Id.* Here, there is no assertion that such matter is peculiarly within the adverse party's knowledge, and the underlying allegations, in any event, fail to satisfy Rule 9(b).

Overall, as demonstrated above, the Complaint fails to satisfy Rule 9(b) in alleging claims based on fraudulent intent against Wehrle. Because the Complaint fails to sufficiently allege a claim for fraudulent transfer with sufficient particularity under Rule 9(b), Count III should be dismissed.

3. Gryphon III's conversion claim in Count VI fails because the "investor funds" described in the Complaint cannot be converted.

The property allegedly converted, as described in the Complaint, are certain "investor funds" belonging to Gryphon III. The Supreme Court of Missouri has defined conversion as "the unauthorized assumption of the right of ownership over the personal property of another to the exclusion of the owner's rights." *Emerick v. Mut. Ben. Life Ins. Co.*, 756 S.W.2d 513, 523 (Mo. 1988). Generally, "personal property" for purposes of conversion does not include money. *L &*

W Engineering Co., Inc., v. Hogan, 858 S.W.2d 847, 850 (Mo. Ct. App. 1993). An exception exists for money that has been given for a specific purpose and where the defendant diverts that money for a different and unauthorized purpose. *Id.*

Missouri courts have allowed claims for the conversion of money given to an attorney for expenses related to the plaintiff's suit, *Dillard v. Payne*, 615 S.W.2d 53 (Mo. 1981), and money paid by a homeowner into escrow for taxes and insurance, *Boyd v. Wimes*, 664 S.W.2d 696 (Mo. Ct. App. 1981). However, money that is held for "general corporate purposes" is not provided for a specific purpose and cannot be converted. *See L & W Engineering Co., Inc*., 858 S.W.2d at 851.

In the present case, Plaintiff describes the money referenced in its Complaint as contributions for the "working capital and other expenditures" of Gryphon III. Complaint ¶ 24. Gryphon III sets forth no specific purpose for which it earmarked that money. Accordingly, under Missouri law, the money described in the Complaint cannot be converted, and Count VI must be dismissed for failure to state a claim.

4. Count VII, for replevin, does not state a claim because the money at issue is not specifically identifiable.

Similarly,"[m]oney is not the subject of an action of replevin." *A.R. By & Through C.R. v. Topper*, 834 S.W.2d 238, 239 (Mo. Ct. App. 1992). Under the narrow exception to this rule, a claim for replevin is allowed only where the money is "marked, or designated in some manner, so as to become specific as regards the power of identification, such as being in a bag, or package." *Id.*

Gryphon III's allegations that certain unidentified "investor funds" were wrongfully possessed by Wehrle does not state a claim for replevin. Replevin claims under Missouri law are limited to instances involving the wrongful retention of ***specific*** property. R.S.Mo. § 533.010.

Here, there are no allegations against Wehrle that he is in possession of any identifiable property belonging to another. Rather, Gryphon III alleges that that the money at issue was comingled with other monies in a general account. Complaint ¶31. Therefore, the money was not adequately marked or designated so as to become the subject of an action of replevin. For this reason, Count VII should be dismissed.

B. Paragraph 35 of the Complaint should be Stricken pursuant to Rule 12(f).

Paragraph 35 of the Complaint alleges, "Wehrle was indicted by a United State Grand Jury for two counts each of tax evasion and filing tales tax returns." This statement is immaterial and impertinent and should be stricken pursuant to Rule 12(f). Rule 12(f) grants the Court the power to strike from a pleading any "immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). The claims presented by Gryphon III do not require, and are not furthered, by the allegation made in paragraph 35. And, such an allegation is unduly prejudicial to Wehrle as it references purported bad acts, which have not been proven at trial.

References to criminal indictments should be stricken where they are not made to prove a necessary element of the claim, and where the underlying actions by the defendant are not one and the same. *See People's Choice Home Loan, Inc. v. Mora*, No. CIVA 306-CV-1709-G, 2007 WL 708872, at *2 (N.D. Tex. Mar. 7, 2007); *see also White v. Philatelic Leasing, Ltd.*, No. CIV-1-86-508, 1987 WL 49640, at *7 (E.D. Tenn. Dec. 7, 1987) (striking reference to prior civil prosecution in complaint regarding lease of certain equipment based on same underlying events); *N. W. Elec. Power Co-op., Inc. v. Gen. Elec. Co.*, 30 F.R.D. 557 (W.D. Mo. 1961) (striking reference to indictment charging conspiracy in violation of Sherman Act in seperate action for violation of Anti-Trust Act). Because the prejudicial statements in paragraph 35 do not prove or

relate to any element of a claim against Wehrle, and the underlying purported acts are not the same as those alleged in the Complaint, paragraph 35 should be stricken.

CONCLUSION

For the reasons set forth above, Counts I, III, VI and VII of the Complaint are insufficient to state a claim for relief and should be dismissed with prejudice in their entirety as to Wehrle. Further, paragraph 35 of the Complaint should be stricken pursuant to Rule 12(f).

Respectfully submitted,

CAPES, SOKOL, GOODMAN, & SARACHAN, P.C.

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CERTIFICATE OF SERVICE

I hereby certify that on April 27, 2015, the foregoing was filed electronically with the Clerk of Court to be served by operation of the Court's electronic filing system upon all counsel of record.

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