

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendants Derek Taylor (“Taylor”) and Alden Adams, LLC (“Alden Adams”) (together, “Defendants”) file this Motion seeking dismissal of the claims asserted against them in Plaintiff’s First Amended Complaint (the “Amended Complaint”) [Dkt. #55], and in support thereof would show as follows:

I. INTRODUCTION

This Court previously dismissed Plaintiff’s claims against Defendants, but provided Plaintiff with the opportunity to replead (Dkt. #54). Plaintiff, however, has failed to assert any new allegations against Defendants. Plaintiffs continue to simply allege the following: Taylor and Alden Adams worked for the Receivership Entities,¹ and because the Receivership Entities engaged in alleged acts of fraud during that time, any compensation paid to Taylor or Alden Adams must be wrongful. These general allegations are insufficient to meet the pleading requirements under the Federal Rules to state any cause of action. Indeed, Plaintiffs fail to assert *any* particularized allegations against Taylor and Alden Adams, other than that they performed work for the Receivership Entities, for which they received compensation. The only difference in the Amended Complaint from the Original, is that the name of Count II has been changed from “Unjust Enrichment,” to “Money Had and Received.” All factual allegations are still the same and the claims are still pled in precisely the same fashion as those that were previously dismissed, with the exception of the title of Count II.

¹ Unless otherwise noted, defined terms have the same meaning as in the Complaint.

For all of the same reasons set forth in Defendants Derek Taylor’s and Alden Adams, LLC’s Rule 12(b)(6) Motion to Dismiss and Brief in Support (the “First Motion to Dismiss”) (Dkt., #25), the Court should dismiss the Amended Complaint, this time with prejudice.²

II. ARGUMENT AND AUTHORITIES

A. Legal Standard for Rule 12(b)(6) Motions to Dismiss.

Rule 8 of the Federal Rules of Civil Procedure requires that a claimant plead “a short and plain statement of the claim showing that the pleader is entitled to relief.” FED. R. CIV. P. 8(a)(2). A complaint must plead “enough facts to state a claim to relief that is plausible on its face” and must contain “specific facts, not mere conclusory allegations.” *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 546, 570 (2007); *Tuchman v. DSC Comms. Corp.*, 14 F.3d 1060, 1067 (5th Cir. 1994). Legal conclusions are not entitled to a presumption of truth. *Twombly*, 550 U.S. at 570.

When ruling on a Rule 12(b)(6) motion, the Court accepts all well-pleaded facts as true and views them in the light most favorable to the claimant. *See Thompson v. City of Waco, Texas*, 764 F.3d 500, 502 (5th Cir. 2014). Dismissal is appropriate when a claimant fails to state a legally cognizable claim. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001, *cert. denied*, 536 U.S. 960 (2002)). The Court may also dismiss a claim “on the basis of a dispositive issue of law.” *Turner v. AmericaHomeKey Inc.*, 514 F. Appx. 513, 516 (5th Cir. 2013) (quoting *Neitzke v. Williams*, 490 U.S. 319, 326 (1989)). A claim must be dismissed if, as a matter of law, no relief could be granted under any set of facts that could be provided consistent with the allegations, or when a successful affirmative defense appears clearly on the face of the pleadings. *See Turner*, 514 Fed. Appx. at 516; *Clark v. Amoco Prod. Inc.*, 794 F.2d 967, 970 (5th Cir. 1986) (citation omitted). A statute of limitations supports dismissal under Rule 12(b)(6) where it is

² Defendants incorporate by reference the First Motion to Dismiss, as if fully set forth herein.

evident from the plaintiff's pleadings that the action is barred and the pleadings fail to raise some basis for tolling. *Jones v. Alcoa, Inc.*, 339 F.3d 359, 366 (5th Cir. 2003).

Courts ruling on a Rule 12(b)(6) motion reviewing allegations of fraud must determine if they meet the heightened pleading requirements of Rule 9(b), which applies to each element of fraud. *See* FED. R. CIV. P. 9(b) (“In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake.”); *Stanissis v. Dyncorp Int’l LLC*, 2016 WL 4159397, at *3 (N.D. Tex. Aug. 5, 2016) (Fitzwater, J.) (citation omitted); *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th Cir. 2003)). “At a minimum, Rule 9(b) requires allegations of the particulars of time, place, and contents of the false representations, as well as the identity of the person making the representation and what he obtained thereby.” *Stanissis*, 2016 WL 4159397, at *3 (citations and quotation marks omitted). This Court has explained that the requirements of Rule 9 are “analogous to ‘the first paragraph of a newspaper story, namely the who, what, when, where, and how.’” *Waller v. DB3 Holdings, Inc.*, 2008 WL 373155, at *6 (N.D. Tex. Feb. 12, 2008) (Fitzwater, J.) (quoting *Melder v. Morris*, 27 F.3d 1097, 1100 n. 5 (5th Cir. 1994)). “This Rule should be applied ‘with force, without apology.’” *Id.* (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 178 (5th Cir. 1997)). Failure to comply with this requirement leads to dismissal for failure to state a claim upon which relief can be granted. *See Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1017 (5th Cir. 1996).

B. Plaintiff Fails to State a Claim for Fraudulent Transfer Against Taylor or Alden Adams.

Plaintiff's attempted TUFTA claim against Defendants is unchanged from when it was dismissed by this Court, and therefore, unquestionably must be dismissed with prejudice. Rule 9(b) applies to fraudulent transfer claims under TUFTA. *Steadfast Ins. Co. v. Limestone Group SW Bluffs, LC*, 3:08-CV-0569-N, 2008 WL 11349994, at *2 (N.D. Tex. Oct. 31, 2008) (holding

that Rule 9(b) applies to TUFTA claims and granting motion to dismiss where Plaintiff failed to state fraudulent transfer claim under TUFTA with particularity). Under TUFTA, fraudulent transfers are divided into two types: actual and constructive. *Sourcing Management, Inc. v. Simclar, Inc.*, 118 F. Supp. 3d 899, 917 (N.D. Tex. 2015). Plaintiff has failed to plead specific facts against Taylor or Alden Adams to support either type. The relevant provisions under TUFTA provide as follows:

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

(1) with actual intent to hinder, delay, or defraud any creditor of the debtor; or

(2) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(A) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(B) intended to incur, or believed or reasonably should have believed that the debtor would incur, debts beyond the debtor's ability to pay as they became due.

TEX. BUS. & COM. CODE ANN. § 24.005

Plaintiff has not specified a single specific transfer made to Taylor or Alden Adams, let alone has Plaintiff pled facts showing that each alleged transfer was made with “actual intent to hinder, delay, or defraud.” Similarly, Plaintiff has not pled any facts showing that Taylor and Alden Adams did not provide “a reasonably equivalent value in exchange for the transfer.” Indeed, Plaintiff has failed to allege a single specific action against Taylor or Alden Adams.

Plaintiff fails to specify *any* allegations directly against Taylor or Alden Adams, instead repeatedly asserting general and vague allegations against “the salespeople (including Defendants)...” [Doc. 1 at ¶¶ 31, 32, 33, 36, 38, 39.] Plaintiffs “shotgun approach” of generally

alleging violations against all of the Defendants is insufficient. See *In re Alamosa Holdings, Inc. Sec. Litig.*, 382 F. Supp. 2d 832, 857–58 (N.D. Tex. 2005) (“[I]t is the parties’ burden to present succinct pleadings which clearly lay out the elements as required by this Circuit.”).

C. Plaintiff’s Claim for “Money Had and Received” Should Be Dismissed.

Count II of Plaintiff’s Amended Complaint continues to allege that “Defendants have been unjustly enriched.” The title of the claim, however, has been changed to “Money Had and Received,” but Plaintiff has failed to articulate a claim against Defendants for Money Had and Received. Among other things, “one who receives money which has been illegally obtained by a third party in due course of business, in good faith, and for valuable consideration, can keep it without liability to him from whom it was stolen.” *Matter of Okedokun*, 968 F.3d 378 (5th Cir. 2020) (citing *Sinclair Hous. Fed. Credit Union v. Hendricks*, 268 S.W.2d 290, 295 (Tex. Civ. App.—Galveston 1954, writ ref’d n.r.e.)). There is no allegation that Defendants received the monies at issue in any way other than as employees, in due course of business, in good faith, and for valuable consideration.

In addition, from the face of the pleading, the claims were asserted outside of the limitations period. Exhibit A to the Amended Complaint, at page 6 shows, that the last wages paid to Defendants were paid in July 2015. This lawsuit was filed over 4 years later – outside the limitations period whether the statute of limitations for a money had and received claim is 2 years, *Tanglewood Terrace, Ltd. v. City of Texarkana*, 996 S.W.2d 330, 342 (Tex. App.—Texarkana 1999, no pet.); or 4 years, *Friberg-Cooper Water Supply Corp. v. Elledge*, 197 S.W.3d 826, 828-33 (Tex. App.—Fort Worth 2006, pet. filed). The claims should be dismissed with prejudice for this reason as well.

III. PRAYER

Defendants request that the Court grant this motion and dismiss Plaintiff's claims against them pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted,

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**ATTORNEYS FOR DEFENDANTS DEREK
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CERTIFICATE OF SERVICE

I hereby certify that on April 30, 2021, I electronically filed the foregoing paper(s) with the Clerk of the Court using the ECF system which will send notification to all parties of record.

/s/ Benjamin L. Riemer
Benjamin L. Riemer

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