

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

| | | |
|--|---|-------------------------|
| SUSSEX FINANCIAL ENTERPRISES, INC., |) | Case No. 08-4791 SC |
| |) | |
| Plaintiff, |) | ORDER DENYING MOTION TO |
| |) | <u>DISMISS</u> |
| |) | |
| v. |) | |
| |) | |
| BAYERISCHE HYPO-UND VEREINSBANK |) | |
| AG, a/k/a HYPOVEREINSBANK; HVB |) | |
| RISK MANAGEMENT PRODUCTS, INC.; |) | |
| HVB U.S. FINANCE, INC., f/k/a |) | |
| HVB STRUCTURED FINANCE, INC.; |) | |
| and DOES 1-100, inclusive, |) | |
| |) | |
| Defendants. |) | |
| |) | |

I. INTRODUCTION

In its Second Amended Complaint ("SAC"), Plaintiff Sussex Financial Enterprises, Inc. ("Sussex"), alleges that Defendants Bayerische Hypo-und Vereinsbank AG, et al. (collectively, "HVB"), committed fraud in connection with the promotion and execution of a tax shelter scheme, and that HVB violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Docket No. 93. HVB filed a previous motion to dismiss Sussex's RICO claim, which this Court granted based upon Sussex's failure to plead the underlying fraud with the requisite level of particularity in its First Amended Complaint ("FAC"). See Docket No. 66 ("Sept. 24, 2009 Order") at

United States District Court
For the Northern District of California

1 15-16. By its SAC, Sussex has attempted to remedy this and other
2 deficiencies.

3 This matter comes before the Court on HVB's second Motion to
4 Dismiss ("Motion"), which challenges not just Sussex's RICO claim,
5 but also Sussex's two state-law fraud claims. Docket No. 105.
6 Sussex has filed an Opposition, Docket No. 112, and HVB has filed a
7 Reply, Docket No. 113. Having considered the briefing submitted by
8 both parties, the Court concludes that this matter is appropriate
9 for resolution without oral argument. For the reasons stated
10 below, the Court DENIES HVB's Motion.

11
12 **II. DISCUSSION**

13 The parties are familiar with the background of this dispute,
14 which this Court recounted in its previous Order. Sept. 24, 2009
15 Order at 2-5. That Order also sets out the legal standards
16 applicable to motions to dismiss pleadings that are based upon
17 fraud. Id. at 5-7. The Court therefore picks up where it left off
18 in its prior Order, and proceeds to the new arguments that HVB has
19 leveled against the SAC.

20 **A. Whether the SAC Pleads Fraud with Particularity**

21 In its previous Order, this Court concluded that:

22 The FAC does not specify precisely how HVB
23 "agreed to participate" in the CARDS program, or
24 how it communicated that it would not "renew" the
25 loans. Indeed, the FAC does not identify any
26 specific meeting or document, and does not
27 identify a single phone conversation or wired
28 communication. As much of the FAC hinges on
HVB's fraudulent portrayal of its "intent" to
renew the loans under the CARDS program for
thirty years, the Court finds it particularly
problematic that the FAC never once suggests "the
who, what, when, where, and how" of the
communication of this "intent" to Sussex. . . .

1 Rule 9(b) requires Sussex to establish, with
2 particularity, the factual basis for concluding
3 that fraud was plausibly committed upon it . . .

4 Id. at 12-13 (citations omitted).

5 The SAC continues to allege, like the FAC before it, that HVB
6 acted as the lender in a program known as Custom Adjustable Rate
7 Debt transactions ("CARDS"), and that "an intended and essential
8 element of each CARDS transaction was the opportunity for the
9 Clients to obtain a tax benefit. . . . All parties fully
10 considered and understood the importance of the tax benefit in the
11 design and proposed execution of the CARDS program." SAC ¶¶ 6, 9.
12 The willingness of clients to participate in CARDS was dependent
13 upon these tax benefits. Id. ¶ 13. However, these tax benefits
14 were contingent upon the CARDS participants' intent that the loans
15 at the heart of the CARDS program would last for thirty years;
16 without this intention, the sought-after tax benefits would not
17 meet the requirements of the Internal Revenue Code. Id. ¶¶ 11-14.
18 In spite of its decision to act as lender in the CARDS program, HVB
19 "had a hidden intention not to renew the loans after the original
20 interest rate period (approximately one year) and failed to
21 disclose this to" Sussex. Id. ¶ 16.

22 Sussex's SAC now includes a description of a series of
23 presentations that took place between November 6 and November 8,
24 2000.¹ According to the SAC, the president of Sussex, Roy Hahn
25 ("Hahn"):

26 made presentations to the Financial Engineering

27 _____
28 ¹ The SAC actually states that this meeting took place "[b]etween
November 6, 2009 through November 8 of 2000" -- the Court assumes
that the 2009 date is a typographical error.

1 subsidiary (hereafter "FNE") of HVB. . . . At
2 such presentations, Hahn made clear that in order
3 for a CARDS' transaction to be able to take
4 advantage of the tax benefits, an investor had to
5 have a legitimate business purpose in doing so.
6 He also pointed out that the 'all in cost' of the
7 loan had to be considered in determining whether
8 or not a borrower had a legitimate business
9 purpose and that the return on capital by the
10 borrower had to exceed the 'all in cost' of the
11 loan.

12 SAC ¶ 10. The SAC also names specific members of FNE who were at
13 these meetings. Id.

14 According to the SAC, after one of the presentations, FNE co-
15 head Dominick DeGiorgio sent an email to Hahn, stating that "our
16 group feels as though we can commit the necessary resources to a
17 group of CARDS transactions that need to be executed before year
18 end." See Welch Decl. Ex. A ("DeGiorgio Email") at 1.² DeGiorgio
19 also recounted that Hahn had stated in his presentation that the
20 term of the loan would be thirty years, "possibly resulting in a
21 prepayment of the entire facility after 12 months or at any 12

22 ² Trevor J. Welch, counsel for HVB, submitted a declaration in
23 support of the Motion, Docket No. 106, which attaches the DeGiorgio
24 Email. The DeGiorgio Email can be considered in deciding this
25 Motion without converting it into a motion for summary judgment,
26 because "documents whose contents are alleged in a complaint and
27 whose authenticity no party questions, but which are not physically
28 attached to the pleading, may be considered in ruling on a Rule
12(b)(6) motion to dismiss." Branch v. Tunnell, 14 F.3d 449, 454
(9th Cir. 1994) overruled on other grounds by Galbraith v. County
of Santa Clara, 307 F.3d 1119 (9th Cir. 2002). Sussex provides no
support for its claim that this doctrine is restricted to public
documents that are normally subject to judicial notice; indeed,
courts often apply this doctrine to private correspondences and
contracts between parties. See, e.g., Hutchinson v. Holder, No.
09-718, 2009 U.S. Dist. LEXIS 105579, *35 n.13 (D.D.C. Nov. 12,
2009) (considering email between plaintiff and employee of
defendant); Doctors Med. Ctr. of Modesto v. Global Excel Mgmt., No.
08-1231, 2009 U.S. Dist. LEXIS 71634, *11 (E.D. Cal. Aug. 14, 2009)
(considering letter between defendant and independent external
review entity); Furman v. Walton, No. 06-3532, 2007 U.S. Dist.
LEXIS 39618, *12-13 (N.D. Cal. May 16, 2007) (considering demand
letter between parties).

1 month anniversary thereafter" Id. at 2.³ However, Sussex
2 claims that HVB never revealed its "hidden intention not to renew
3 the loans," and therefore it was not clear that the tax benefits of
4 the CARDS program would be unavailable or illegitimate. SAC ¶ 16.

5 HVB contends that these new allegations do not amount to a
6 "promise to renew the loans under the CARDS program annually for 30
7 years," and recounts that the email expressly recounted the
8 possibility that the loans may be prepaid after one year. Mot. at
9 8-9. This contention fundamentally misunderstands the premise of
10 Sussex's fraud and RICO claims. Sussex is not asserting that HVB
11 breached a contract by issuing the loans for thirty years and then
12 unexpectedly unwinding the loans early; it is claiming that HVB
13 participated in the CARDS program with an intention to unwind the
14 loans in less than thirty years, even though it understood that its
15 intention to issue thirty-year loans was necessary to allow
16 Sussex's clients to enjoy the tax benefits that were the primary
17 and essential purpose of the transactions. Although the DeGiorgio
18 Email clearly shows that HVB expressly contemplated the possibility
19 that the loans could be repaid in less than thirty years, given the
20 context of the email -- including the Hahn presentations mentioned

21 ³ HVB has also submitted a sample credit agreement to illustrate
22 the point that the parties contemplated that the loans may be
23 unwound in less than thirty years. See Second Decl. of Trevor J.
24 Welch, counsel for HVB, Docket No. 114, Ex. A. Sussex has objected
25 to the submission of this document. Docket No. 122. HVB has
26 submitted a motion to strike the objection and a motion to shorten
27 time. Docket Nos. 125, 127. The Court finds that the exhibit was
28 submitted in direct response to a characterization of the credit
agreements made by Sussex. See Opp'n at 12. It therefore
OVERRULES Sussex's objection, and HVB's Motion to Strike is DENIED
as moot. However, the Court notes that the sample credit agreement
does not alter the outcome of this Order. There is no question as
to whether HVB had the right to unwind the loans in less than
thirty years, see DeGiorgio Email at 2, and the conditions under
which it could do so are not material to this Motion.

1 in the email and outlined in the SAC -- the email can be read as an
2 assurance that HVB was willing to participate in CARDS in a manner
3 that would allow the other participants to enjoy the mutually-
4 understood benefits of the program (i.e., the tax benefits), and
5 that HVB was not harboring an intention to unwind the loan after
6 one year, even though it explicitly retained the right to do so.
7 This reading is both plausible and, because the Court must read the
8 SAC in the light most favorable to Sussex at this time, compulsory.
9 See Cahill v. Liberty Mutual Ins. Co., 80 F.3d 336, 337-38 (9th
10 Cir. 1996) ("All allegations of material fact are taken as true and
11 construed in the light most favorable to the nonmoving party.").
12 The Court therefore finds that Sussex has corrected the deficiency
13 of the FAC by pleading specific meetings and correspondences
14 between itself and HVB and its subsidiary. The SAC now identifies
15 specific uses of wired communications, and provides "the who, what,
16 when, where, and how" of the fraud. C.f. Vess v. Ciba-Geigy Corp.
17 USA, 317 F.3d 1097, 1106 (9th Cir. 2003).

18 The DeGiorgio Email does not contradict HVB's position that
19 "all of the parties to the [CARDS] transaction, including [Sussex],
20 knew that the transaction was intended to be unwound after one
21 year." Mot. at 10, quoting Curtis Inv. Co., LLC v. Bayerische
22 Hypo-Und Vereinsbank, No. 08-14401, 2009 U.S. App. LEXIS 17469, at
23 *6 (11th Cir. Aug 5, 2009). Nor does it conclusively prove this
24 position. The Court is mindful of HVB's allegations that Sussex
25 was a willing participant in all of the fraudulent aspects of the
26 CARDS program, but this email does not strongly suggest this claim,
27 nor does any other judicially noticeable document that is currently
28 before this Court. HVB's arguments on this point are better suited

1 for summary judgment, or that failing, for trial before an
2 appropriate fact finder.

3 HVB also argues that Sussex is impermissibly "lumping"
4 multiple defendants together, without identifying the role that
5 each defendant played in the alleged fraud, because the SAC names
6 three related corporate entities and refers to them collectively as
7 HVB. Mot. at 12. It is true that "Rule 9(b) does not allow a
8 complaint to merely lump multiple defendants together but
9 "require[s] plaintiffs to differentiate their allegations when
10 suing more than one defendant . . . and inform each defendant
11 separately of the allegations surrounding his alleged participation
12 in the fraud." Swartz v. KPMG LLP, 476 F.3d 756, 764-65 (9th Cir.
13 2007). However, the Defendants who are "lumped together" by the
14 SAC include HVB and two of its American subsidiaries, SAC ¶ 4, and
15 each are represented by the same counsel. In this context,
16 "lumping" the defendants together is arguably less likely to
17 frustrate notice of the claims as to any particular defendant.
18 More importantly, the SAC specifically identifies the HVB employees
19 who were alleged to have participated in the wrongdoing, as well as
20 the HVB division and subsidiary for which they worked. See SAC
21 ¶ 10. The Court therefore finds that the SAC is sufficiently
22 detailed to put each Defendant on notice of the claims against
23 them, and to allow each Defendant to prepare its defense.

24 **B. Whether Sussex Has Plead All of the Elements of a RICO**
25 **Claim**

26 The elements of a civil RICO claim include: "(1) conduct (2)
27 of an enterprise (3) through a pattern (4) of racketeering activity
28 (known as 'predicate acts') (5) causing injury to the plaintiff's

1 'business or property.'" Grimmett v. Brown, 75 F.3d 506, 510 (9th
2 Cir. 1996) (citing 18 U.S.C. §§ 1964(c), 1962(c)). HVB claims that
3 Sussex has failed to allege a valid "enterprise," "pattern," and
4 "racketeering activity." Mot. at 13-21.

5 1. RICO Enterprise

6 18 U.S.C. § 1962(c) makes it unlawful for "any person employed
7 by or associated with any enterprise engaged in, or the activities
8 of which affect, interstate or foreign commerce, to conduct or
9 participate, directly or indirectly, in the conduct of such
10 enterprise's affairs through a pattern of racketeering activity or
11 collection of unlawful debt." An "enterprise" includes "any
12 individual, partnership, corporation, association, or other legal
13 entity, and any union or group of individuals associated in fact
14 although not a legal entity." 18 U.S.C. § 1961(4). It may include
15 "a group of persons associated together for a common purpose of
16 engaging in a course of conduct." United States v. Turkette, 452
17 U.S. 576, 583 (1981). However, "[t]o establish liability under
18 § 1962(c) one must allege and prove the existence of two distinct
19 entities: (1) a 'person'; and (2) an 'enterprise' that is not
20 simply the same 'person' referred to by a different name." Cedric
21 Kushner Promotions, Ltd. v. King, 533 U.S. 158, 161 (2001).

22 The SAC alleges that the "enterprise" in question includes
23 Bayerische Hypo-und Vereinsbank A.G., and two of its wholly-owned
24 American subsidiaries, which are also named as Defendants in this
25 suit, and 100 "Doe" defendants whom the SAC does not describe in
26 any detail. SAC ¶¶ 4, 5, 44. HVB argues that an "enterprise"
27 cannot consist of a company and its own subsidiaries, as these are
28 not "distinct" entities, and HVB cannot be held liable under RICO

1 for having associated with itself. Mot. at 14-15. Although the
2 Ninth Circuit has not decided whether a parent and its subsidiaries
3 are sufficiently distinct to establish both a RICO "person" and
4 "enterprise," "other circuits have decided that these entities
5 generally are not sufficiently distinct." In re Countrywide Fin.
6 Corp. Mortg. Mktg. & Sales Practices Litig., 601 F. Supp. 2d 1201,
7 1213-14 (S.D. Cal. 2009) (citing Bucklew v. Hawkins, Ash, Baptie &
8 Co., LLP, 329 F.3d 923, 934 (7th Cir. 2003); Bessette v. Avco
9 Financial Services, Inc., 230 F.3d 439, 449 (1st Cir. 2000); Fogie
10 v. THORN Americas, Inc., 190 F.3d 889, 898 (8th Cir. 1999); Lorenz
11 v. CSX Corp., 1 F.3d 1406, 1412 (3d Cir. 1993)). However, courts
12 have considered companies to be parts of "enterprises" where
13 allegations show that there is "something more" to suggest that the
14 use of subsidiaries facilitated the unlawful activity, id. at 1214-
15 15 (citing Bucklew, 329 F.3d at 934), or where employees operate
16 with outside individuals, Living Designs, 431 F.3d at 361-62.

17 The Court finds that Sussex has sufficiently pled a RICO
18 "enterprise" for the purpose of surviving a motion to dismiss. The
19 Complaint specifically identifies particular individuals and
20 subsidiaries within HVB -- DeGiorgio and FNE -- that drove the
21 alleged fraud. SAC ¶¶ 10, 20-22. This is consistent with the
22 DeGiorgio Email, which shows that DeGiorgio was operating within a
23 distinctive and independent division within HVB, which had to
24 maintain "a good working relationship" with other divisions that
25 "remained skeptical" of certain portions of the transactions.
26 DeGiorgio Email at 1. In particular, FNE had to operate with HVB's
27 credit department to fund the loan. Id.; c.f. Countrywide, 601 F.
28 Supp. 2d 1214-15 (finding "enterprise" where defendant used own

1 subsidiary to fulfill role of appraiser, thereby avoiding
2 traditional checks). This is also consistent with the DPA, which
3 suggests that DeGiorgio actually infiltrated and deceived HVB and
4 its legitimate business operatives. DPA Ex. 1 ("Statement of
5 Admitted Facts") ¶ 3.⁴ Various courts have held that a corporation
6 may serve as a RICO "enterprise" through which "persons" violate
7 RICO. See Comwest, Inc. v. American Operator Services, Inc., 765
8 F. Supp. 1467, 1475 (C.D. Cal. 1475) (collecting cases).

9 The SAC also indicates that DeGiorgio and FNE had to operate
10 with Sussex as well as HVB's own legal counsel, and Sussex points
11 out that it is "not prohibit[ed] . . . from including [itself] in a
12 legitimate, albeit infiltrated, enterprise and [RICO] has not been
13 interpreted to limit RICO enterprises to those persons engaged in
14 the illegal conduct." United Energy Owners Committee, Inc. v. U.S.
15 Energy Management Systems, Inc., 837 F.2d 356, 360-61 (9th Cir.
16 1988) (citing Sedima v. Imrex Co., 473 U.S. 479, 483-84, 497-98,
17 499-500 (1985)). The DPA confirms that HVB "engage[ed] in activity
18 with others, including accounting firms, investment advisory firms,
19 various individuals affiliated with those entities, lawyers, and
20 clients . . . , all directed toward the implementation of the tax
21 shelters designed to defraud the United States." Statement of
22 Admitted Facts ¶ 2. The Court finds that the SAC sufficiently

23 ⁴ The Statement of Admitted Facts states that:

24 Internally at HVB, DeGiorgio accurately described
25 many aspects of the shelter transactions that
26 should have led HVB to refuse to participate in
27 the transactions. However, DeGiorgio also made
28 false and misleading representations concerning
the legitimacy of various transactions to HVB
personnel. HVB's wrongful conduct is largely
derived from the wrongful actions of DeGiorgio .

Statement of Admitted Facts ¶ 3.

1 delineates between the "person" at issue and the "enterprise" that
2 was utilized to further the alleged racketeering activity, for the
3 purposes of defeating a motion to dismiss.

4 2. Racketeering Activity

5 HVB next contends that Sussex has failed to establish
6 cognizable "racketeering activity," such as mail fraud or wire
7 fraud. Mot. at 15-18. Specifically, HVB argues that wire fraud
8 must include a "false representation," which "generally precludes
9 any alleged 'fraudulent scheme' premised on an omission." Id. at
10 16. The Ninth Circuit has explained that "a non-disclosure can
11 only serve as a basis for a fraudulent scheme when there exists an
12 independent duty that has been breached by the person so charged.
13 This independent duty may exist in the form of a fiduciary duty to
14 third parties, or may derive from an independent explicit statutory
15 duty created by legislative enactment." United States v. Dowling,
16 739 F.2d 1445, 1449 (9th Cir. 1984), rev'd on other grounds, 473
17 U.S. 207 (1985).

18 The Court finds HVB's reading of Sussex's allegations to be
19 too narrow. Sussex is not alleging that HVB simply omitted the
20 detail of its intention to unwind the loans after one year -- it is
21 alleging that, in order to collect loan origination fees, HVB
22 positively affirmed its willingness to participate in the CARDS
23 program, which all participating parties understood to be premised
24 upon an intention to issue loans that could last thirty years. See
25 SAC ¶¶ 11-14; DeGiorgio Email at 2. This is sufficient to support
26 an allegation of wire fraud; "deceitful statements of half-truths
27 or the concealment of material facts and the devising of a scheme
28 for obtaining money or property by such statements or concealments

1 is within the prohibition of the statute." United States v. Allen,
2 554 F.2d 398, 410 (10th Cir. 1977), cert. denied, 434 U.S. 836
3 (1977); see also United States v. Benny, 786 F.2d 1410, 1418 (9th
4 Cir. 1986) (citing Allen with approval); United States v. Edmonds,
5 No. 94-241, 1996 U.S. Dist. LEXIS 1973, *2-3 (D. Or. 1996)
6 (allegations setting out facts necessary to make affirmative
7 representations and promises not misleading are "allegations in
8 support of affirmative, material misrepresentations").

9 3. Pattern

10 To plead a RICO claim, Sussex must allege "a series of related
11 [predicate acts] extending over a substantial period of time."
12 H.J. Inc. v. Northwestern Bell Tel. Co., 492 U.S. 229, 242 (1989).
13 HVB argues that Sussex has failed to sufficiently allege a
14 "pattern" of racketeering activity, since it does not allege
15 "related acts" spanning a "substantial period of time." Mot. at
16 18-21. The Court disagrees. Sussex alleges that HVB engaged in at
17 least twenty-nine similarly-structured transactions in or around
18 late 2000, SAC ¶ 17, and that in 2002, HVB was marketing a product
19 known as "RAFT," "which was the same program as CARDS but merely
20 renamed and marketed to its own customers." Id. ¶ 26. Sussex
21 further alleges that HVB "did not exit the CARDS program until
22 sometime in August, 2003, when it closed the last two CARDS deals
23 then on its books." Id. This is substantially more specific than
24 the conclusory allegation in the previous FAC, which simply alleged
25 that the fraudulent programs "continued over the course of years."
26 FAC ¶ 41. The Court finds the allegations of the SAC sufficient to
27 defeat a motion to dismiss.

28 ///

1 **C. Sussex's Fraud Claims**

2 Although HVB did not challenge Sussex's two state-law fraud
3 claims in its earlier motion to dismiss, and although Sussex did
4 not significantly amend these claims in its SAC (except to include
5 additional details to meet the particularity requirements of Rule
6 9(b)), HVB now challenges both of Sussex's fraud claims.

7 HVB first claims that Sussex has failed to plausibly allege
8 that it reasonably relied upon HVB's alleged fraudulent
9 misrepresentations and/or omissions. Mot. at 22-23. The Court
10 disagrees, and concludes that the SAC sufficiently makes out a
11 prima facie case for fraud. It would be inappropriate to conclude,
12 at this stage of the litigation, that Sussex's reliance was
13 unreasonable as a matter of law. Whether Sussex's reliance was
14 reasonable is a question of fact. The mere fact that HVB
15 explicitly contemplated the possibility that the loans would be
16 unwound after one year, and the fact that it retained this right,
17 do not render it unreasonable per se for the other CARDS
18 participants to expect that HVB intended for the loans to last
19 thirty years when it entered into the program.

20 Finally, HVB makes a series of challenges to Sussex's first
21 cause of action. Mot. at 11 (quoting SAC ¶¶ 18-19). By this cause
22 of action, Sussex alleges:

23 On information and belief, Defendants failed to
24 set up and fund the loans in individual accounts
25 in the year in which the CARDS loans closed. On
26 information and belief Defendants did not set up
27 separate accounts for each loan until the Client
28 proposed, and Defendants accepted, substitute
collateral and the Client actually asked for use
of the monies supposedly set aside for that
particular Client. Such requests did not occur
until the year following the date in which the
Cards investment closed. Failing to set up the

1 loans in individual accounts as required, in the
2 year in which the transactions closed, negated
any possible tax benefits of the CARDS program.

3 SAC ¶ 18.

4 HVB argues that Sussex "does not even attempt to explain how
5 the alleged failure to fund a particular CARDS account until the
6 client posted 'collateral' and 'actually asked for use of the
7 monies' could possibly be fraudulent." Id. HVB also challenges
8 this claim on the basis that allegations made "on information and
9 belief" generally do not satisfy the pleading requirement of Rule
10 9(b) of the Federal Rules of Civil Procedure. Mot. at 11. This is
11 generally true. See Neubronner v. Milken, 6 F.3d 666, 672 (9th
12 Cir. 1993). However, Sussex's first cause of action amounts to a
13 claim based on promissory fraud. "A promise to do something
14 necessarily implies the intention to perform; hence, where a
15 promise is made without such intention, there is an implied
16 misrepresentation of fact that may be actionable fraud." Lazar v.
17 Superior Court, 12 Cal. 4th 631, 638 (1996). The crux of Sussex's
18 allegation is that HVB made representations that it would set up
19 the individual accounts contemplated by the CARDS program without
20 possessing any intention to do so. SAC ¶¶ 31-32. Sussex need not
21 plead with specificity that HVB had no intention of fulfilling this
22 promise at the time it was made. See Fed. R. Civ. P. 9(b)
23 ("[C]onditions of a person's mind may be alleged generally."). The
24 Court finds that the SAC sufficiently describes what HVB promised,
25 how that promise was false when made, and how that promise resulted
26 in a frustration of the parties' objectives. The SAC's use of the
27 phrase "upon information and belief," to qualify the allegation

28

1 that HVB did not ultimately provide these loans, does not deprive
2 the allegations of their requisite particularity.

3

4 **III. CONCLUSION**

5 HVB has failed to persuade this Court that it would be
6 appropriate to dismiss any of the causes of action set out by the
7 Second Amended Complaint. Many of HVB's arguments -- particularly
8 those relating to Sussex's own role in the alleged fraud -- are
9 best suited for later stages of the litigation. At this stage,
10 HVB's Motion to Dismiss must be DENIED.

11

12 IT IS SO ORDERED

13

14 Dated: January 6, 2010

15


UNITED STATES DISTRICT JUDGE

16

17

18

19

20

21

22

23

24

25

26

27

28