Stollenwerk v. Tri-West Healthcare Alliance
D.Ariz.,2005.
Only the Westlaw citation is currently available.
United States District Court,D. Arizona.
Michael STOLLENWERK and Andrea DeGatica, husband and wife; Mark William Brandt; et al., Plaintiffs,
v.
TRI-WEST HEALTHCARE ALLIANCE, Defendant.
No. Civ. 03-0185PHXSRB.

Sept. 6, 2005.

Barry Lawrence Bellovin, Matthew David Karnas, Siegel Bellovin & Karnas PC, Tucson, AZ, Henry T. Dart, Henry T. Dart Law Office, Covington, LA, Joel Grant Woods, Law Offices of Grant Woods, Kenneth Sean Countryman, Kenneth S. Countryman PC, Phoenix, AZ, for Plaintiffs.
Andrew Foster Halaby, Barry D. Halpern, Shane De Gosdis, Snell & Wilmer LLP, Phoenix, AZ, for Defendant.

OPINION AND ORDER

BOLTON, J.
***1** This matter arises out of the burglary of Defendant TriWest Healthcare Alliance's ("Triwest") corporate office on December 14, 2002. During this burglary, computer hard drives containing the personal information of Plaintiffs Michael Stollenwerk, Andrea DeGatica, and Mark Brandt were stolen, leading Plaintiffs to file a class action lawsuit alleging negligence under Arizona law as well as other violations that have since been dismissed by this Court. Pursuant to Fed.R.Civ.P. 56, Defendant now seeks summary judgment on the remaining negligence claim (Doc. 77).

I. BACKGROUND

Defendant TriWest, a contractor and agent of the federal government, manages the local region of the U.S. Department of Defense's health insurance program and, as a result, possessed the personal information, including names, addresses, birth dates, and social security numbers, of the beneficiaries of that program. Plaintiffs, current and former members of the U.S. military and their dependents, are several such beneficiaries whose data was stored in computerized and hard copy form at Defendant's facility in Phoenix, Arizona.

In May 2001, Defendant experienced a security breach wherein unauthorized personnel entered the Phoenix facility. Defendant reported the incident to the Phoenix Police Department, but Plaintiffs allege that no other action was taken to ensure the security of the facility despite its apparent vulnerabilities. On December 14, 2002, unidentified individuals again breached security and proceeded to burglarize the Phoenix facility, removing computer hard drives containing Plaintiffs' personal information and other items.

Beginning on January 28, 2003, Plaintiff Brandt's personal data was used on six occasions to open or to attempt to open unauthorized credit accounts in Plaintiff Brandt's name. Unknown individuals successfully opened at least two credit accounts and generated more than $7,000 in unauthorized charges to these accounts. Plaintiffs Stollenwerk and DeGatica allege a different form of injury; following the theft of their data, both have obtained both credit monitoring services and identity theft insurance.

On January 28, 2003, Plaintiffs Stollenwerk and DeGatica filed their original complaint in this action, alleging violations of the Privacy Act, the Ninth Amendment, and Arizona tort and contract law.[FN1]Plaintiff Brandt later joined the lawsuit and Plaintiffs filed and served their First Amended Complaint in May 2003. The First Amended Complaint asserted claims for negligence, "gross negligence," "negligence per se," "res ipsa loquitur,"

breach of the implied bailment contract, and violations of the Privacy Act, the Ninth Amendment, and the Arizona Consumer Fraud Act. Defendant moved to dismiss the First Amended Complaint pursuant to Rule 12(b)(6), and at oral argument of the motion on October 20, 2003, the Court granted the motion to dismiss with leave to amend the Complaint as to only the negligence, Arizona Consumer Fraud Act, and Privacy Act claims.

> FN1. The original complaint was never served on Defendant.

*2 Plaintiffs filed their Second Amended Complaint on October 30, 2003. The Second Amended Complaint alleged two counts of Privacy Act violations, one count of negligence, one count of consumer fraud under the Arizona Consumer Fraud Act, and one count of breach of a contract intended to benefit Plaintiffs. On September 30, 2004, this Court granted Defendant's second motion to dismiss as to all counts but the negligence claim. Defendant now moves for summary judgment on the remaining negligence claim pursuant to Rule 56 of the Federal Rules of Civil Procedure. The Court heard argument on Defendant's motion on June 6, 2005.

II. LEGAL STANDARDS AND ANALYSIS

The standard for summary judgment is set forth in Rule 56(c) of the Federal Rules of Civil Procedure. Under this rule, summary judgment is properly granted when: (1) no genuine issues of material fact remain; and (2) after viewing the evidence most favorably to the non-moving party, the movant is clearly entitled to prevail as a matter of law. Fed.R.Civ.P. 56; *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-23, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986); *Eisenberg v. Ins. Co. of N. Am.,* 815 F.2d 1285, 1288-89 (9th Cir.1987).

In considering a motion for summary judgment, the Court must regard as true the non-moving party's evidence if it is supported by affidavits or other evidentiary material. *Celotex,* 477 U.S. at 324, 106 S.Ct. at 2548;*Eisenberg,* 815 F.2d at 1289. However, the non-moving party may not merely rest on its pleadings, he must produce some significant probative evidence tending to contradict the moving party's allegations, thereby creating a material question of fact. *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 256-57, 106 S.Ct. 2505, 2513-14, 91 L.Ed.2d 202 (1986) (holding that the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment); *First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 289, 88 S.Ct. 1575, 1592, 20 L.Ed.2d 569 (1968).

Defendant argues that summary judgment is appropriate because Plaintiffs Stollenwerk and DeGatica have not come forward with evidence legally sufficient to show that they incurred injury and because Plaintiff Brandt has not provided significant probative evidence of a causal connection between the theft of his personal information from Defendant and the fraudulent use of his personal information. Plaintiffs dispute these contentions.

A. Plaintiffs Stollenwerk and DeGatica

Plaintiffs Stollenwerk and DeGatica maintain that the exposure of their sensitive personal information at the hands of Defendant necessitated the purchase of credit-monitoring services and that the cost of these services constitutes injury within the meaning of the law. In its Order of September 30, 2004, this Court found, for the purposes of deciding a motion to dismiss, that "an exposure of personal information likely to result in the unauthorized use of one's identity is sufficiently similar [to exposure to toxic chemicals or asbestos likely to result in disease] so as to justify the maintenance of a cause of action for recovery of the cost of credit monitoring services."(Sept. 30, 2004 Order at 8.) Plaintiffs contend that the Court is prevented from revisiting this position under the law of the case doctrine, and that even if the Court were to readdress its prior finding, caselaw concerning latent injury would require the Court to reach the identical conclusion.

*3 Generally, the law of the case doctrine precludes a court "from reconsidering an issue that has already been decided by the same court, or a higher court in the identical case." *United States v. Alexander,* 106 F.3d 874, 876 (9th Cir.1997). Where a district court has never relinquished jurisdiction over a case, however, the law of the case doctrine is inapplicable and the Court is free to revisit its earlier decisions. *United States v. Smith,* 389 F.3d 944, 948-49 (9th Cir.2004). Because the Court never entered judgment in this matter nor otherwise relinquished jurisdiction over the case, the law of the case doctrine is "wholly inapposite," *id.,* (quoting *City of Los Angeles v. Santa Monica Baykeeper,* 254 F.3d 882, 888 (9th Cir.2001)), and the Court is free to revisit its determinations made within the context of a motion to dismiss.

With the intent of permitting the parties to explore fully the issue of credit monitoring as adequate injury in a negligence action, in deciding Defendant's Motion to Dismiss the Court found itself unable to say that a cause of action could never be maintained on such a basis. Having more fully considered the issue upon further briefing by the parties and after Plaintiffs had the opportunity to obtain discovery, the Court finds that summary judgment in Defendant's favor nevertheless is appropriate as to the negligence claims of Plaintiffs Stollenwerk and DeGatica. Defendant argues that credit monitoring costs should not be viewed as injury sufficient to establish the tort of negligence for several reasons: (1) unlike toxic tort or products liability cases, cases involving the exposure of sensitive personal information do not involve a latent injury at the time of exposure-the only injury occurs at the time the information is misused; (2) the interest in preserving public health, which merits awards for medical monitoring, does not exist with respect to claims for credit monitoring; and (3) any injury resulting from identity theft can be compensated with monetary damages after the fact, eliminating the need for preventive monitoring. Defendant further argues that credit monitoring should not suffice as injury in this case, even if it might be adequate in other instances.

The Court is not convinced that the negligent exposure of confidential personal information is entirely dissimilar from negligent exposure to toxic substances or unsafe products. In both circumstances the individual may manifest more obvious injury, such as identity fraud or disease, after some period of time, and in neither instance is the later manifestation of patent injury guaranteed, although the certainty with which such a development may be anticipated may be greater for toxic torts. It is unnecessary for the Court to determine whether the timing and manifestation of the injuries are sufficiently analogous where credit monitoring and medical monitoring are sought, however, as another reason for granting summary judgment in Defendant's favor is apparent.

*4 The Court must acknowledge the important distinction between toxic tort and products liability cases, which necessarily and directly involve human health and safety, and credit monitoring cases, which do not. Arizona recognizes the importance of preserving public health and " 'fostering access to medical testing for individuals whose exposure to toxic chemicals creates an enhanced risk of disease. The value of early diagnosis and treatment for cancer patients is well documented." ' *Burns v. Jaquays Mining Corp.,* 156 Ariz. 375, 752 P.2d 28, 33 (Ariz.Ct.App.1988), *quoting Ayers v. Township of Jackson,* 106 N.J. 557, 525 A.2d 287, 311 (N.J.1987). It is, in large part, this public health interest that justifies departure from the general rule that enhanced future risk of injury cannot form the sole basis for a negligence action. *See Amfac Distrib. Corp. v. Miller,* 138 Ariz. 152, 673 P.2d 792, 793-94 (Ariz.1983) (requiring actual injury to sustain cause of action in negligence); *Commercial Union Ins. Co. v. Lewis & Roca,* 183 Ariz. 250, 902 P.2d 1354, 1358 (Ariz.Ct.App.1995) (noting that a threat of future harm is insufficient). Notwithstanding the intimation in *Doe v. Chao,* 540 U.S. 614, 626 n. 10, 124 S.Ct. 1204, 1211 n. 10, 157 L.Ed.2d 1122 (2004), that "fees associated with running a

credit report" might qualify as actual damages in the context of an action under the Privacy Act, the Court has been unable to identify a single instance where damages for the cost of monitoring were awarded absent increased risk of injury to human health or well-being. Although a victim of identity theft and/or fraud, like the victims in other negligence actions where present actual injury is required, may experience nonmonetary harm, the primary injury does not present a serious health risk. Thus, despite findings that identity theft results in more than purely pecuniary damages, including psychological or emotional distress, inconvenience, and harm to his credit rating or reputation, *see United States v. Williams,* 355 F.3d 893, 898 (6th Cir.2003); *United States v. Karro,* 257 F.3d 112, 121 (2d Cir.2001), as a matter of law identity theft and credit monitoring must still be differentiated from toxic torts and medical monitoring.

Defendants also maintain that even if credit monitoring costs were sufficient injury to state a cause of action for negligence in some circumstances, the evidence here is inadequate to maintain such an action. In medical monitoring cases, a plaintiff must meet several criteria before recovery is permitted. Proof must be offered to satisfy at least the following elements: (1) significant exposure to a toxic substance; (2) a significantly increased likelihood of developing a serious disease as a proximate result of exposure; (3) the reasonable necessity of periodic diagnostic testing; and (4) the existence of monitoring and testing procedures that facilitate the early detection and treatment of disease. *See Burns,* 752 P.2d at 33,*quoting Ayers,* 525 A.2d at 312;*Miranda v. Shell Oil Co.,* 17 Cal.App.4th 1651, 1657-58, 26 Cal.Rptr.2d 655 (Cal.Ct.App.1993), *quoting Ayers,* 525 A.2d at 312;*see also DeStories v. City of Phoenix,* 154 Ariz. 604, 744 P.2d 705, 711 (Ariz.Ct.App.1987) (implicitly requiring proof that the "frequency, cost or intensity of plaintiffs' need for periodic medical examinations [exceeded] what would normally have been prudent for them"); *In re Marine Asbestos Cases,* 265 F.3d 861, 866 (9th Cir.2001), *citing In re Paoli R.R. Yard PCB Litigation,* 916 F.2d 829, 852 (3d Cir.1990). Applying these factors to identity theft cases, a plaintiff would be required to establish, at a minimum: (1) significant exposure of sensitive personal information; (2) a significantly increased risk of identity fraud as a result of that exposure; and (3) the necessity and effectiveness of credit monitoring in detecting, treating, and/or preventing identity fraud.

***5** Defendant challenges Plaintiffs' ability to establish these criteria, and the Court agrees that Plaintiffs are unable to provide evidence sufficient to prevent summary judgment in Defendant's favor. Plaintiffs have not brought forward evidence that the personal information on the stolen computers was ever exposed to the thieves involved. Unlike a case involving pure data theft, there is nothing in the record here to suggest that the data, rather than the hardware on which the data was stored, formed the thieves' target. Absent evidence that the data was targeted or actually accessed, there is no basis for a reasonable jury to determine that sensitive personal information was significantly exposed.

Furthermore, the affidavit of Plaintiffs' expert conclusorily posits that Plaintiffs' risk of identity fraud is significantly increased without quantifying this risk.[FN2]Defining "significant" for the purpose of awarding credit monitoring is a matter of law for the Court, however, and mere allegations that an increase is significant do not constitute evidence.[FN3] Similarly, although Plaintiff's expert opines that credit monitoring will "substantially" reduce the risk of identity fraud, he fails to quantify the reduction of risk in objective terms. Because the Court finds that there is no evidence in the record before it that Plaintiffs' personal information itself endured significant exposure, that Plaintiffs' risk of identity fraud is significantly increased, or that credit monitoring will reduce the risk of identity fraud to the necessary degree, Defendant's motion for summary judgment must be granted as to this case even if credit monitoring were available in other circumstances.

FN2. Plaintiffs' expert opines that

> Plaintiffs are at an increased risk of experiencing identity fraud for the next seven years, but fails to indicate the mathematical degree to which the risk is increased despite stating that his conclusions were arrived at as a matter of scientific probability.
>
> FN3. Defendant also argues that summary judgment is appropriate because Plaintiffs were aware of the risk of identity fraud, yet failed to utilize free measures for reducing this risk and did not obtain credit monitoring insurance until nearly a year after learning of the burglary. These facts are relevant only to demonstrating that any increased risk of fraud may not be solely attributable to Defendant's behavior and must be taken into account by experts when determining the portion of the increased risk attributable to Defendant.

B. Plaintiff Brandt

Defendant also seeks summary judgment as to the negligence claims of Plaintiff Brandt. Although Plaintiff Brandt's personal information was used to open or attempt to open unauthorized credit accounts in his name at various retailers, Defendant disputes Plaintiff Brandt's contention that these incidents of identity fraud can be causally connected to the burglary of Defendant's facility.

In order to maintain a cause of action for negligence, a plaintiff must prove causation; that is, that the defendant's act or omission, "in a natural and continuous sequence, unbroken by any efficient intervening cause, produce[d] an injury, and without which the injury would not have occurred."*Roberston v. Sixpence Inns of Am.,* 163 Ariz. 539, 789 P.2d 1040, 1047 (Ariz.1990)."[W]hen damage may have resulted from one of several causes, and ... it is as probable that it may have been a cause for which defendant was not responsible as one for which it was, a plaintiff may not recover."*Salt River Valley Water Users' Ass'n v. Blake,* 53 Ariz. 498, 90 P.2d 1004, 1007 (Ariz.1939); *see also Butler v. Wong,* 117 Ariz. 395, 573 P.2d 86, 87 (Ariz.Ct.App.1977) ("It is not sufficient in an action for damages that plaintiff show a certain injury might have been caused by the negligence of defendant. It is necessary to establish that the injuries have been so caused."). A plaintiff must show that causation by the defendant's act or omission is reasonably likely, not merely possible. *See Purcell v. Zimbelman,* 18 Ariz.App. 75, 500 P.2d 335, 342 (Ariz.Ct.App.1972).

***6** In the summary judgment context, a plaintiff must provide evidence from which a reasonable jury could conclude that Plaintiff Brandt's injuries were the result of the burglary rather than other causes. *See Taft v. Ball, Ball & Brosamer, Inc.,* 169 Ariz. 173, 818 P.2d 158, 162 (Ariz.Ct.App.1991). This evidence may be either direct or circumstantial. *Mason v. Ariz. Public Serv. Co.,* 127 Ariz. 546, 622 P.2d 493, 500 (Ariz.Ct.App.1980); *see also Robertson,* 789 P.2d at 1047 ("Plaintiff need only present probable facts from which the causal relationship reasonably may be inferred."); *cf. Clausen v. M/V New Carissa,* 339 F.3d 1049, 1059 (9th Cir.2003). Where evidence is circumstantial, it must permit a jury to draw reasonable inferences, not merely speculate or conjecture. *Sunward Corp. v. Dun & Bradstreet, Inc.,* 811 F.2d 511, 521 (10th Cir.1987); *Dreijer v. Girod Motor Co.,* 294 F.2d 549, 554 (5th Cir.1961).

Plaintiff Brandt's evidence primarily consists of information about six occasions after the burglary on which an unknown person(s) successfully or unsuccessfully attempted to open credit accounts in his name. The first of these incidents occurred on January 28, 2003, when an unidentified individual attempted to open a Home Depot account in his name. Additional incidents occurred on March 20, 2003 (an account opened via Citifinancial Retail Services at Rex Electronics in Uniontown, Pennsylvania), on March 31, 2003 (an account opened with T-Mobile Cellular in Youngstown, Ohio, an account opened with Sears in Young-

stown, Ohio, and an attempted account opening with Kaufmann's in West Virginia) and in Spring 2003 (an attempted account opening via GE Credit Services at Walmart). The account with Rex Electronics allegedly was opened using a false address in Dover, Delaware, a city where Plaintiff Brandt was stationed while serving in the Air Force. Plaintiff Brandt also offers his own statements that he has never transmitted his personal information over the internet and shreds all mail he receives in relation to credit applications, approvals, and pre-approvals, but admits that he provided his sensitive personal information to individuals or organizations other than Defendant.

The Court notes Defendant's objections to Plaintiff Brandt's evidence as inadmissible hearsay drawn from conversations between Plaintiff Brandt and the involved businesses. Although the mere occurrence of unauthorized transactions is within Plaintiff Brandt's personal knowledge, any additional information about the circumstances surrounding these transactions is outside his personal knowledge and therefore hearsay inadmissible to prove the truth of the matter asserted. Fed.R.Evid. 602. Thus, Plaintiff Brandt's evidence that the Rex Electronics credit account was opened using a Dover, Delaware address, or any other evidence about the information used in these fraudulent acts, is inadmissible because it is only what he was told by others. Inadmissible evidence cannot create a genuine issue of material fact. *Urbina v. Gilfilen,* 411 F.2d 546, 547-58 (9th Cir.1969).

*7 Absent evidence that the Rex Electronics account was opened using an address similar to one of Plaintiff Brandt's addresses listed among the information contained on the equipment stolen from Defendant, the only evidence before the Court is that Plaintiff's information was used to fraudulently open or attempt to open accounts beginning approximately six weeks after the burglary of Defendant's facility. Although "a temporal relationship between exposure to a substance and the onset of a disease ... can provide compelling evidence of *Clausen,* 339 F.3d at 1059,*quoting Westberry v. Gislaved Gummi AB,* 178 F.3d 257, 265 (4th Cir.1999), it is not dispositive of the causation issue. To the contrary, to determine that one event caused another merely because the first preceded the second is a classic example of *post hoc ergo propter hoc* ("after this, therefore because of this"), a logical fallacy. *See Choe v. Immigration & Naturalization Serv.,* 11 F.3d 925, 938 (9th Cir.1993); *Sunward Corp.,* 811 F.2d at 521 n. 8;*Dreijer,* 294 F.2d at 555. Standing alone, Plaintiff Brandt's evidence that the burglary preceded the incidents of identity fraud does not allow a reasonable jury to infer that the burglary caused the incidents of identity fraud. Such a conclusion would be the result of speculation and conjecture, not a reasonable inference. *See Sunward Corp.,* 811 F.2d at 521 n. 8 (citing cases that held that *post hoc ergo propter hoc* equates to speculation and conjecture, not reasonable inference).

Although the Court has determined that Plaintiff Brandt's evidence concerning the type of information used in opening the unauthorized accounts is inadmissible, in the interest of fully resolving the matter the Court will also discuss the impact of this evidence in the event that it could be offered in a form that would comply with the Federal Rules of Evidence. In short, it has no effect on Defendant's entitlement to summary judgment. Plaintiff Brandt's Dover, Delaware address and other information, including his social security number, was disclosed to others on multiple occasions. The mere use of such information in the course of acts of identity fraud, therefore, does not permit a finder of fact to draw the reasonable inference that the unidentified identity thieves obtained it from Defendant. Summary judgment is appropriate regardless of the admissibility of Plaintiff Brandt's evidence concerning information used by the identity fraud perpetrators.

IT IS ORDERED granting Defendant's Motion for Summary Judgment (Doc. 77).

IT IS FURTHER ORDERED directing the Clerk of the Court to enter judgment in favor of Defendant

and dismissing Plaintiffs' claims.

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Not Reported in F.Supp.2d, 2005 WL 2465906 (D.Ariz.)

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2007 WL 5298458 (E.D.La.)

Terrebonne v. Allstate Ins. Co.
E.D.La.,2007.
Only the Westlaw citation is currently available.
United States District Court,E.D. Louisiana.
Kathleen and Peter TERREBONNE, et al.
v.
ALLSTATE INSURANCE COMPANY, et al.
Civil Action No. 06-4697.

July 31, 2007.

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ORDER AND REASONS

SARAH S. VANCE, District Judge.
***1** Before the Court is defendant Allstate Insurance Company's motion to strike the class allegations pursuant to Rule 23(d)(4) of the Federal Rules of Civil Procedure. For the following reasons, the Court GRANTS defendant's motion.

I. BACKGROUND

Plaintiffs are nineteen Louisiana property owners who suffered damage to their property during Hurricane Katrina and who have sued their insurance providers under their homeowner's policies. The named plaintiffs each seek to represent all other similarly situated class members, namely Louisiana homeowners who suffered a total loss of their property as a result of Hurricane Katrina. The twelve defendant insurance companies are: Allstate Insurance Company, State Farm Fire and Casualty Company, Louisiana Citizens Property Insurance Company, Liberty Mutual Insurance Company, The Hartford Insurance Company, Metropolitan Property and Casualty Insurance Company, Balboa Insurance Company, Farmers Insurance Company, American Reliable Insurance Company, United Fire and Casualty Company, Hanover Insurance Company, and Travelers Casualty Insurance Company of America.[FN1] Plaintiffs seek recovery based on Louisiana's Valued Policy Law, La.Rev.Stat. § 22:695. Specifically, plaintiffs assert that the insurers placed a valuation on their respective properties for premium purposes and did not pay the full value of those properties after they became a total loss. They allege that they sustained a covered loss to their property, and the VPL obligates their insurers to pay the full value of their policies.

> FN1. Of the nineteen named plaintiffs, three aver that they are insured by Allstate, three by State Farm, three by Metropolitan, two by Hartford, and one each by the remaining defendants.

Since the filing of plaintiffs' amended complaint on September 29, 2006, eight of the named plaintiffs have dismissed their claims against Liberty Mutual, Hartford, Metropolitan, American Reliable, and Balboa, leaving seven defendants remaining in the lawsuit. Allstate now moves to strike the class allegations pursuant to Rule 23(d)(4).[FN2]

FN2. Hanover, Lafayette, and Standard Fire (improperly identified as "Travelers Casualty Insurance Company of America" in plaintiff's petition) also join Allstate's motion to strike. (R. Docs.89, 90, 96).

II. DISCUSSION

Class actions are governed by Rule 23 of the Federal Rules of Civil Procedure. To be certified, the class must first satisfy the following threshold requirements of Rule 23(a): (1) numerosity (a "class [so large] that joinder of all members is impracticable"); (2) commonality ("questions of law or fact common to the class"); (3) typicality ("named parties' claims or defenses are typical ... of the class"); and (4) adequacy of representation (representatives "will fairly and adequately protect the interest of the class").*See id.* at 623 (citing *Amchem Prods., Inc. v.. Windsor,* 521 U.S. 591 (1997)). In addition, the class must satisfy one of the three subsections of Rule 23(b).*See Amchem Prods.,* 521 U.S. at 614. The party seeking class certification bears the burden of showing that all of the criteria are met. *See id.;Unger v. Amedisys Inc.,* 401 F.3d 316, 320 (5th Cir.2005).Rule 23(d)(4) authorizes a district court "to make appropriate orders ... requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly."FED.R.CIV.P. 23(d)(4); *see also Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 184 n. 6 (1974) ("Under Rule 23(d)(4), the District Court may in some instances require that pleadings be amended to eliminate class allegations."); *Aguilar v. Allstate Fire & Cas. Ins. Co.,* 2007 WL 734809, at *2 (E.D.La. Mar. 6, 2007) ("A court may strike class allegations under Rule 23(d)(4) where a complaint fails to plead the minimum facts necessary to establish the existence of a class satisfying Rule 23's mandate."); *Thompson v. Merck & Co., Inc.,* 2004 WL 62710, at *2 (E.D.Pa. Jan. 6, 2004) ("If the court determines that the prerequisites of Rule 23 are not satisfied, then the court may issue an order 'requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons.' "). Here, Allstate challenges plaintiffs' ability to maintain a class action under either Rule 23(b)(3) or Rule 23(b)(1)(A), the two subsections on which plaintiffs rely for certification in their amended complaint. The Court addresses each subsection in turn.

1. Rule 23(b)(3)

***2** Where, as here, the proposed class seeks money damages, Rule 23(b)(3) imposes two prerequisites, predominance and superiority: "[Q]uestions of law or fact common to the members of the class [must] predominate over any questions affecting only individual members, and ... a class action [must be] superior to the other available methods for the fair and efficient adjudication of the controversy."FED.R.CIV.P. 23(b)(3); *see also Amchem Prods.,* 521 U.S. at 615 (characterizing Rule 23(b)(3) as two additional requirements to those set forth in Rule 23(a)[FN3]); *Unger,* 401 F.3d at 320. To predominate, "common issues must constitute a significant part of the individual cases."*Mullen,* 186 F.3d at 626. "This requirement, although reminiscent of the commonality requirement of Rule 23(a), is 'far more demanding' because it 'tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation.' " *Unger,* 401 F.3d at 320 (quoting *Amchem Prods.,* 521 U.S. at 623-24).

FN3.Rule 23(a) provides:

> One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Plaintiffs contend that the predominance requirement is satisfied because they ask the Court to determine a threshold legal issue: whether they are entitled under the VPL to a rebuttable presumption to recover the full value of their policies unless their respective insurers can prove that an uncovered peril caused their total loss. This argument is wide of the mark. While the "rebuttable presumption" issue may be common to all of the plaintiffs' claims, it does not change the nature of plaintiffs' claims. Even if plaintiffs were entitled to the presumption, plaintiffs' claims still require highly individualized inquiries into the cause of each plaintiff's loss and the amount of the damages sustained at each of the plaintiff's properties. Regardless of any rebuttable presumptions, a VPL case still requires proof by someone of the proximate cause of each plaintiff's total loss.[FN4]Under similar circumstances, a Mississippi federal court denied class certification in a lawsuit brought by all insured Mississippi property owners against their insurers, stating:

> FN4. That, generally, the existence of a "rebuttable presumption" does not eliminate issues of individualized proof finds support in Louisiana case law. *See, e.g., Williams v. Aymond,* 945 So.2d 823, 830 (La.App. 3d Cir.2006) ("In Louisiana jurisprudence applying La.R.S. 32:81, there is a rebuttable presumption that a following motorist involved in a rear-end collision is negligent in causing the accident. To overcome this presumption, the following motorist must prove that he or she maintained a proper lookout."); *Everett v. Rubicon, Inc.,* 938 So.2d 1032, 1042 (La.App. 1st Cir .2006) ("Therefore, pursuant to LSA-R.S. 23:1061(A)(3), Rubicon was entitled to a rebuttable presumption that it was Everett's statutory employer. The burden then shifted to Everett to rebut this presumption by demonstrating that the work he was performing at the time he sustained his injuries was not an integral part of or essential to Rubicon's ability to generate its goods, products, or services."); *Jaramillo v. Lopez,* 925 So.2d 559, 564 (La.App. 4th Cir.2006) ("The *Housley* presumption is a rebuttable presumption, however. Even if the presumption exists, a defendant may defeat it by showing that an alleged injury could have been caused by some other particular incident rather than by the accident that the plaintiff claims was the cause of the injury.").

Each property owner in Mississippi who had real and personal property damaged in Hurricane Katrina is uniquely situated. No two property owners will have experienced the same losses. The nature and extent of the property damage the owners sustain from the common cause, Hurricane Katrina, will vary greatly in its particulars....
Comer v. Nationwide Mut. Ins. Co., 2006 WL 1066645, at *2 (S.D .Miss. Feb. 23, 2006). Other district courts have likewise rejected Katrina-related class certifications under Rule 23(b)(3) because of the highly individualized and varied nature of the respective plaintiffs' claims. *See Aguilar,* 2007 WL 734809;*Spiers v. Liberty Mut. Fire Ins. Co.,* No. 06-4493 (E.D.La. Nov. 21, 2006); *Guice v. State Farm Fire & Cas. Co.,* 2006 WL 2359474 (S.D.Miss. Aug. 14, 2006). The Court therefore concludes that certification of plaintiffs' proposed class is inappropriate under Rule 23(b)(3), as the different factual circumstances pertaining to each claim outweigh the common legal issues.[FN5]

> FN5. Because the Court finds that the predominance requirement has not been satisfied, it need not address Rule 23(b)(3)'s superiority requirement.

***3** Finally, to the extent that plaintiffs ask the Court to at least proceed with questions of liability on a class basis, this argument also fails. Before the Court can even reach the issue of damages, the VPL requires a determination that an individual plaintiff's property sustained a total loss that was

proximately caused by a covered peril. *See Caruso v. Allstate Ins. Co.,* 2007 WL 625830, at *10 (E.D.La. Feb. 26, 2007). This inquiry necessarily entails a highly specific factual determination of the cause and extent of that plaintiff's damages. For the reasons already discussed, this makes resolution of plaintiffs' claims through a class action inappropriate under Rule 23(b)(3).

2. Rule 23(b)(1)(A)

Rule 23(b)(1) provides that an action may be maintained as a class action when:

> (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class....

FED.R.CIV.P. 23(b)(1). In the context of a proposed Rule 23(b)(1)(A) class certification, the Fifth Circuit recently instructed a district court to "consider the extent to which the due process concerns inherent in *Allison [v. Citgo Petroleum Corp* ., 151 F.3d 402 (5th Cir.1998)] apply to a(b)(1)(A) class and whether a(b)(1)(A) class can be maintained if damages are the primary remedy sought."*Langbecker v. Electronic Data Sys. Corp.,* 476 F.3d 299, 318 (5th Cir.2007) (internal citations omitted). The court added that "resolution of these issues is still uncertain in the Fifth Circuit."*Id.*

In *Allison,* the Fifth Circuit determined that monetary relief may be obtained in a Rule 23(b)(2) class action as long as the predominant relief sought is injunctive or declaratory. 151 F.3d at 411. The court stated that "monetary relief 'predominates' under Rule 23(b)(2) when its presence in the litigation suggests that the procedural safeguards of notice and opt-out are necessary, that is, when the monetary relief being sought is less of a group remedy and instead depends more on the varying circumstances and merits of each class member's case."*Id.* at 414.The court explained:

> [T]he drafters of Rule 23 found it unnecessary to provide (b)(1) and (b)(2) class members with the absolute right to notice or to opt-out of the class-procedural safeguards made mandatory under (b)(3) for class members who might wish to pursue their claims for money damages in individual lawsuits and to not be bound by membership in a class action. Providing these rights exclusively to (b)(3) classes demonstrates concern for the effect of monetary claims on class cohesiveness. Monetary remedies are often related directly to the disparate merits of individual claims. As a result, a class seeking substantial monetary remedies will more likely consist of members with divergent interests.

***4** *Id.* at 412-13 (internal citations omitted).

Having considered *Allison,* the Court finds that certification of a class under Rule 23(b)(1)(A) is inappropriate here. Plaintiffs predominantly seek monetary relief, specifically the face value of their respective homeowner's policies under La.Rev.Stat. § 22:695. As discussed above, the facts almost certainly will vary from plaintiff to plaintiff, including the amount and type of damage sustained and the specific cause of the damage (wind, rain, and/or flood). In *Allison,* the court implied that class certification is inappropriate under Rule 23(b)(1)(A) for individualized damage claims akin to those presented in this case. *Id.* at 421 n. 16 ("Given the individual-specific nature of the plaintiffs' claims for compensatory and punitive damages, we perceive no risk of inconsistent adjudications or incompatible standards of conduct in having *those claims* adjudicated separately.") (emphasis in original). Moreover, plaintiffs have not alleged an entitlement to any type of class-wide recovery. Further, the only declaratory relief plaintiffs request is as to the burden of proof, and they do not seek injunctive relief. Plaintiffs thus have not demonstrated that defendants would face incompatible standards of conduct if the Court does not certify the proposed

class. Given the type and predominance of monetary damages requested, the Court concludes that it is improper to certify the class under Rule 23(b)(1)(A).

III. CONCLUSION

For the foregoing reasons, the Court GRANTS defendant's motion to strike the class allegations under Rule 23(d)(4).

E.D.La.,2007.
Terrebonne v. Allstate Ins. Co.
--- F.R.D. ----, 2007 WL 5298458 (E.D.La.)

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Thompson v. Home Depot, Inc.
S.D.Cal.,2007.
Only the Westlaw citation is currently available.
United States District Court,S.D. California.
John THOMPSON, an individual, on behalf of himself, and on behalf of all persons similarly situated, Plaintiff,
v.
HOME DEPOT, INC. a Delaware Corporation, and Does 1-100, inclusive, Defendants.
No. 07cv1058 IEG (WMc).

Sept. 18, 2007.

Jeffrey M. Temple, Schwartz Semerdjian Haile Ballard & Cauley, San Diego, CA, for for Plaintiff.
Shon Morgan, Stan Karas, Quinn Emanuel Urquhart Oliver and Hedges, Los Angeles, CA, for Defendants.

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS COUNTS TWO AND THREE OF THE COMPLAINT

IRMA E. GONZALEZ, Chief Judge.
***1** Presently before the Court is defendant's motion to dismiss the second and third causes of action in plaintiff's complaint. For the following reasons, the Court GRANTS the motion.

BACKGROUND

A. Factual Background

John Thompson ("Plaintiff") alleges that on March 30, 2007, Home Depot Inc. ("Defendant") "requested and required [that he] fill out a Home Depot, Inc. preprinted form and provide personal identification as a condition to performing a credit card transaction at Home Depot, Inc.'s retail store." (Pl.Compl.(06/08/2007) at ¶ 4.) The form in question is labeled "REFUND" and contains a space for the cardholder's name, telephone number, and signature.(*Id.*, Exh. 2.)

B. Procedural Background

On April 24, 2007, Plaintiff filed his complaint in San Diego Superior Court, alleging, on behalf of himself and others similarly situated in California, that Defendant had committed violations of (1) the Song-Beverly Credit Card Act, Cal. Civ.Code § 1747.08; (2) California's Unfair Competition Law ("UCL"), Cal. Bus. & Prof.Code § 17200, *et seq.;* and (3) the Consumers Legal Remedies Act ("CLRA"), Cal. Civ.Code § 1750, *et seq.*(*Id.* at ¶ 23-36.)Plaintiff seeks statutory penalties, an injunction prohibiting Defendant from using a credit card form with a preprinted space for the cardholder's telephone number, an order declaring that practice to be an unlawful business practice and ordering Defendant to restore personal information back to the Plaintiff and other class members, and costs of suit. (*Id.* at 9 .)

On June 6, 2007, Defendant removed the case to this Court. (Doc. No. 1.) Subsequently, Defendant filed a motion to dismiss the second and third causes of action in Plaintiff's complaint, namely the actions based on alleged violations of the UCL and the CLRA respectively. (Doc. No. 6.) Plaintiff filed an opposition (Doc. No. 7) and Defendant filed a reply. (Doc. No. 8.) The matter is now fully briefed, and the Court finds it appropriate for disposition without oral argument pursuant to Civil Local Rule 7.1(d)(1).

DISCUSSION

A. Legal Standard

A motion to dismiss pursuant to Fed. R. Civ. Pro. 12(b)(6) tests the legal sufficiency of the claims asserted in the complaint. Fed. R. Civ. Proc. 12(b)(6);

Navarro v. Block, 250 F.3d 729, 731 (9th Cir.2001). To survive a Rule 12(b)(6) motion, a complaint generally must satisfy only the minimal notice pleading requirements of Fed. R. Civ. Pro. 8(a)(2).[FN1]*Porter v. Jones,* 319 F.3d 483, 494 (9th Cir.2003). A court may dismiss a complaint for failure to state a claim when "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."*Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957); *Navarro,* 250 F.3d at 732 (citing *Conley*);*see also Haddock v. Board of Dental Examiners,* 777 F.2d 462, 464 (9th Cir.1985) (a court should not dismiss a complaint if it states a claim under any legal theory, even if plaintiff erroneously relies on a different theory). In other words, a Rule 12(b)(6) dismissal is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory."*Balistreri v. Pacifica Police Dept.,* 901 F.2d 696, 699 (9th Cir.1988).

> FN1.Rule 8(a)(2) requires only that the complaint include "a short and plain statement of the claim showing that the pleader is entitled to relief."Fed.R.Civ.P. 8(a)(2).

***2** In deciding a motion to dismiss for failure to state a claim, the court's review is limited to the contents of the complaint. *Campanelli v. Bockrath,* 100 F.3d 1476, 1479 (9th Cir.1996); *Allarcom Pay Television, Ltd. v. General Instrument Corp.,* 69 F.3d 381, 385 (9th Cir.1995). The court must accept all factual allegations pled in the complaint as true, and must construe them and draw all reasonable inferences from them in favor of the nonmoving party.[FN2]*Cahill v. Liberty Mutual Ins. Co.,* 80 F.3d 336, 337-38 (9th Cir.1996); *Mier v. Owens,* 57 F.3d 747, 750 (9th Cir.1995) (citing *Usher v. City of Los Angeles,* 828 F.2d 556, 561 (9th Cir.1987). In spite of the deference the court is bound to pay to the plaintiff's allegations, it is not proper for the court to assume that "the [plaintiff] can prove facts which [he or she] has not alleged."*Associated General Contractors of California, Inc. v. California State Council of Carpenters,* 459 U.S. 519, 526, 103 S.Ct. 897, 74 L.Ed.2d 723 (1983). Furthermore, a court is not required to credit conclusory legal allegations cast in the form of factual allegations, unwarranted deductions of fact, or unreasonable inferences. *Sprewell v. Golden State Warriors,* 266 F.3d 979, 988 (9th Cir.2001); *Western Mining Council v. Watt,* 643 F.2d 618, 624 (9th Cir.1981).

> FN2. Thus, the plaintiff need not necessarily plead a particular fact if that fact is a reasonable inference from facts properly alleged.*Wheeldin v. Wheeler,* 373 U.S. 647, 648, 83 S.Ct. 1441, 10 L.Ed.2d 605 (1963) (inferring fact from allegations of complaint).

A court may dismiss a complaint without granting leave to amend only if it appears with certainty that the plaintiff cannot state a claim and any amendment would be futile. *See*Fed.R.Civ.P. 15(a) (leave to amend "shall be freely given when justice so requires"); *DeSoto v. Yellow Freight Systems, Inc.,* 957 F.2d 655, 658 (9th Cir.1992); *Albrecht v. Lund,* 845 F.2d 193, 195 (9th Cir.1988); *Schreiber Distrib. Co. v. Serv-Well Furniture Co.,* 806 F.2d 1393, 1401 (9th Cir.1986) ("leave to amend should be granted unless the court determines that the allegation of other facts consistent with the challenged pleading could not possibly cure the deficiency").

B. Analysis

1. Plaintiff's Unfair Competition Law ("UCL") Claim

Plaintiff's second cause of action alleges Defendant is civilly liable under the UCL.[FN3]According to Plaintiff, Defendant "unfairly competes by engaging in [the illegal acquisition and collection of consumer information] and thereby received an unfair competitive advantage over competitors ...." (Compl.¶ 30.)

> FN3. While Plaintiff's complaint fails to explicitly label the UCL claim as the

> second cause of action, the complaint discusses this claim after what it labels as the first cause of action (a violation of the Song Beverly Credit Card Act) and before what it labels as the third cause of action (violations of the CLRA).

Under the UCL, the only persons authorized to bring claims are those who have "suffered injury in fact and *lost money or property* as a result of [ ] unfair competition."Cal. Bus. & Prof.Code § 17204 (emphasis added); *Consumer Advocacy Group, Inc. v. Kintetsu Enterprises of America,* 150 Cal.App.4th 953, 802 (2007). Defendant argues Plaintiff has failed to state a claim upon which relief can be granted under the UCL because he has not alleged that filling out the refund form caused him any damage. (Def. Memorandum In Support of Motion to Dismiss ("Memo. ISO Motion") at 1.) Plaintiff disagrees, arguing it is sufficient for the complaint to allege he was an actual victim of the Defendant's business practice and noting that the California Court of Appeals in *Florez v. Linens 'N Things,* 108 Cal.App.4th 447, 133 Cal.Rptr.2d 465 (2003), has expressly approved the legally sufficiency of a UCL claim under similar circumstances. (Pl. Opp. at 1.)

***3** The Court agrees with Defendant-Plaintiff has not stated a claim under the UCL. While Plaintiff's alleges he was required to fill out a form which prompted him to provide personal identification, he does not allege filling out the form caused him to lose any money or property-as required to make out a claim under the UCL. Similarly, while Plaintiff's complaint alleges Defendant uses the personal information acquired on these forms for marketing purposes (Compl.¶ 13), he does not allege that he actually received any marketing solicitations as a result of completing the form nor does he allege such solicitations would or could cause him monetary injury. The complaint merely makes the conclusory claim that "Home Depot's conduct caused and continues to cause substantial injury" (Compl.¶ 30), but does not specify the form or quality of the injury. The Court is not required to credit the Plaintiff's conclusory legal allegations. *See Warren v. Fox Family Worldwide, Inc.,* 328 F.3d 1136, 1139 (9th Cir.2003) ("[A court does] not ... necessarily assume the truth of legal conclusions merely because they are cast in the form of factual allegations.") (internal citations and quotation marks omitted). Plaintiff's related argument-which he urges without citation to supporting authority-that his personal information constitutes property under the UCL, is similarly unpersuasive and also rejected. *Cf. In re Jetblue Airways Corp. Privacy Litigation,* 379 F.Supp. 299, 327 (E.D.N.Y.2005) ("There is ... no support for the proposition that an individual passenger's personal information has or had any compensable value in the economy at large."); *Dwyer v. American Express Co.,* 273 Ill.App.3d 742, 210 Ill.Dec. 375, 652 N.E.2d 1351, 1356 (Ill.App.Ct.1995) (sale of cardholder names to various merchants did not state a claim for tortious appropriation because cardholder's name has little or no intrinsic value apart from its inclusion on a categorized list).

Finally, Plaintiff's reliance on the Court of Appeal's decision in *Florez* is misplaced. In *Florez,* the Court of Appeal concluded that a store's practice of prompting a customer for her telephone number during a purchase violated the Song Beverly Credit Card Act, which in turn supported a viable claim under the UCL. *Florez,* 108 Cal.App.4th at 454, 133 Cal.Rptr.2d 465. But as Defendant points out, *Florez* was decided more than a year before amendments to the UCL added a requirement that a plaintiff personally suffer an injury in order to plead a cause of action under the UCL. *See Californians for Disability Rights v. Mervyn's, LLC,* 39 Cal.App.4th 223, 227 (2006) (explaining that while California's UCL previously authorized any person acting for the general public to sue for relief, the current law-as amended on November 2, 2004 by proposition 64-gives a private person standing to sue only if he or she has suffered injury in fact and has lost money or property as a result of the violation). This key development makes *Florez* distin-

guishable from the current case and inapposite to the argument raised by Plaintiff.

2. Plaintiff's Consumer Legal Remedies Act ("CLRA") Claim

*4 Plaintiff's third cause of action alleges that Defendant violated the CLRA. According to Plaintiff, Defendant's conduct is proscribed by § 1770(14) of the CLRA, which prohibits "[r]epresenting that a transaction confers or involves rights, remedies, or obligations which it does not have or involve, or which are prohibited by law."Cal. Civ.Code § 1770(14). Specifically, Plaintiff contends Defendant's "acts and practices constitute representations that the credit card transactions in question confer rights, remedies, or obligations which they do not have, or which are prohibited by law."(Compl.¶ 34.)

The CLRA permits consumers "who suffer[ ] any damage as a result of the use or employment by any person of a method, act, or practice declared to be unlawful by [the CLRA]" to bring an action against that person and obtain actual damages or an order enjoining the methods, acts, or practices. *See*Cal. Civ.Code § 1780(a). As with the UCL claim, Defendant argues Plaintiff has failed to state a claim upon under the CLRA because he has not alleged that filling out the refund form caused him any damage as required by the statutory language. The Court agrees. Again, as with the UCL claim, Plaintiff's opposition fails to direct the Court to a single portion of the complaint which explains what specific injury occurred due to the alleged violation of the CLRA. The Court's own review of the complaint reveals only a bare allegation that Plaintiff and class members "have been irreparably harmed." (Compl.¶ 36) As discussed above, this bare legal conclusion is insufficient.

CONCLUSION

For the foregoing reasons, the Court **DISMISSES** the second and third causes of action in Plaintiff's complaint. The Court **GRANTS** Plaintiff leave to amend the complaint. Plaintiff may file an amended complaint addressing the deficiencies set forth above, no later than 14 days from the date this order is filed.

IT IS SO ORDERED.

S.D.Cal.,2007.
Thompson v. Home Depot, Inc.
Slip Copy, 2007 WL 2746603 (S.D.Cal.)

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Vinewood Capital, L.L.C. v. Al-Maal
N.D.Tex.,2007.
Only the Westlaw citation is currently available.
United States District Court,N.D. Texas,Fort Worth Division.
VINEWOOD CAPITAL, L.L.C.
v.
Dar AL-MAAL Al-Islami Trust, et al.
Civil Action No. 4:06-CV-316-Y.

Sept. 26, 2007.

Geoffrey S. Harper, Victor C. Johnson, Fish & Richardson P.C., Dallas, TX, for Vinewood Capital L.L.C.
Bart W. Huffman, Cox Smith Matthews Incorporated, San Antonio, TX, M. David Bryant, Jr., Marcus E. Johnson, Cox Smith Matthews Incorporated, Dallas, TX, for Dar Al-Maal Al-Islami Trust, et al.

ORDER DENYING DEFENDANTS' MOTION TO STAY OR DISMISS (with special instructions for the clerk of Court)

TERRY R. MEANS, United States District Judge.
***1** Plaintiff Vinewood Capital, LLC ("Vinewood"), has filed suit against defendants Dar al-Maal al-Islami Trust ("the DMI Trust"), Ziad Rawashdeh, and Khalid Abdulla-Janahi for breach of contract, promissory estoppel, fraud, and negligent misrepresentation. Vinewood asserts that Defendants entered into an agreement with it or made promises to invest in certain real-estate ventures and that it suffered damages when Defendants failed to invest.

Defendants have filed a motion (doc. # 42) to stay or dismiss this case. Defendants argue that Vinewood's claims all relate to or arise from two written agreements between the parties that contain binding arbitration clauses. Alternatively, Defendants argue that Vinewood's claims should be dismissed under Federal Rule of Civil Procedure 12(b)(6) and 9(b). Finally, should the Court rule against them, Defendants argue that Alpha Investment Fund I Limited should be joined as an indispensable party under Rule 19(a). After review, the Court concludes that Defendants' motion should be DENIED.

I. Factual Background

In April 2004, Wendel Pardue and Laird Fairchild filed an action in Texas state court ("the Texas litigation") against their former employer, Overland Realty Capital LLC ("Overland"), and several of its subsidiaries, affiliates, and directors, including defendant Ziad Rawashdeh (collectively, "the Overland defendants"). Pardue and Fairchild alleged that the Overland defendants terminated their employment without cause and falsely told others that they were fired for committing fraud. The Overland defendants filed counterclaims.

In June 2004, James Conrad, a former Overland employee, traveled to Geneva, Switzerland, and met with Rawashdeh and defendant Khalid Abdulla-Janahi to negotiate a settlement of the Texas litigation.[FN1] At that meeting Pardue and Fairchild proposed an agreement to resolve all of their disputes. (Defs.' Reply App. at 4.) Under the proposal, Pardue, Fairchild, and Conrad ("the Trio") would create a new real-estate investment company called "Vinewood ... for the purpose of sourcing real estate investments for" DMI Trust and its related entities ("the DMI Trust entities"). Vinewood "would be the exclusive company used by" these entities for real-estate ventures in the United States, and it "would take over the Asset Management Agreements for real estate that was sourced by Overland while [Conrad] was employed [there]."(*Id.*)The DMI Trust entities would provide a 2.5 million dollar five-year loan to Vinewood as startup capital, and make a cash payment of almost 1.5 million dollars to Vinewood. (*Id.*)

FN1. Janahi was not a defendant in that case but was present at the settlement con-

> ference as a representative of the Islamic Investment Company of the Gulf (Bahamas) ("IICGB"), one of the Overland defendants. Conrad worked for Overland until his termination in March 2004. Although Conrad was not a party to the Texas litigation, he claims that, because he had a relationship with the parties, the Overland defendants asked him to participate in the settlement negotiations. (Pl.'s App. at 41-42.) According to the Settlement Agreement discussed below, Conrad also had claims he intended to assert against the Overland defendants arising from his employment and termination at Overland.

Negotiations continued for several months and, on October 7, 2004, the parties signed a "Settlement Agreement and Release." [FN2](Pl.'s App. at 29.) ("The Settlement Agreement") The Settlement Agreement states that it is an agreement between the Trio on the one hand, and the Overland defendants on the other, to resolve all of their disputes stemming from the Trio's employment and termination by Overland. (Pl.'s App. at 29.) In the agreement, the Overland defendants agreed to pay the Trio 1.25 million dollars. (*Id.* at 30.)In exchange, the parties agreed to "fully, forever, irrevocably and unconditionally" release each other "from any and all claims ... of every kind and nature and description whatsoever ... from the beginning of time up to and including the date of this Agreement ...."(*Id.* at 31-32.)The Settlement Agreement also contained the following provisions:

> FN2. As mentioned in footnote 1 above, Conrad was not a party to the Texas litigation. The Settlement Agreement, however, recites,
>
> > Conrad has asserted that he has claims against one or more of the [Overland defendants that] may be brought in arbitration pursuant to an employment agreement between him and [Overland] ... and [Overland] likewise asserts that it has claims against ... Conrad arising from that employment agreement ....
> >
> > (*Id.*)

*2 6. *Prior Agreements.*This Agreement contains and constitutes the entire understanding and agreement between the Parties hereto with respect to all matters relating to Plaintiffs' [meaning the Trio] employment with or termination from any of the [Overland defendants] and the settlement of the complaint and other claims settled hereby. This Agreement also supercedes all previous oral and written negotiations, agreements, commitments, and writings in connection therewith, including the September 3, 2004, Memorandum of Understanding executed among the parties.

...

16. *Applicable Law; Resolution of Disputes.*This Agreement shall be governed by the laws of the State of New York, without regard to conflict of laws provisions. Each of the Parties agrees that any dispute or controversy arising out of or relating to any interpretation, construction, performance, or breach of this Agreement shall be settled by arbitration to be held in the Commonwealth of the Bahamas, in accordance with the applicable rules of the American Arbitration Association .... The decision of the arbitrator shall be final, conclusive, and binding on the parties ....

...

17. *Entire Agreement.*This Agreement contains and constitutes the entire understanding and agreement between the Parties hereto with respect to the subject matter thereof, and cancels all previous oral and written negotiations, agreements, commitments, and writings in connection therewith between and among all of the Parties to this Agreement ....

(*Id.* at 32-36.)Nowhere in the agreement does it mention the creation of Vinewood, that Vinewood

would be the exclusive company used by the DMI Trust entities (or any of the defendants in this suit) for real-estate ventures in the United States, or that the DMI Trust entities would pay any cash or loan any money to Vinewood.

During the negotiations that culminated in the October 2004 Settlement Agreement, the Trio created Vinewood. Seven days after the parties executed the Settlement Agreement, Vinewood entered into an agreement with August Investment Fund I Limited ("August Investment") called the "Special Purpose Mudaraba Agreement." [FN3]Under the mudaraba agreement, August Investment agreed to loan Vinewood up to 2.5 million dollars. In the agreement are the following provisions:

> FN3. A mudaraba agreement is an Islamic financing instrument extending credit for an annual fee rather than compounding interest. Evidently, under Islamic law, loaning money for riba (interest) is prohibited. *See* A.L.M. ABDUL GAFOOR, MUDARABA-BASED INVESTMENT AND FINANCE, ht tp://www.islamicbanking.nl/article2.html# _ ftnref1.

8.2 Entire Agreement

This Agreement embodies the entire agreement and understanding between the Mudarib [Vinewood Capital] and the Participant [August Investment] and supercedes all prior agreements and understandings between the Mudarib and the Participant relating to the subject matter thereof.

...

8.12 Relationship

This Agreement relates to the funding of Participation Tranches and shall in no way be construed as creating any other relationship. The relationship between the Mudarib and the Participant is and shall be that of a Participant ("Rab Al Maal") and Mudarib in respect of a property interest and shall not be construed as a partnership or joint venture.

***3** ...

8.14 Applicable Law and Dispute Resolution

... [T]his Agreement shall be governed by the laws of the State of New York, without regard to conflicts of law provisions. Each of the Mudarib and the Participant agrees that any dispute or controversy arising out of or relating to any interpretation, construction, performance, or breach of this Agreement shall be settled by arbitration to be held in the Commonwealth of the Bahamas, in accordance with the applicable rules of the American Arbitration Association .... The decision of the arbitrator shall be final, conclusive, and binding on the parties ....

(Pl.'s App. at 15-18.) Nowhere in the mudaraba agreement does it refer to the Settlement Agreement nor does it state that Vinewood would be the exclusive company used by the DMI Trust entities (or any of the defendants in this suit) for real-estate ventures in the United States. August Investment subsequently transferred its interest in the mudaraba agreement, with Vinewood's consent, to Alpha Investment Fund I Limited ("Alpha Investment").

On May 2, 2006, Vinewood filed this suit against Defendants alleging claims for breach of contract, promissory estoppel, fraud and misrepresentation. The main text of Vinewood's first amended complaint is devoid of any factual allegations. It simply alleges the elements for each cause of action, and makes conclusory allegations such as: "Plaintiff and Defendants entered into various agreements regarding business relationships," that "Defendants made representations to Plaintiff of promises of future performance ... upon which Plaintiff relied to its detriment," and "Defendants fraudulently induced Plaintiff into entering into agreements based upon false representations upon which Plaintiff relied to its detriment."(Pl.'s Am. Compl. at 2.)

The first amended complaint, however, does refer to and incorporate two attached affidavits from

Fairchild and Conrad. According to Fairchild, in October 2004, Vinewood entered into agreements with DMI Trust, through Rawashdeh and Janahi, to provide and manage certain real-estate ventures. (App. to Pl.'s Am. Comp. at 3.) He states that in December 2004 he went to London to meet with Janahi and other representatives of the DMI Trust to discuss real estate investment opportunities. Per their request, Fairchild claims, he and Conrad put together a business plan for approximately 125 million dollars worth of real-estate ventures and brought with them the chairman of Fairfield Residential LLC to discuss the investment opportunities. (*Id.*) Although he was asked not to participate in the meeting, Fairchild claims that afterwards, representatives of the DMI Trust told him that they were "going to invest in each of the Fairfield deals that were presented to them ...."(*Id.*)

In reliance on that representation, Fairchild states he "prepared a due diligence analysis, [conducted a] market study, engaged in discussions with architects, review[ed] plans and specs, proposed pricing of units, and prepared a detailed investment summary."(*Id.* at 4.) Fairchild states that a representative of the DMI Trust told him that the DMI Trust "would transfer asset management responsibilities for the Fairfield related investments to Vinewood."(*Id.*) Relying on that representation, Fairchild claims Vinewood "began expending time recruiting employees and incorporated such into our business plan, including preparing budgets and other activities."(*Id.*)

***4** Conrad's affidavit claims that in 2004, Vinewood entered into agreements with the DMI Trust, through Rawashdeh and Janahi, to provide and manage real-estate ventures. (*Id.* at 8.) Conrad states that in December 2004, he had a meeting in London with Janahi and other representatives of the DMI Trust, and claims that Janahi told him that if he "brought them the Fairfield business, [the DMI Trust] would fund the Fairfield business that [Vinewood] brought them."(*Id.*) He claims that prior to the meeting, "Rawashdeh called [him] from Pakistan and represented to [him] that [the DMI Trust] was moving forward to enter into the Fairfield business opportunities with Vinewood."(*Id.*) Relying on those representations, Conrad states that he and Fairchild put together a package of approximately 125 million dollars of real-estate ventures with Fairfield. (*Id.*) At the meeting, Conrad states they "reviewed the business opportunities, ... Fairfield executives presented detailed information concerning the investments, [and] ... there was discussion about the specifics of the funding of the deals with [the DMI Trust]."(*Id.*)

Over the next twelve months, Conrad claims he met with representatives of the DMI Trust at various locations, including once with Janahi in New York in April 2006. (*Id.*) At one of these meetings, Conrad states Janahi introduced him to individuals from Bahrain and Kuwait who were doing business with the DMI Trust. (*Id.*) He alleges, "Janahi represented to me that we still intended to do business and that [the DMI Trust] still intended to fund the Fairfield deals as well as other deal [sic] that [Vinewood] brought them."(*Id.* at 8-9.)And during a breakfast meeting, Conrad claims "Janahi told [him] that they were getting the funds together and he wanted me to send him the Dulles and Addison deals."(*Id.* at 9.) He claims that in reliance upon those representations Vinewood "did a substantial amount of work putting together the business opportunities that were to be funded by [the DMI Trust]," only to have Defendants never followed through with their promises to invest.

II. Analysis

A. Arbitration

The Court begins its analysis by recognizing that there is a strong and liberal policy favoring arbitration and the enforcement of arbitration agreements that fall under the Federal Arbitration Act ("FAA"), 9 U.S.C. § 3.[FN4]*See Personal Security & Safety Systems Inc. v. Motorola Inc.*, 297 F.3d 388, 391 (5th Cir.2002). Under this general policy, "all

doubts concerning the arbitrability of claims should be resolved in favor of arbitration."*Washington Mutual Finance Group, LLC v. Bailey,* 364 F.3d 260, 263 (5th Cir.2004)."Of course this general policy is not without limits. Because arbitration is necessarily a matter of contract, courts may require a party to submit a dispute to arbitration only if the party has expressly agreed to do so."*Personal Security & Safety Systems Inc.,* 297 F.3d at 391. Thus, the first task of a court asked to compel arbitration is to determine whether the parties agreed to arbitrate the dispute.

> FN4. Neither party argues that the arbitration clauses at issue here do not fall under the FAA.

***5** To ascertain whether the parties have agreed to arbitrate a particular claim, the Court must first determine whether there is a valid agreement to arbitrate between them. *Id.* at 392.If the court concludes that the parties agreed to arbitrate, then the Court must determine whether the dispute in question falls within the scope of that arbitration agreement. *Id.*

1. Valid Agreement

Vinewood argues that there is no valid arbitration agreement between it and the defendants. The two agreements relied upon by Defendants-the Settlement and Mudaraba Agreements-are not agreements that are between Vinewood and Defendants, it argues. Vinewood contends that its claims involve an oral agreement that is separate and apart from those agreements. (Pl.'s Resp. at 8.) Thus, Vinewood argues, "it would be inappropriate to force [it] to arbitrate its dispute against" Defendants when it never agreed to arbitration. (*Id.*)

Defendants, on the other hand, argue that Vinewood "signed the mudaraba agreement, which contains a mandatory arbitration clause."(Defs.' Mem. at 6.) Additionally, Defendants argue that Vinewood's principals, the Trio, signed the Settlement Agreement, which also contains an arbitration provision. (*Id.*) Thus, Defendants argue, the parties have a valid and enforceable agreement to arbitrate Vinewood's claims. (*Id.*)

It is undisputed that Defendants are not parties to the mudaraba agreement as that agreement is a written contract between Vinewood and Alpha Investment. It is also undisputed that Vinewood is not a party to the Settlement Agreement.(*Id.* at 6, 8.) The Court agrees with Vinewood that none of these agreements evince an agreement to arbitrate between Vinewood and Defendants.

Although the Settlement Agreement is signed by Vinewood's principals, they did not sign the agreement as its representatives. Instead, the Trio signed the Settlement Agreement in their individual capacities agreeing to settle claims they owned-not claims Vinewood owned. And Vinewood does not benefit in any way from the Settlement Agreement.

Not one of the defendants is a party to the mudaraba agreement. That agreement is between Vinewood and Alpha Investment for a loan to be repaid under certain terms. Although Janahi signed the mudaraba agreement, he did so as a representative of August Investment, which subsequently transferred its interest in the agreement to Alpha Investment. Nothing in the mudaraba agreement creates any contractual relationship between Vinewood and Defendants.

Nevertheless, Defendants argue that Vinewood should be compelled to arbitration under the doctrine of equitable estoppel. Equitable estoppel can in fact, impose an exception upon the general rule that "a party cannot be required to submit to arbitration any dispute [that] he has not agreed so to submit."*Steelworkers v. Warrior & Gulf Nav. Co.,* 363 U.S. 574, 582, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). In *Grigson v. Creative Artists Agency, L.L.C.,* 210 F.3d 524, 527 (5th Cir.2000), the court of appeals adopted the view that equitable estoppel would allow a nonsignatory to compel arbitration in two circumstances:

*6 First, equitable estoppel applies when the signatory to a written agreement containing an arbitration clause must rely on the terms of the written agreement in asserting its claims against a nonsignatory. When each signatory's claims against a nonsignatory makes reference to or presumes the existence of the written agreement, the signatory's claims arise out of and relate directly to the written agreement, and arbitration is appropriate. Second, application of equitable estoppel is warranted when the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.

The first basis requires a signatory's claim to completely rely on the terms of an agreement that contains an arbitration clause. The second basis is satisfied where a signatory makes claims against a group of defendants that is comprised of both signatories and nonsignatories to an agreement containing an arbitration clause.

The purpose of the equitable estoppel doctrine is to prevent a plaintiff from claiming the benefits of a contract while at the same time avoiding its burdens. *See Washington Mutual Finance Group, LLC,* 364 F.3d at 268. "In short, ... a signatory ... cannot, on the one hand, seek to hold the nonsignatory liable pursuant to the duties imposed by the agreement, which contains an arbitration provision, but, on the other hand, deny arbitration's applicability because the defendant is a nonsignatory."*Grigson,* 210 F.3d at 528. "Restated, the doctrine of estoppel prevents a party from having it both ways."*Washington Mutual Finance Group, LLC,* 364 F.3d at 268.

Equitable estoppel cannot apply to the Settlement Agreement because Vinewood is not a signatory to that agreement. Under both bases for equitable estoppel, the party bringing the claim must be a signatory to an agreement that contains an arbitration provision. And, although Vinewood is a signatory to the mudaraba agreement, equitable estoppel does not apply because Vinewood neither relies on that agreement to support its claims nor has it brought claims against a group of defendants that is comprised of both signatories and nonsignatories to that agreement. None of the defendants have signed or are in any way bound by the mudaraba agreement.

Defendants, nonetheless, argue that Vinewood should be estopped because its claims "presume the existence of and rely upon both the settlement and mudaraba agreements."(Defs.' Mem. at 11.) Defendants accuse Vinewood of artfully pleading claims against defendants who are nonsignatories to the mudaraba agreement, but that since its claims presume the existence of that agreement and relies upon it, Vinewood should be compelled to arbitration.

*7 Throughout their brief, however, Vinewood concedes that it cannot rely and does not rely on either of those agreements to sustain its claims against Defendants. None of Vinewood's claims relate to or arise from those agreements and, according to the express terms of those agreements, anything discussed, agreed to, or negotiated prior to the execution of those agreements that is not expressly included in those agreements is not binding on the parties to those agreements. The Settlement Agreement concerned the settlement of wrongful-termination claims for a definite sum. The mudaraba agreement concerned a loan Alpha Investment made to Vinewood and provides for certain terms under which Vinewood is obligated to repay that loan. "Indeed," Vinewood concedes, Alpha "met its obligation under the [mudaraba] agreement and there is no basis upon which to assert a claim against [it]." (Pl.'s Resp. at 11.) Neither agreement addresses nor requires the defendants to commit to or invest in any real-estate ventures brought to them by Vinewood.[FN5]Thus, the Court concludes that the parties have not entered into any agreement to arbitrate the claims brought by Vinewood.

> FN5. In contrast, IICGB has initiated an arbitration against Fairchild for allegedly breaching the confidentiality and non-disparagement provisions in the Settlement Agreement. Both IICGB and Fairchild are parties to that agreement and, in that agreement, the parties promised to keep the terms of the settlement and any and all negotiations and discussions leading up to the agreement confidential and to refrain from making any disparaging statements about each other. The arbitration provision in the agreement covers any breach of the agreement.

2. Scope of the Agreement

Even assuming that the arbitration provisions in both agreements are binding on the parties in this case, Vinewood's claims do not arise out of, do not relate to, nor are connected with those agreements. According to the provisions, the parties agreed to arbitrate "any dispute or controversy arising out of or relating to any interpretation, construction, performance, or breach" of the agreements. (Pl.'s App. at 18, 35.) "Both the Supreme Court and this court have characterized similar arbitration clauses as broad arbitration clauses capable of expansive reach."*Pennzoil Exploration and Production Company v. Ramco Energy Limited,* 139 F.3d 1061, 1067 (5th Cir.1998).[FN6] Arbitration provisions that not only use the phrase "arising out of," but also include "in connection with" or "relating to" are construed as broad arbitration agreements that are not limited to disputes arising directly from the contract, but cover " 'all disputes between the parties having a significant relationship to the contract regardless of the label attached to the dispute.'"*Personal Security & Safety Systems, Inc.,* 297 F.3d at 393 (quoting *Pennzoil,* 139 F.3d at 1067). Thus, the Court must determine whether the claims in this case "touch" on matters covered by the settlement and mudaraba agreements and the central question is whether the Court "can say with positive assurance that the arbitration provision[s] ... [are] not susceptible of an interpretation that would cover those claims."*Personal Security & Safety Systems, Inc.,* 297 F.3d at 392;*Pennzoil,* 139 F.3d at 1068.

> FN6. The arbitration provision at issue in Pennzoil read:
>
> > Any dispute, controversy or claim arising out of or in relation to or in connection with this Agreement or the operations carried out under this Agreement, including without limitation any dispute as to the validity, interpretation, enforceability or breach of this Agreement, shall be exclusively and finally settled by arbitration ....
>
> 136 F.3d at 1064.

Defendants' main argument is that the parties discussed the creation of Vinewood, its loan, and their future business relationship when they were negotiating the settlement of the Texas litigation. Defendants contend that Vinewood "seeks redress concerning representations allegedly made by Defendants and/or its representatives in the negotiations of the settlement of the [Texas litigation], which was effected by those two related agreements or in related discussions immediately thereafter."(Defs.' Mem. at 9.) Thus, Defendants argue, Vinewood's "very existence-as well as the funds by which it was capitalized, the reasons for that funding, and its present claims against its funders-all rise out of and relate to the settlement of the [Texas litigation]."(*Id.*)

***8** Although the creation of Vinewood, its capitalization, and its business relationship with Defendants were discussed during the settlement negotiations, the ultimate settlement agreement did not provide for the creation of Vinewood and did not impose any duty on Defendants to provide it with any loans or to invest in any realestate ventures it brought to their attention.

Similarly, the mudaraba agreement provided for an entity that was not a party to the Texas litigation

and is not a party to this litigation to loan Vinewood up to 2.5 million dollars. Nowhere does the mudaraba agreement refer to the Texas litigation; nowhere does it state it was made for the purposes of settling any litigation; and, it too fails to contain any provision requiring Defendants to invest in any real-estate ventures procured by Vinewood.

Vinewood's claims stem from an alleged agreement, promises, and representations that occurred after the Settlement and mudaraba agreements were made. Vinewood accordingly concedes that its claims cannot rely on them.

But just as Vinewood is unable to rely on the agreements to support its claims, Defendants are equally unable to rely on them as a defense because they have no bearing on Vinewood's claims. Whether Defendants agreed, promised, or represented that they would invest in certain real-estate ventures brought to them by Vinewood does not relate to, arise from, nor is in any way connected to the Overland defendants' agreement to pay the Trio in settlement of the Texas litigation and Alpha Investment's agreement to loan Vinewood up to 2.5 million dollars. And simply because Defendants may have discussed the possibility of a future business relationship during settlement negotiations does not, *a fortiori,* mean any claims stemming from any alleged agreements, promises, or representations made after the Texas litigation settled relate to or are connected with that settlement-especially when the express wording of the settlement and mudaraba agreements do not touch on such matters. Thus, the Court concludes that Vinewood's claims do not have a significant relationship to or touch on matters covered by the settlement and mudaraba agreements.

B. Failure to State a Claim

A motion to dismiss under Rule 12(b)(6) for a failure to state a claim "is viewed with disfavor and is rarely granted."*Kaiser Aluminum & Chem. Sales v. Avondale Shipyards, Inc.,* 677 F.2d 1045, 1050 (5th Cir.1982) (internal quotations and citations omitted). The court must accept as true all well pleaded, non-conclusory allegations in the complaint, must liberally construe the complaint in favor of the plaintiff, and resolve all doubts in the plaintiff's favor. *See Kaiser Aluminum,* 677 F.2d at 1050;*Collins, et al. v. Morgan Stanley Dean Witter,* 224 F.3d 496, 498 (5th Cir.2000). But conclusory allegations, unwarranted deductions of fact, or "legal conclusions masquerading as factual [allegations] will not suffice to prevent [the granting of] a motion to dismiss."*Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278, 284 (5th Cir.1993); *see Spiller v. City of Texas City, Police Dept.,* 130 F.3d 162, 167 (5th Cir.1997); *Associated Builders, Inc. v. Alabama Power Co.,* 505 F.2d 97, 100 (5th Cir.1974)."Dismissal is proper if the complaint lacks an allegation regarding a required element necessary to obtain relief."*Blackburn v. City of Marshall,* 42 F.3d 925, 930 (5th Cir.1995). A court should not dismiss a complaint for failure to state a claim unless it appears beyond doubt from the face of the plaintiff's pleadings that he cannot prove any set of facts in support of his claim that would entitle him to relief. *See Hishon v. King & Spalding,* 467 U.S. 69, 73, 104 S.Ct. 2229, 81 L.Ed.2d 59 (1984); *Garrett v. Commonwealth Mortgage Corp.,* 938 F.2d 592, 594 (5th Cir.1991); *Kaiser Aluminum,* 677 F.2d at 1050.

***9** The issue is not whether the plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claim. Thus, the Court should not dismiss the claim unless the plaintiff would not be entitled to relief under any set of facts or any possible theory that he could prove consistent with the allegations in the complaint.

Great Plains Trust Co. v. Morgan Stanley Dean Witter & Co., 313 F.3d 305, 313 (5th Cir.2002)."In considering a motion to dismiss for failure to state a claim, a district court must limit itself to the contents of the pleadings, including attachments thereto."*Collins,* 224 F.3d at 498;FED.R.CIV.P. 12(b)(6).

1. Breach-of-Contract Claim

Defendants argue that Vinewood has failed to sufficiently plead the threshold issue of a valid contract. Defendants complain that "there are no allegations of a written contract, of certain or definite terms, or of mutual assent-not even an assertion of a formal offer, let alone an acceptance by any defendant."(Defs.' Mem. at 17.) Vinewood retorts that it is not required to plead the specifics of the contract, such as the date it was formed or the specific terms of the contract. Instead, Vinewood argues, it need only give Defendants fair notice of its breach-of-contract claim and the grounds upon which it rests. (Pl.'s Resp. at 15-16.)

"The elements of a breach-of-contract claim under Texas law are: 1) the existence of a valid contract; 2) performance or tendered performance by the plaintiff; 3) breach of the contract by the defendant; and, 4) damages to the plaintiff resulting from the breach."*Lewis v. Bank of America NA,* 343 F.3d 540, 545 (5th Cir.2003). While Rule 8(a) does not require a plaintiff to plead these elements in detail and the official forms to the federal rules of civil procedure demonstrate that a valid contract complaint can be very brief, a complaint must, nonetheless, "describe the alleged terms of the contract in a sufficiently specific manner to give the defendant notice of the nature of the claim."*American Realty Trust, Inc. v. Travelers Casualty and Surety Company of America,* 362 F.Supp.2d 744, 753 (N.D.Tex.2005) (Godbey, J.).

Vinewood's first amended complaint only conclusorily claims that it had a valid oral contract with Defendants, that it performed under the terms of that oral contract, that Defendants breached that contract, and that it suffered damages caused by Defendants's breach. Legal conclusions masquerading as factual allegations are insufficient to state a valid claim and certainly fail to provide Defendants with sufficient notice as to the nature of the breach-of-contract claim.

The two affidavits attached to Vinewood's complaint offer very little assistance. Fairchild's affidavit simply states that he and Conrad met with Defendants in London to discuss real-estate ventures for Defendants to invest in. He admits that he did not participate in that meeting, but says afterwards, unnamed representatives of the DMI Trust told him they were going to invest in the Fairfield real-estate ventures presented to them. Fairchild alleges no facts that this representation amounted to a contractual obligation to invest in the Fairfield real-estate ventures. And Fairchild fails to give any factual allegations outlining how much Defendants agreed to invest, under what terms Defendants agreed to invest, when Defendants were to tender their investment, and what Vinewood's obligations and consideration were under the oral contract. Fairchild's affidavit offers nothing more than an allegation that Defendants represented that they intended to invest in the Fairfield real-estate venture, not that they committed to doing so.

***10** Conrad's affidavit states that Defendants allegedly told him if Vinewood brought them the Fairfield real-estate ventures, they would invest in it. But then Conrad states he and Fairchild put together a presentation outlining 125 million dollars worth of Fairfield real-estate ventures and brought representatives of Fairfield to the meeting in London. If Defendants had already contractually committed to investing in the Fairfield ventures, then the presentation shouldn't have been necessary.

At the presentation, Conrad states that the parties discussed the real-estate ventures and discussed specifics regarding investments in the ventures. Conrad goes on to say that over the next twelve months, he had more discussions with Defendants, that he was introduced to other individuals already doing business with Defendants, and that Defendants told him they still intended to invest in the Fairfield ventures. He too, fails to give any specifics discussed at these meetings to show that the parties came to any agreement. On the contrary, his statements illustrate that the parties were locked in negotiations and discussions regarding potential in-

vestment in the Fairfield real-estate ventures and never came to any meeting of the minds. Of particular note, Conrad makes no factual allegation to show that Defendants had committed a definite sum to invest and agreed to invest rather than just represent that they intended to invest. And Conrad fails to allege any facts that establish what Vinewood's obligations and benefits were under its alleged agreement with Defendants.[FN7]Thus, the Court concludes that Vinewood has failed to state a claim for breach of contract.[FN8]

> FN7. In its first amended complaint, Vinewood alleges in boiler plate language that the conduct of the parties evidences that they had a valid and binding contract. An implied contract can arise "from the acts and conduct of the parties, it being implied from the facts and circumstances that there was a mutual intention to contract."*Haws & Garrett General Contractors, Inc. v. Gorbett Bros. Welding Co.,* 480 S.W.2d 607, 609 (Tex.1972). In the present case, Vinewood fails to allege any facts that show Defendants acted in any manner evidencing an intention to contract. Simply attending meetings and discussing possible real-estate ventures for investment and stating an intent to invest, without more, is insufficient to establish an implied con- tract.
>
> FN8. As will be discussed below, because Vinewood will be given an opportunity to file a second amended complaint, the Court need not address at this time Defendants' statute-of-frauds argument.

2. Promissory Estoppel

Defendants argue that Vinewood has filed to state a claim for promissory estoppel because its complaint only shows that the parties engaged in preliminary discussions regarding possible investment in certain real-estate ventures. Defendants contend, "There were no promises by Defendants, and clearly there could not be any substantial, foreseeable, and reasonable reliance by [Vinewood]." (Defs.' Mem. at 18.) Vinewood, naturally, disagrees, and argues that it has stated a claim because its complaint pleads "that Defendants made promises and that [Vinewood] relied on those promises."(Pl.'s Resp. at 17.) Vinewood points out that in Conrad's affidavit, he alleges that "Ziad Rawashdeh called me [Conrad] from Pakistan and represented to me that [the DMI Trust] was moving forward to enter into the Fairfield business opportunities with Vinewood."(*Id.*)

To state a cause of action for promissory estoppel under Texas law, a plaintiff must plead sufficient facts showing: (1) a promise; (2) foreseeability of reliance thereon by the promisor; and, (3) substantial reliance by the promisee to his detriment. *Clardy Mfg. Co. v. Marine Midland Bus. Loans,* 88 F.3d 347, 360 (5th Cir.1996). In addition, a plaintiff must show that injustice can be avoided only by enforcing the promise and a plaintiff must show that his reliance on the promise was reasonable or justified. *Id.*

***11** Similarly to its exposition of its breach-of-contract claim, Vinewood's first amended complaint avers no more than the elements of promissory estoppel as its factual allegations. And the attached affidavits fail to show that Defendants made any specific promises-only that they expressed a desire to invest in certain real-estate ventures.

Even if, however, the Court were to liberally construe Defendants' statements as promises, Vinewood fails to allege any facts that show it was reasonable or justified for it to rely on those statements to its detriment. According to Vinewood, Defendants at best allegedly "promised" to invest, there is nothing to say how much they would invest, in which ventures it would invest, and when it would invest in the ventures. Any acts Vinewood took based on a very vague and general "promise" to invest is just not reasonable or justified. For example, Vinewood claims that it hired additional employees in anticipation of Defendants' investment in the

Fairfield real-estate ventures, but without knowing which ventures Defendants would invest in and how much they would invest. It is simply not reasonable to rely on an alleged "promise" to invest when the details of the investment are unknown. Thus, the Court concludes that Vinewood has failed to state a claim for promissory estoppel.

3. Fraud

Defendants argue that Vinewood's "allegations wholly fail to satisfy the pleading requirements of a fraud claim."(Defs.' Mem. at 19.) In particular, Defendants contend that Vinewood's fraud allegations fail to meet the heightened pleading requirements under Rule 9(b) because Vinewood relies on general allegations that lump all of the defendants together and fail to explain what was false about any of the alleged representations, why they were fraudulent, and what demonstrates that the defendants had any fraudulent intent. (*Id.* at 20.)

While Vinewood agrees that "allegations of fraud must be made with sufficient particularity pursuant to [Rule 9]," it contends, nonetheless, that "the affidavits of Fairchild and Conrad clarify the specific individuals ... that were responsible for making the misrepresentations of which Vinewood complains and also lay out the who, what, why, and where."(Pl.'s Resp. at 17-18.) Vinewood argues, thus, its allegation of fraud is sufficient under Rules 8 and 9 to give Defendants adequate notice. (*Id.*)

Under Rule 9(b), allegations of fraud must be stated with particularity. To satisfy the rule's heightened pleading standard, a plaintiff must specify the statements contended to be fraudulent, identify the speaker of the statements, state when and where the statements were made, and explain why they were fraudulent. *See Zuckerman v. Foxmeyer Health Corp.,* 4 F.Supp.2d 618, 622 (N.D.Tex.1998) (Maloney, J.). While Rule 9(b) allows allegations of intent to be averred generally, a mere allegation that a defendant had the intent to commit fraud is insufficient. *See Melder v. Morris,* 27 F.3d 1097, 1102 (5th Cir.1994). A plaintiff "must set forth *specific facts* supporting an inference of fraud."*Id.* (emphasis in original).

***12** Vinewood's complaint fails to specify which statements of Defendants set out in Fairchild's and Conrad's affidavits were fraudulent. Further, Fairchild states that in London "representatives" of the DMI Trust told him that they were going to invest in the Fairfield real-estate ventures, but he fails to identify who these "representatives" were.

Worse, even as to statements that are attributable to either Rawashdeh or Janahi, Vinewood fails to explain why they were fraudulent. Vinewood's complaint simply conclusorily alleges that Defendants made oral promises "with no intention to perform such promises."(Pl.'s Am. Compl. at 3.) Vinewood offers no basis to support fraudulent intent other than the obvious fact that Defendants failed to invest in the Fairfield real-estate ventures. "Generally, there is no inference of fraudulent intent not to perform from the mere fact that a promise made is subsequently not performed."*Willard v. Humana Health Plan of Texas, Inc.,* 336 F.3d 375, 386 (5th Cir.2003); *see also Fluorine on Call Ltd. v. Fluorogas Ltd.,* 380 F.3d 849, 858-59 (5th Cir.2004) ("Failure to perform a contract ... is not evidence of fraud."). Even assuming Rawashdeh's and Janahi's statements were promises to invest, Vinewood fails to allege any facts that would support an inference that, at the time they made those statements, they were anything but genuine.

Moreover, this Court is unwilling to infer, from generalized and vague representations of an intent to invest in a real-estate venture, a promise or a commitment to invest. Absent good-faith allegations that Defendants made specific promises to invest, indicated which ventures they agreed to invest in, and stated the amounts of their promised investment, the Court cannot find a claim of fraud under Rule 9(b).

4. Negligent Misrepresentation

A claim of negligent misrepresentation under Texas law contemplates a defendant's providing a misstatement of existing fact to a plaintiff in the course of business or in a transaction in which the defendant has a pecuniary interest. *See Clardy Mfg. Co.,* 88 F.3d at 357. "Negligent misrepresentation does not occur when a defendant simply makes a guess as to a future, unknown event."*Id.* (internal quotations and citations omitted). Here, Vinewood alleges that Defendants represented or stated that they intended to invest in realestate ventures through Fairfield. While those may have been statements of intent and not a guess, they lacked any substance to constitute a misstatement of fact. Vinewood does not allege that Defendants indicated which realestate ventures they would invest in, how much they would invest, and when they would make the investment. Moreover, Defendants' alleged statements were, at best, of future performance or an intent to invest in the future and not a statement of "existing" fact. *See Alpha Road v. NCNB Texas National Bank,* 879 F.Supp. 655 (N.D.Tex.1995) (Fitzwater, J.) (holding bank officer's assurance that loan was a "done deal" referred to future performance and not actionable under theory of negligent misrepresentation) (followed in *Clardy Mfg. Co.,* 88 F.3d at 357). Thus, the Court concludes that Vinewood fails to state a claim for negligent misrepresentation.

5. Claims Based on Statements Made Prior to the Settlement and Mudaraba Agreements

***13** Defendants argue that to the extent Vinewood's claims rest on statements or representations made by Defendants prior to the settlement and mudaraba agreements, those claims are precluded by the merger clauses contained in those agreements. Vinewood's complaint, however, does not rest on alleged statements, promises, or representations made prior to the agreements. At best, Fairchild's affidavit states that in October 2004, he became a shareholder in Vinewood and entered into an agreement with Defendants to provide and manage realestate ventures. He does not state when in October the alleged agreement was made. The remainder of his affidavit details a meeting he and Conrad had with Defendants in London in December 2004.

Conrad's affidavit, on the other hand, makes no mention of any agreement or statements in October 2004, but details statements and discussions that occurred from December 2004 through April 2006. In its response to Defendants' motion to stay or dismiss, Vinewood concedes that its claims do not rely on the agreements or any representations made prior to those agreements. (See Pl.'s Resp. at 20.) ("It does not, however, preclude Vinewood from suing nonsignatories for breaching other contracts that were entered into **months after the mudaraba agreement was signed.**") (Emphasis added.) As will be discussed below, the Court will permit Vinewood one final opportunity to file an amended complaint to meet its pleading requirements. To the extent that Vinewood files a second amended complaint that relies on any statements made prior to the settlement or mudaraba agreements, the Court reserves the right to revisit whether, in light of both agreements' merger provisions and provisions addressing any prior discussions, negotiations, or understandings, the parties should not be compelled to arbitration.

III. Conclusion

In light of the foregoing, the Court concludes that the parties have not entered into any agreement to arbitrate Vinewood's claims. Even assuming the arbitration provisions in the settlement and mudaraba agreements are enforceable against the parties, the Court concludes that Vinewood's claims do not arise from or relate to those agreements. Further, the Court concludes that Vinewood has failed to state a cause of action for breach of contract, promissory estoppel, fraud, and negligent misrepresentation. Although the Court may dismiss Vinewood's first amended complaint, "it should not do so without granting leave to amend, unless the defect is simply incurable or the plaintiff has failed to plead with particularity after being afforded re-

peated opportunities to do so."*See Hart v. Bayer Corp.*, 199 F.3d 239, 248 n. 6 (5th Cir.2000). Since Vinewood's defects are its failure to plead with the requisite particularity, the Court does not find them to be incurable. The courts in this district prefer to decide cases on their merits rather than on their pleadings and, therefore, the Court concludes that it is appropriate to give Vinewood one final opportunity to file an amended complaint. Finally, because the Court concludes that Vinewood's claims do not arise from or are not related to the mudaraba agreement, the Court concludes that Alpha Investment should not be joined to this litigation as an indispensable party under Rule 19. None of Vinewood's claims involve Alpha Investment.

***14** Accordingly, Defendants' motion to stay or dismiss this case is DENIED, and the Court's stay of this case pending its decision of this motion is lifted. The clerk of Court is DIRECTED to remove the stay notation from the Court's docket. Vinewood shall have thirty days from the date of this order to file an amended complaint. Failure to do so will result in the dismissal of this case without further notice.

N.D.Tex.,2007.
Vinewood Capital, L.L.C. v. Al-Maal
Slip Copy, 2007 WL 2791876 (N.D.Tex.)

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