EXHIBIT A

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United States District Court, E.D. Louisiana.

Irving J. HENRY and Jennifer Henry, III

v.

ALLSTATE INSURANCE COMPANY.

Civil Action No. 07-1738.

Aug. 8, 2007.

Gregory Pius Dileo, Gregory P. Dileo, Attorney at Law, Michael David Meyer, Michael D. Meyer, PLC, Amy Collins Fontenot, Val Patrick Exnicios, Liska, Exnicios & Nungesser, New Orleans, LA, Conrad S.P. Williams, III, Joseph G. Jevic, III, St. Martin, Williams & Bourque, Melanie G. Lagarde, Houma, LA, for Irvin J. Henry, and Jennifer Henry, III.

Judy Y. Barrasso, Bailey H. Smith, Barrasso Usdin Kupperman Freeman & Sarver, LLC, New Orleans, LA, for Allstate Insurance Company.

ORDER AND REASONS

MARTIN L.C. FELDMAN, United States District Judge.

*1 Before the Court is Allstate's motion to strike class allegations, motion to dismiss, and motion for costs and a stay. For the reasons that follow, the motion to strike the class allegations is GRANTED, the motion to dismiss is GRANTED in part and DENIED in part, and the request for costs and a stay is GRANTED in part and DENIED in part.

Background

After Hurricanes Katrina and Rita, Irvin and Jennifer Henry filed a claim with Allstate, their insurer. Allstate inspected the Henrys' property on October 30, 2005, which resulted in payments of $13,550.73 and $4,865.43 on October 30, 2005 and May 15, 2006 for their dwelling, additional living expenses and contents. On August 7, 2006, the Henrys provided Allstate with a proof of loss and engineering report showing that their dwelling suffered wind damage in the amount of $112,743.96.

On December 21, 2006, the Henrys sued Allstate to collect their insurance proceeds, as well as purporting to represent all Allstate insureds in Louisiana that suffered property damage from Hurricanes Katrina and Rita. This first suit, Civil Action Number 06-11217 ("*Henry I*"), was allotted to this Court. However, the Henrys were also named plaintiffs in another suit, Civil Action Number 06-7375, pending in Section L. The Court denied the Henrys' motion to transfer to Section L. After that, Judge Fallon severed the claims of the several dozen named plaintiffs proceeding in Civil Action Number 06-7375 in Section L. The Henrys then voluntarily dismissed *Henry I* (the suit in this Section), and filed an "amended petition," which was randomly assigned to Judge Barbier ("*Henry II*"). Allstate's motion to transfer *Henry II* to this Court as a related case pursuant to Local Rule 3.1.1E was granted over the Henrys' objection.

Accordingly, Henrys' Amended Petition for Damages, filed on April 12, 2007, was transferred to this Court on May 30, 2007. Count I, their individual damage claim, alleges that "Allstate has yet to engage in adequate loss adjustment" and therefore has violated La.R .S. 22:658 and La.R.S. 22:1220. The Henrys allege that Allstate arbitrarily and capriciously breached its duty to promptly and fairly adjust their claims in good faith, and ultimately underpaid their claim.

In Count II, the Henrys propose to represent a class defined as "all holders of homeowner's policies issued by Allstate Insurance Company, or any of its subsidiaries, for property located in the State of Louisiana who suffered damages as a result of Hurricanes Katrina and Rita."The Henrys' proposed class claims allege that when Allstate adjusted the claims of all members of the proposed class, Allstate used a software package named "IntegriClaim." [FN1]By using the IntegriClaim software,[FN2] Allstate breached their contracts with the class, it is urged, in violation of La.Rev.Stat. § 22:658, in a manner sufficient to demonstrate lack of good faith pursuant to La.Rev.Stat. § 22:1220, and in a manner sufficient to demonstrate fraud pursuant to La. Civ.Code art.1953.

FN1. According to the Amended Petition, IntegriClaim price list is composed of individual repair actions, broken down into different categories, with each of these repair

actions having a unit price that is adjusted quarterly to reflect market conditions and inflation in the area being repaired. The plaintiffs contend that IntegriClaim's prices are actually lower than those prices used in the construction industry or in other estimating programs such as Exactimate pricing software used by other insurance companies.

FN2. Additionally, the plaintiffs charge that Allstate has willfully, arbitrarily and capriciously adjusted IntegriClaim's already reduced prices by *further* reducing the unit prices necessary to adjust the claims of their insureds.

***2** Allstate now moves to strike the class allegation under Fed.R.Civ.P. 23(d)(4), arguing that the plaintiffs' lawsuit necessarily requires a claim-by-claim inquiry for each member of the proposed class to determine "the nature and extent of damage, the timing and adjustment of each class member's claim, the source data used to prepare damage estimates, the precise market conditions at the time each class member's damages were assessed,...."[FN3] The plaintiffs assert that Allstate manipulated its claims adjusting software so as to produce artificially depressed claim values with the intent to underpay their insured's claims.

FN3. Allstate had filed a substantially similar motion to dismiss *Henry I.* However, because the plaintiffs had voluntarily dismissed *Henry I,* they never filed a response to that motion.

Allstate counters that plaintiffs' class allegations fail as a matter of law and must be stricken because individualized inquiries predominate. Allstate also moves to dismiss under Fed.R.Civ.P. 12(b)(1) and/or 12(b)(6), claiming that the plaintiffs' breach of contract claims fail because they failed to identify any specific contract provision that Allstate violated, and that the plaintiffs' bad faith claims under La.Rev.Stat. § 22:658 must likewise fail. Finally, Allstate maintains that the plaintiffs' fraud claims are preempted by the Louisiana breach of contract statutes, and, in the alternative, that the fraud claims fail for lack of sufficient pleading as required by Fed.R.Civ.P. 9(b).

I.

Rule 23(a) sets forth four prerequisites to any class action: (1) a class "so numerous that joinder of all members is impracticable"; (2) the existence of "questions of law or fact common to the class"; (3) class representatives with claims or defenses "typical ... of the class"; and (4) class representatives that "will fairly and adequately protect the interests of the class."Fed.R.Civ.P. 23(a). In addition to these prerequisites, a party seeking class certification under Rule 23(b)(3) must also demonstrate that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members" and that the class action is "superior to other available methods for the fair and efficient adjudication of the controversy."Fed.R.Civ.P. 23(b)(3).

The plaintiffs bear the burden of showing that all of these Rule 23 criteria are met. *Unger v. Amedisys Inc.,* 401 F.3d 316, 320 (5th Cir.2005). 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. *See Terrebonne v. Allstate Ins. Co.,* No. 06-4697 (E.D.La. July 31, 2007) (Vance, J.) (citing Fed.R.Civ.P. 23(d)(4) and *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."); *see also Hedgepeth v. Blue Cross & Blue Shield of Miss.,* 2006 WL 141624 (N.D.Miss. Jan. 18, 2006) (citing *Stewart v.. Winter,* 669 F.2d 328, 331 (5th Cir.1982)) and noting that the Fifth Circuit has upheld the power of district courts to dismiss class allegations prior to any extensive class-related discovery).

***3** The plaintiffs appear to seek certification of their putative class under Rule 23(b)(3). Even assuming that the plaintiffs have met the four requirements of Rule 23(a), they have not met their burden under Rule 23(b)(3) of proving that common issues of the class predominate over individual issues, and the class certification fails for this reason. *See Maldonado v. Ochsner Clinic Foundation,* No. 06-30573, 2007 WL 2054906 (5th Cir. July 19, 2007).

Rule 23(a)(2) instructs that there be issues of law or fact common to the class. The commonality requirement is satisfied if at least one issue's resolution will

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affect all or a significant number of class members. *See* James v. City of Dallas, 254 F.3d 551, 570 (5th Cir.2001); *Mullen v. Treasure Chest Casino, LLC,* 186 F.3d 620, 625 (5th Cir.1999). A low threshold exists for commonality, and the fact that some plaintiffs have different claims or require individualized analysis does not defeat commonality. *James,* 254 F.3d at 570. But the analysis continues because Rule 23(b)(3) mandates that common questions of law or fact must also "predominate over any questions affecting only individual [class] members." *Unger,* 401 F.3d at 320. This is the test of cohesion, and it is demanding. To predominate, common issues must form a significant part of individual cases. *Mullen,* 186 F.3d at 626. The predominance requirement of Rule 23(b)(3) is "far more demanding" than the commonality requirement of Rule 23(a), because it "tests whether proposed classes are sufficiently cohesive to warrant adjudication by representation." *Unger,* 401 F.3d at 320. Lastly, the cause of action as a whole must satisfy Rule 23(b)(3)'s predominance requirement. *Steering Committee v. Exxon Mobil Corp.,* 461 F.3d 598, 601-02 (5th Cir.2006) ("where individual damages claims cannot be determined by reference to a mathematical or formulaic calculation, the damages issue may predominate over any common issues shared by the class").

The plaintiffs allege that Allstate improperly adjusted hurricane property damage claims by utilizing software that undervalued the actual market cost of construction materials.[FN4] This Court has struck similar class allegations against an insurer based on its alleged "corporate scheme and pattern and practice of bad faith and improper claims handling."*See* *Aguilar v. Allstate Fire and Casualty Ins. Co.,* No. 06-4660, 2007 WL 734809 (E.D.La. March 6, 2007) and *Spiers v. Liberty Mut. Fire Ins. Co.,* C.A. No. 06-4493 (E.D.La. Nov. 21, 2006). A Mississippi federal court likewise declined to certify a class of insured property owners against their insurers, noting:

> FN4. The plaintiffs contend that the quarterly cost estimates used by IntegriClaim software valued each loss below the actual industry cost to complete the repairs, that the IntegriClaim quarterly cost estimates were lower than comparable values used by competitor's claim-adjusting software programs, and that Allstate further reduced the allegedly below-market values of the IntegriClaim cost estimates when they calculated damage settlements for each claim.

> 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 particulars....
> ***4** *Comer v. Nationwide Mut. Ins. Co.,* 2006 WL 1066645, at *2 (S.D . Miss. Feb. 23, 2006).

Even more recently, Judge Vance of this Court struck similar class allegations, citing these rulings with approval, noting that "[o]ther 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."*Terrebonne v. Allstate Insurance Company,* No. 06-4697 (E.D.La. July 31, 2007). Similarly, Judge Trimble of the Western District of Louisiana recently struck class action allegations where the claims at issue involved the need to examine actual market prices for construction materials compared to the insurer's estimate of the cost of those materials. *See John v.* *Nat'l Sec. Fire & Cas. Co.,* No. 06-1407, 2006 WL 3228409 (M.D.La. Nov. 3, 2006).[FN5]

> FN5. I n granting the motion to dismiss class allegations, Judge Trimble noted:
>
> > [A]s to Plaintiff's claims for damages for under adjustment of unit prices because of the supply and demand problem after Hurricanes Katrina and Rita struck Louisiana, a factual inquiry would have to be made into each putative class member's claims, such as where and when materials and supplies were being purchased, what was the market price at that time, and when did the price of materials and supplies decrease.
>
> *Id.* at * 4.

The striking similarity of the allegations here compels the same result. Allstate's general internal policies for adjusting claims, including its use or manipulation of software, may arguably be one common issue of fact, but proving a questionable pattern and

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practice of undervaluing claims will require an intensive review of the individual facts of each class member's damage claim, including the nature and extent of damage, the timing and adjustment of each class member's claim, how much each class member was paid for his claim and for what damage, and whether that amount was sufficient and timely. On the face of the pleading, it is clear that those individualized and highly personal issues pertaining to each class member patently overwhelm any arguably common issues, rendering the claims inappropriate for class treatment. *See* Pollet v. Travelers Prop. Cas. Ins. Co., 2001 WL 1471724 (E.D.La. Nov. 16, 2001) (Clement, C.J.)(holding that class certification was inappropriate in an action alleging that the insurer failed to adequately compensate policyholders because of the need for individualized proof on thousands of separate insurance claims).FN6

> FN6. Judge Clement's reasoning in *Pollet* is compelling:
>
>> In the instant case, the need for individualized proof on thousands of separate claims strongly counsels against maintaining a class action. First, every claimant has a different roof, with different hail damage, in a different location. In addition, each of the thousands of allegations that [defendants] acted in bad faith by intentionally failing to pay legitimate claims will require an individual investigation into the damages, the type of insurance policy, and the defendants' actions. Accordingly, the Court finds that maintaining the instant suit as a class action would result in several thousand mini-trials on individual issues, rather than a single comprehensive resolution of issues relevant to the class as a whole. Similarly, the plaintiff's remaining allegations of misrepresentation and deceptive business practices also require fact-specific evidence of the individual policies issued and the promises made to each class member. As a result, a class action trial of these claims would involve multiple detailed analyses of individual issues rather than the efficient resolution of questions pertinent to the class as a whole. For these reasons, the Court does not find that common issues of law or fact predominate over individual questions.
>
> *Id.* at * 2.

The Henrys concede that the only common questions that unite the putative class is that their property was damaged by Hurricanes Katrina and Rita and that Allstate used software as a claims-adjusting tool. They suggest that these common issues "simply predominate over and eliminate all individual issues except for quantum."This is a gross oversimplification and perverts Rule 23. Their failure to show that these common questions predominate over questions affecting individual class members (such as the nature and extent of the homeowner's damage, the timing and adjustment of the homeowner's claim, the source of data used to prepare the damage estimate, the market conditions in place at the time the damage was assessed, whether Allstate further discounted the amount of the claim, and the amount the homeowner was paid for his claim) confirms that they cannot carry their heavy burden to show that class action treatment is appropriate.

***5** II.

Rule 12(b)(6) of the Federal Rules of Civil Procedure allows a party to move for dismissal of a complaint for failure to state a claim upon which relief can be granted. Such a motion is rarely granted because it is viewed with disfavor. *See* Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc., 677 F.2d 1045, 1050 (5th Cir.1982). The complaint must be liberally construed in the plaintiff's favor and all facts pleaded in the complaint must be taken as true. *See* Campbell v. Wells Fargo Bank, 781 F.2d 440, 442 (5th Cir.1986). This Court cannot dismiss a complaint under Rule 12(b)(6) unless it appears beyond doubt that the plaintiff cannot prove a plausible set of facts in support of his claim which would entitle him to relief. *Bell Atlantic Corp. v. Twombly,* No. 05-1126, slip op. at 7-12 (U.S. May 21, 2007).

The Henrys assert claims against Allstate for underpayment of their insurance claim and breach of its good faith duty, and for fraud; they seek damages for violation of state law penalty statutes under La.Rev.Stat. § 22:1220 and La.Rev.Stat. § 22:658.

A.

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The Fifth Circuit requires that, "[t]o state a claim for breach of an insurance contract under Louisiana law, a plaintiff must allege a breach of a specific policy provision." *Louque v. Allstate Insurance Company,* 314 F.3d 776, 782 (5th Cir.2002) (citing *Bergeron v. Pan Am. Assurance Co.,* 731 So.2d 1037, 1045 (La.App.1999). The plaintiffs point to no specific policy provisions in their complaint that would prohibit anything Allstate did in the settlement of their claims. Confusingly, the plaintiffs say that their claim against Allstate is for underpayment of their insurance claim, but they also appear to concede in their opposition papers that they are not urging that Allstate breached its insurance contract. At the same time, the plaintiffs argue that Allstate incorrectly interprets *Bergeron;* but if that is so, then the Fifth Circuit is also misguided in its interpretation of *Bergeron.*The Court, however, agrees with *Bergeron* and the Fifth Circuit. While the plaintiffs' complaint is vaguely and inartfully crafted, this Court must resolve all doubts regarding the sufficiency of their claims in the plaintiffs' favor. Considering the *Lowrey* standard for dismissing a plaintiff's claim, the Court declines to dismiss their individual breach of contract claim, but instead will allow the plaintiffs the opportunity to amend their complaint to correct the *Bergeron* deficiencies, if they can.

B.

Louisiana Revised Statutes 22:658 and 22:1220 announce statutory penalties that may be imposed on insurance companies for improper handling of first-party property insurance claims. Section B of La. R.S. 22:1220 outlines five causes of action against an insurer: misrepresenting insurance policy provisions relating to coverage, failing to pay a settlement timely after an agreement is reduced to writing, denying coverage or attempting to settle a claim on an altered application without the insured's consent, misleading a claimant as to the prescriptive period, and arbitrarily failing to settle claims timely after receiving satisfactory proof of loss.

***6** Louisiana courts have held that "because R.S. 22:1220 is penal in nature, strict construction of the statute is required and that the five instances specified in section B are exclusive."*Armstrong v. Rabito,* 669 So.2d 512, 514 (La.App.1995)(citing *Hernandez v. Continental Casualty Co.,* 615 So.2d 484 (La.App.1993)); *see also* *Hart v. Allstate Ins. Co.,* 437 So.2d 823 (La.1983). Louisiana courts have also held that unless one of the prohibited acts specified in 22:1220 is asserted by the plaintiff, then the claims must be dismissed. *Armstrong,* 669 So.2d at 514;*Boatner v. State Farm Mutual,* No. 92-C-1248 (La.App. Sept. 28, 1992).

The plaintiffs rather vacuously characterize their complaint as "nothing more than your typical action for statutory damages."They contend that they are entitled to recover penalties because Allstate failed to pay the full amount of their claim even though they provided Allstate with a proof of loss. Their inartful assertions appear to be an attempt to implicate La. R.S. 22:1220(B)(5). Because the Court will allow the plaintiffs to try to cure their obvious breach of contract pleading deficiencies, the plaintiffs will also have a chance to cure their bad faith claims deficiencies as well.

C.

Allstate also moves to dismiss the plaintiffs' fraud claim. The plaintiffs' amended petition charges that "Allstate's use of IntegriClaim [was] so deceptive and misleading as to constitute fraud sufficient to vitiate the necessary consent of their insureds with regard to the settlement of their claims as set forth in La.C.C. article 1953."

The plaintiffs only reference "fraud" in Count II, which concerns their class allegations and the Court has determined that the plaintiffs' class allegations should be stricken.[FN7]Even if the plaintiff is somehow attempting to state an individual claim for fraud, the claim would be dismissed for failure to satisfy the particularity requirements of Federal Rule of Civil Procedure 9(b). The plaintiffs' fraud allegations are vague and fail to "plead enough facts to illustrate the 'who, what, when, where, and how' of the alleged fraud."*See* *Carroll v. Fort James Corp.,* 470 F.3d 1171, 1174 (5th Cir.2006) (citations omitted).

FN7. The plaintiffs' attempt to certify a fraud class action fails for the well-established reason that "[a] fraud class action cannot be certified where individual reliance will be an issue." *Castano v. American Tobacco Co.,* 84 F.3d 734, 745 (5th Cir.1996) (citation omitted).

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III.

Finally, Allstate contends that the Henrys should reimburse Allstate for the costs and attorney's fees incurred in defending *Henry I,* which the Henrys voluntarily dismissed.

Federal Rule of Civil Procedure 41(d) provides:

> If a plaintiff who has once dismissed an action in any court commences an action based upon or including the same claim against the same defendant, the court may make such order for the payment of costs of the action previously dismissed as it may deem proper and may stay the proceedings in the action until the plaintiff has complied with the order.

The plaintiffs voluntarily dismissed *Henry I* and commenced this suit, which nevertheless contains the same claims against Allstate. The plaintiffs' voluntary dismissal contains no statement that the Henrys intended to refile their lawsuit, in obvious and somewhat crude disregard of Local Rule 41.1E. An award of costs, including attorney's fees, is warranted.[FN8] As the plaintiffs suggest, any costs assessed will be *minimal,* considering Allstate seems to agree that the pending motion is nearly identical to the one filed in *Henry I.* Any costs or fees incurred in defending *Henry I* that were equally valuable in defending this action must not be included in the award. Once Allstate files a motion to determine fees and costs, the magistrate judge will, by appropriate reference, determine the quantum owed. As to Allstate's request that the action be stayed, the Court declines to grant the request. A stay would not serve the interests of justice or judicial economy and would only delay resolution of this lawsuit.

> FN8. Plaintiffs' counsel might also wish to pay close attention to the mandate of 28 U.S.C. § 1927 in the future.

*7 Accordingly, the defendant's motion to strike class allegations is GRANTED. The defendant's motion to dismiss is GRANTED in part and DENIED in part: The plaintiffs' fraud claim is dismissed. The plaintiffs are granted leave to amend their claim for breach of contract and violation of penalty statutes within fourteen days. The defendant's motion for costs and a stay is GRANTED in part and DENIED in part: An award of costs is appropriate, the amount to be determined by the magistrate judge. However, Allstate's request for a stay is DENIED.

E.D.La.,2007.
Henry v. Allstate Ins. Co.
Not Reported in F.Supp.2d, 2007 WL 2287817 (E.D.La.)

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C
United States District Court; N.D. Texas, Dallas Division.
Pearlstein
v.
Justice Mortgage Investors, et al.
No. CA-3-76-1476-D
CA-3-76-1476-D
October 17, 1978

HILL, District Judge.
***1** Comes now the defendants in the above-styled action and move for an order dismissing the plaintiff's suit. Having reviewed the motion, the parties' briefs, and having heard oral argument, the court is of the opinion that the motion should be granted in part and denied in part at this time.

Facts

Plaintiff has instituted a federal securities action purportedly under Section 10(b) of the Securities Exchange Act of 1934 ("1934 Act") and rule 10b-5 promulgated thereunder on behalf of himself and as claimed representative of a class of "all those persons who purchased the Trust's (defendant Justice Mortgage Investors) securities during the period of approximately January 19, 1972, to approximately February 21, 1975, and sustained a loss as a result thereof." Plaintiff alleges that defendants intentionally and knowingly made material misrepresentations and failed to disclose material facts all or part of which are contained in, among other documents, prospectuses dated January 31, 1972, November 7, 1972, February 21, 1973, May 2, 1973, and October 29, 1973, an annual report for the year 1973, quarterly reports, press releases, and reports filed with the Securities and Exchange Commission ("SEC").

The defendants, in their motion to dismiss, have contended that the plaintiff may not pursue an implied action under Section 10(b) or rule 10b-5, but instead, is limited to causes of action based on the express liability sections of the Securities Act of 1933 ("1933 Act") and the 1934 Act. In particular, defendants argue that Sections 11 and 12 of the 1933 Act govern any misstatements or omissions found in the various prospectuses, and that Section 18 of the 1934 Act controls any action for misstatements or omissions found in the annual report of 1973, quarterly reports, press releases, and reports filed with the SEC. If the express liability provisions do govern, defendants maintain that any actions under those provisions are barred by the respective statutes of limitations, which are Section 13 of the 1933 Act with respect to claims under Sections 11 or 12 of the 1933 Act, and Section 18(c) of the 1934 Act for claims under Section 18 of the 1934 Act. As an additional matter, defendants attack the lack of particularity in plaintiff's allegations of fraud and move for dismissal on the basis of Fed. R. Civ. P. 9(b).

Plaintiff's Section 10(b) Claims Based on Alleged Misstatements and Omissions in the Prospectuses

Prior to a series of recent Supreme Court decisions, the law seemed fairly clear in allowing implied actions under Section 10(b) and rule 10b-5 for conduct also covered by the express liability provisions of the Securities Acts, *see, e.g.,* Ellis v. Carter, 291 F.2d 270 (9th Cir. 1961); *see also, A. Bromberg, Securities Law; Fraud* Section 2.4 (1968). These decision, *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975), and *Ernst & Ernst v. Hochfelder*, 425 U.S. 185 (1976), reveal the Court's concern with the proper harmonization of the express liability provisions and the judicially-created action under Section 10(b) and rule 10b-5, *see A. Bromberg, supra* Section 2.4 at 384.5 (Supp. 1977); Cox, *Ernst & Ernst v. Hochfelder: A Critique and an Evaluation of its Impact upon the Scheme of the Federal Securities Laws*, 28 Hast. L.J. 569, 593-94 (1977). In the *Blue Chip* case, the Court noted: "Blue Chip did not here present the question of whether an implied action under Section 10(b) . . . will lie for actions made a violation of the 1933 Act and the subject of express civil remedies under the 1933 Act. We therefore have no occasion to pass on the issue." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. at 752 n. 15. In *Ernst & Ernst*, the majority opinion relied heavily on the interrelation between the various components of the federal securites acts in concluding that scienter should be a necessary element of an implied action under Section 10(b). *Ernst & Ernst v. Hochfelder*, 425 U.S. at 206-11. Given these two decisions, de-

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fendants contend that plaintiff's action for misstatements and omissions allegedly contained in the various prospectuses referred to in the complaint should only be allowed under Sections 11 and 12(2) of the 1933 Act, rather than Section 10(b) of the 1934 Act.

***2** The court believes, however, that *Ernst & Ernst* supports, rather than negates, the proposition that an implied action under Section 10(b) can be asserted on the basis of acts which also violate Sections 11 and 12. The Court in *Ernst & Ernst* relied on the procedural differences between actions under Sections 11 and 12(2) of the 1933 Act and actions under Section 10(b) of the 1934 Act in determining that scienter should be required in 10(b) suits. In other words, since Section 10(b) does not have the same procedural requisites, *e.g.*, shorter statute of limitations, as do Sections 11 and 12, the Court felt an action under Section 10(b) should not be permitted on the basis of mere negligence alone. If the *Ernst & Ernst* Court was of the opinion that a 10(b) action could not be maintained for conduct also transgressing the provisions of Sections 11 and 12, then their discussion of the procedural differences between the sections would have been meaningless. The scienter requirement for a Section 10(b) action sufficiently distinguishes that cause of action from the causes of action under Sections 11 and 12 of the 1933 Act, which do not necessitate the proof of scienter. Since the added burden of proving fraud is imposed upon the plaintiff, this court is of the opinion that he may proceed under 10(b) in this case for the alleged misstatements and omissions found in the prospectuses.

Courts in other jurisdictions have followed this rationale in a number of post-*Ernst & Ernst* decisions, *see Tirone v. Calderone Carran Ranches, Inc.*, (Current) FED. SEC. L. REP. (CCH) P 96,480, at 93,773 (W.D.N.Y. 1978); *In Re Clinton Oil Co. Securities Litigation*, (1977-78 Transfer Binder) FED. SEC. L. REP. (CCH) P 96,015, at 91,573 (D.Kan. 1977); Beecher v. Able, 435 F.Supp. 397, 411-13 (S.D.N.Y. 1977); *see also* A. Bromberg, *supra* Section 2.4, at 384.6 (Supp. 1977). Defendants' reliance on Rosenberg v. Globe Aircraft Corp. 80 F.Supp. 123 (E.D. Pa. 1948), a case cited by the Court in *Ernst & Ernst*, is ill-founded. The Supreme Court also referred to Fischmann v. Raytheon Manufacturing Co. 188 F.2d 783 (2d Cir. 1951), which is considered as a leading opinion on the classic reconciliation between Section 11 of the 1933 Act and Section 10(b) of the 1934 Act, *see* A. Bromberg, *supra* Section 2.4, at 384.6 (Supp. 1977). The *Fischmann* case permitted a 10(b) action to be asserted for conduct which also contravened Section 11, primarily on the basis that Section 10(b) required proof of fraud unlike Section 11. *Id.* at 786-87.

Therefore, this court holds, with respect to the allegations concerning the prospectuses, that the plaintiff's complaint states a cause of action under Section 10(b) and rule 10b-5 and is not subject to dismissal. The court does not, at this time, express any opinion concerning plaintiff's compliance with the limitations period for the 10(b) action based on the misstatements and omissions allegedly contained in such prospectuses.

Plaintiff's Section 10(b) Claims Based on Alleged Material Misstatements or Omissions in the Annual Report for the Year 1973, Quarterly Reports, Press Releases, and Reports Filed With the SEC

***3** As with the problem of the conflict between Sections 11 and 12 of the 1933 Act and Section 10(b) of the 1934 Act, courts prior to *Ernst & Ernst* permitted implied actions under Section 10(b) for conduct also violating Section 18 of the 1934 Act, *see Barotz v. Monarch General Inc.*, (1975-76 Transfer Binder) FED. SEC. L. REP. (CCH) P 94,933 (S.D.N.Y. 1975); A Bromberg, *supra*, Section 2.4(4) at 40.1 n.99(b). In *Ernst & Ernst*, however, the Court cast doubt on the validity of this view by stating:

Section 18 of the 1934 Act creates a private cause of action against persons, such as accountants, who 'make or cause to be made' materially misleading statements in reports or other documents filed with the Commission. 15 U.S.C. Section 78r. We need not consider the question whether a cause of action may be maintained under Section 10(b) on the basis of actions that would constitute a violation of Section 18. Under Section 18 liability extends to persons who, in reliance on such statements, purchased or sold a security whose price was affected by the statements. Liability is limited, however, in the important respect that the defendant is accorded the defense that he acted in 'good faith and had no knowledge that such statement was false or misleading.' Consistent with this language the legislative history of the section suggests something more than negligence on the part of defendant is required for

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recovery.

Ernst & Ernst v. Hochfelder, 425 U.S. at 211 n.31. Two cases subsequent to *Ernst & Ernst* have held that Section 18 is the exclusive remedy for injury suffered as a result of materially misleading statements found in documents filed with the SEC, *see Berman Richford Industries, Inc.* (Current) FED. SEC. L. REP. (CCH) P 96,518, at 94,013 (S.D.N.Y. 1978); *Kulchok v. Government Employees Insurance Co.*, (1977-1978 Transfer Binder) FED. SEC. L. REP. (CCH) P 96,002 (D.D.C. 1977).[FN1] On the other hand, it has been held that summary judgment could not be granted upon the basis that Section 18 provided an express remedy for conduct also the basis of a 10(b) action, *Kramer v. Scientific Control Corp.*, (Current) FED. SEC. L. REP. (CCH) P 96,546 (E.D. Penn. 1978). The *Kramer* court felt that the question was an open one, and, therefore, summary judgment was inappropriate. One court has also held that an implied action under Section 14(e) of the 1934 Act, which contains language similiar to Section 10(b), can be instituted on the basis of conduct also covered by Section 18, *see* Horwitz v. R.B. James Corp., 76 F.R.D. 149, 161 n.9 (W.D.Mo. 1977). Additionally, one case has allowed an action under Section 10(b) notwithstanding coverage for the same conduct by Section 9 of the 1934 Act, *In Re Clinton Securities Litigation*, (1977-78 Transfer Binder) FED. SEC. L. REP. (CCH) P 96,015, at 91,574 (D. Kan. 1977); *see also* Schaefer v. First National Bank, 509 F.2d 1287 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). Section 9 of the 1934 Act, like Sections 10(b), required proof of scienter as an element of the cause of action.

> FN1 Defendants have also cited numerous cases which have declined to imply an action under Section 13 of the 1934 Act in light of the express liability provision of Section 18, *see, e.g., Lewis v. Elam*, (1977-78 Transfer Binder) (CCH) P 96,013 (S.D.N.Y. 1977); *Meer v. United Brand Co.*, (1976-77 Transfer Binder) FED. SEC. L. REP. (CCH) P 95,648 (S.D.N.Y. 1976); *In Re Penn Central Securities Litigation*, 347 F.Supp. 1327 (E.D. Pa. 1972), *modified on other grounds*, 357 F.Supp. 869 (E.D. Pa. 1973), *aff'd*, 494 F.2d 528 (3d Cir. 1974). The cases are not of persuasive import since Section 13 and the rules promulgated thereunder appear to be "administrative devices not intended to provide private rights to investors,"*In Re Equity Funding Corp. of America Securities Litigation*, 416 F.Supp. 161,190 (C.D. Calif. 1977). Section 10(b) and rule 10b-5 can hardly be categorized as mere "administrative devices."

*4 The scienter requirements for Section 10(b) and 18 provide the starting point for this court's analysis of the problem. Section 18 does require scienter to be proved in the normal case, although unlike Section 10(b) the burden is upon the defendant to prove a lack of scienter. The Supreme Court, however, apparently places little importance on the placement of the burden of proof in resolving any conflict between Sections 18 and 10(b), as evidenced by the above-quoted footnote in *Ernst & Ernst, see also L. Loss*, III *Securities Regulation* 1751-52 (2d ed. 1961). Apart from the burden of proof, the scienter requirement for the causes of action under the two sections are essentially the same. Therefore, the analysis previously made with respect to Sections 11 and 12 of the 1933 Act is inapplicable in determining the proper reconciliation between Sections 10(b) and 18 of the 1934 Act. As a second point, the burden of proving reliance on the part of the plaintiff is at least as difficult under Section 18 as it is under Section 10(b). Section 18 requires actual "eyeball" reliance upon the filed document in order to state a cause of action, and constructive reliance is insufficient, *see* Heit v. Weitzen, 402 F.2d 909 (2d Cir. 1968); *Jacobson v. Peat, Marwick, Mitchell & Co.*, (1977-78 Transfer Binder) FED. SEC. L. REP. (CCH) P 96,169 (S.D.N.Y. 1977); *Falkenburg v. Baldwin*, (1977-78 Transfer Binder) FED. SEC. L. REP. (CCH) P 96,086 (S.D.N.Y. 1977); *Gross v. Diversified Mortgage Investors*, 438 F.Supp. 190 (S.D.N.Y. 1977). *Compare Rifkin v. Crow*, 574 F.2d 256 (5th Cir. 1978) (discussing reliance for 10(b) private action). Nor does the element of causation appear to be any less stringent under Section 18 than under Section 10(b), *see* *Rich v. Touche Ross & Co.*, 415 F.Supp. 95, 103 (S.D.N.Y. 1976). Finally, both sections have similar standards of "materiality." The conclusion reached is that in order to maintain a cause of action under Section 18, the plaintiff's task is no less difficult than proving a similar action under Section 10(b).

Having concluded that the standards of proof are analogous under both sections, this court believes

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that the plaintiff should be required to proceed under Section 18 in order to recover for any alleged misstatements or omissions in the "reports filed with the Securities and Exchange Commission." The plaintiff should not be allowed to avoid the procedural requirements of Section 18 when no greater obligation is imposed upon him by the implied action of Section 10(b). While deference should be given to the remedial purposes of the Securities Acts, the express liability provisions of the same Acts should not be obviated by the breadth of Section 10(b), *see Cox, supra*, at 595. It is difficult to imagine any situation where the plaintiff, if given the choice, would proceed under Section 18, as opposed to Section 10(b), to recover for misrepresentations and material omissions contained in documents required to be filed under the 1934 Act.[FN2]

FN2 An argument can be made that the 10(b) action should be sustained on the basis that the alleged wrongful Section 18 conduct is merely a part of a larger "scheme" or "device" on the part of the defendant. *See Miller v. Bargain City, U.S.A., Inc.*, 224 F.Supp. 33, 36-37 (E.D. Penn. 1964). Although this view may have some support, its practical effect would be to erase Section 18 from the statute since it is highly improbable that any complaint would ever allege conduct violating solely Section 18. Moreover, this rationale merely begs the question of determining the proper interrelation of the various sections of the Securities Acts and their respective procedural requirements.

***5** The more difficult question presented is determining the breadth and scope of Section 18. Defendants have contended that Section 18 covers the annual report of 1973 since that report contains "statements" which are also found in documents filed pursuant to the 1934 Act. Similar arguments have been made concerning the quarterly reports and press releases allegedly issued by the defendants. This court is unconvinced that Section 18 should be extended to cover these unfiled documents, especially in light of a number of decisions which have held that reliance on the actual, filed document is required under that section, *see* *Heit v. Weitzen*, 402 F.2d 909 (2d Cir. 1968); *In Re Falstaff Brewing Corp. Antitrust Litigation*, 441 F.Supp. 62 (E.D.Mo. 1977); *Gross v. Diversified Mortgage Investors*, 438 F.Supp. 190 (S.D.N.Y. 1977); *Rich v. Touche Ross & Co.*, 415 F. Supp. 95 (S.D.N.Y. 1966).[FN3] The coverage of Section 18 should be no broader than indicated by the plain meaning of its language, *Hoover v. Allen*, 241 F.Supp. 213 (S.D.N.Y. 1965). Even conceding some logic in defendants' argument, a suit under Section 10(b) would not necessarily be barred. Some disruption to the regulatory scheme is necessarily inherent whenever a cause of action is implied, *see* Cox *supra* at 594. The main concern, as the opinion in *Ernst & Ernst* directs, is to avoid the nullification of Section 18, not to avoid all potential conflict with Section 10(b) entirely.

FN3 Nor does this Court believe that *Kulchok v. Government Employees Insurance Co.*, supra, effectively decided this issue as contended by defendants. In his treatise, Professor Bromberg in discussing Judge Hart's opinion in *Kulchok* states: "He (Judge Hart) does not explore the effect of dissemination of information to shareholders and to the investment community as distinct from filing it with the SEC." A. Bromberg, supra, Section 2.4, at 384.5 (Supp. 1977).

With respect to the quarterly reports, Defendants argue that SEC Rule 15d-13(e) exempts these reports from all civil liability. This rule's language is as follows:

Notwithstanding the foregoing provisions of this section, the financial information required by Part 1 of Form 10-Q shall not be deemed to be "filed" for the purpose of section 18 of the Act or otherwise subject to the liabilities of that section of the Act but shall be subject to all other provisions of the Act.

Defendants' contention is that the use of the word "Act" as opposed to the word "Rules," indicates that the SEC did not intend for the imposition of civil liability under Section 10(b) and rule 10b-5 to be permitted. This court cannot accept this narrow view of the word "Act," especially in light of the fact that Section 10(b) is most assuredly a part of the 1934 Act. *See also* *SEC v. Keller Industries, Inc.*, 342 F.Supp. 654, 657 n.5(S.D.N.Y. 1972) (wherein the court stated that an interim quarterly report circulated to the public can be actionable, if it is materially misleading).

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*6 Accordingly, this court holds that with respect to plaintiff's claim for alleged misstatements and material omissions contained in reports filed with the SEC, the cause of action must be brought under Section 18 rather than Section 10(b). The court dismisses this cause of action insofar as allegations under Section 10(b) are made on the basis of those filed reports. The plaintiff may, however, replead his action under Section 18 for any misstatements or omissions contained in those reports so long as he affirmatively pleads compliance with the applicable statute of limitations. With respect to the allegations concerning the annual report for the year 1973, the quarterly reports, and press releases, the defendants' motion to dismiss is denied and plaintiff may proceed under Section 10(b) for claims based upon those documents. The court again does not express any opinion, at this time, concerning plaintiff's compliance with the limitations period for the Section 10(b) action based on the latter documents.

Defendants' Motion to Dismiss Based on Fed. R. Civ. P. 9(b)

Defendants have also contended that plaintiff's complaint is deficient for failure to plead the fraud allegations with the requisite particularity, Fed. R. Civ. P.9(b). The plaintiff's substantive allegations break down into roughly the following format: (1) the numerous defendants are listed and identified; (2) the documents upon which this action is primarily based are designated; 1and (3) the purported fifty-four material misrepresentations and omissions are stated. Apparently, the transactions which give rise to this lawsuit occurred over a number of years.

The law is now well-settled that rule 9(b) applies to private actions for securities fraud, due in most part to the scienter requirement of *Ernst & Ernst, see* Comment, *Pleading a Securities Cause of Action Under Rule 9(b)*, 22 Vill. L. Rev. 1226, 1230 (1977). Mere conclusory allegations of fraud are not sufficient, *see, e.g.,* *Schlick v. Penn-Dixie Cement Corp.* 507 F.2d 374, 378 (2d Cir.), *cert. denied*, 421 U.S. 976 (1974); *Shemtob v. Shearson, Hammill & Co.*, 448 F.2d 442, 444 (2d Cir. 1971); *Clinton Hudson & Sons v. Lehigh Valley Cooperative Farms, Inc.*, 73 F.R.D. 420, 424 (E.D. Penn. 1977). A plaintiff is required to identify the persons involved in and the circumstances constituting the fraud, such as the time, place, and contents of the alleged fraudulent scheme or misrepresentation, *see* *Clinton Hudson & Sons v. Lehigh Valley Cooperative Farms, Inc.*, 73 F.R.D. at 424; *see also* 2A J. Moore, Federal Practice, P 9.03, at 1925-38 (2d ed. 1975); Comment, *supra*, at 1727 and cases cited therein. Applying these general principles to plaintiff's pleading in this case, the court finds that it fails to comply with rule 9(b).

The major shortcoming from which this complaint suffers is a lack of correlation. The plaintiff has broadly pleaded fifty-four alleged omissions and misrepresentations in a variety of documents, without any specific reference to any defendant or any date or any connection between any specific allegation of misrepresentation or omission with any specific document or any other circumstances surrounding the alleged omission or misrepresentation. In order to meet the requisites of rule 9(b), plaintiff must identify what misrepresentations or omissions are contained in each specific document, *see Ross v. A. H. Robbins Co., Inc.*, (Current) FED. SEC. L. REP. (CCH) P 96,388 (S.D.N.Y. 1978) (Investor's complaint was deficient because it failed to state which particular reports and press releases contained allegedly material omissions). More importantly, the pleading should designate the specific defendants who are responsible for each individual document or the nature of their participation in the alleged scheme so that relationship can be precisely ascertained, *Berman v. Richford Industries, Inc.*, (Current) FED. SEC. L. REP. (CCH) P 96,518 (S.D.N.Y. 1978); *Ross v. A. H. Robbins Co., Inc., supra*. If the pleading sufficiently identified the role of each defendant with regard to each document, then those defendants would be able to ascertain the extent of their potential liability. This identification of the roles played by the various defendants in the alleged fraudulent scheme is of particular importance to the defendant accountants, who may or may not be legally responsible for certain documents, *see Gross v. Diversified Mortgage Investors*, (1977-78 Transfer Binder) FED. SEC. L. REP. (CCH) P 96,170 (S.D.N.Y. 1977).

*7 As a final matter, the complaint also fails to properly identify the different dates upon which the documents were issued. From a reading of the complaint, this court and the defendants should be able to ascertain the relevant time frame within which the misrepresentations or omissions were made. (Apart from the prospectuses and the 1973 annual report,

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plaintiff has not dated such misrepresentations or omissions.) The proper time designation is again of importance, especially in light of the allegations that certain disclosures were not made in "timely manner" and further allegations regarding certain "inherent risks" in a number of transactions, *see Denny v. Barber* (Current) FED. SEC. L. REP. P 96,438 (2d Cir. 1978).

In short, plaintiff's complaint should allege facts which indicate what misrepresentations or omissions are contained in which documents, the relevant dates of those misrepresentations or omissions, and the defendants responsible for each of the documents. *See* Robertson v. National Basketball Ass'n., 67 F.R.D. 691 (S.D.N.J. 1975). The court recognizes the inherent difficulties in making such allegations without the aid of discovery and in light of the fact that many of the allegations relate to omissions, *see* Comment, *supra*, at 1235. In view, however, of the numerous defendants named, the myriad of alleged misrepresentations and omissions, and the length of time involved, the present pleadings lack sufficient particularity. The plaintiff will be afforded the opportunity to replead his cause of action in compliance with this court's opinion.

Order

Accordingly, it is hereby ORDERED that the plaintiff's complaint insofar as it alleges an implied action under Section 10(b) of the 1934 Act for material misrepresentations and omissions contained in reports filed with the Securities and Exchange Commission be dismissed. Plaintiff may replead such allegations under Section 18 of the 1934 Act within 30 days from the file date of this Order. If plaintiff chooses to replead under Section 18, he must show affirmative compliance with the relevant statute of limitations.

It is further ORDERED that the plaintiff's complaint will be dismissed 30 days from the file date hereof unless he repleads the fraud allegations of his complaint with sufficient particularity in accordance with the terms of this opinion.

Pearlstein v. Justice Mortg. Investors
Not Reported in F.Supp., 1978 WL 1143 (N.D.Tex.), Fed. Sec. L. Rep. P 96,760

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H Only the Westlaw citation is currently available.
United States District Court, E.D. Louisiana.
UNITED STATES OF AMERICA ex rel Mary Jane Stewart, et al
v.
THE LOUISIANA CLINIC
No. Civ.A. 99-1767.

May 28, 2002.

ORDER AND REASONS

ENGELHARDT, J.
*1 Before the court are the following motions: (1) Motion to Dismiss Second Amended and Restated Complaint, filed by The Louisiana Clinic, Inc. (the "Clinic"), Dr. Stewart Phillips, Dr. Bernard Manale, Dr. John O'Keefe, Dr. Robert Bernauer, Dr. Ida Fattel, Dr. Stephen Flood, and Dr. John Watermeier; (2) Second Motion to Dismiss filed on behalf of Dr. Susan McSherry; (3) Motion for Reconsideration of Defendant Dr. Stephen Flood's Motion to Dismiss under Rule 12(b)(1); and (4) Motion to Reconsider, filed by Dr. Ida Fattel. For the reasons that follow, the motions to dismiss the Second and Amended and Restated Complaint are GRANTED IN PART and DENIED IN PART. Both motions for reconsideration are DENIED.

I. *BACKGROUND*

On June 19, 1999, relators Mary Jane Stewart, Jr. and Margaret Catherine McGinty brought this *qui tam* action seeking damages on behalf of the United States, alleging that the defendants had violated the False Claims Act ("FCA") by making false claims for Medicaid and Medicare reimbursements.FN1 *See* 31 U.S.C. §§ 3729(a), 3730(b). In previous motion practice, the defendants each moved under Rule 12(b)(6) to dismiss the six-count complaint against them on grounds that the relators had failed to plead with the particularity required by Rule 9(b). In Order and Reasons dated February 22, 2002, the Court found that Count Two passed muster as to Dr. Flood and that Count Three was sufficient as to Dr. Fattel, but granted the Rule 9(b) motions in all other respects, allowing relators twenty days to cure the deficiencies by amendment. In the same Order and Reasons, the Court denied a motion by Dr. Flood to dismiss Count Two for lack of subject matter jurisdiction.

FN1. Relators added Dr. Watermeier as a defendant in an amending complaint dated July 7, 1999.

Relators filed a Second Amended and Restated Complaint on March 14, 2002 (the "Second Amended Complaint"). Defendants now argue that the Second Complaint cures none of the deficiencies laid out by the Court in its previous order and, thus, should be dismissed.

II. *LAW AND ANALYSIS*

A. *Rule 9(b) Motions to Dismiss the Second Amended Complaint:*

"Claims brought under the FCA must comply with Rule 9(b)," which requires that the circumstances constituting fraud be pled with particularity. *See United States ex. rel. Thompson v. Columbia/HCA Healthcare Corp.,* 125 F.3d 899, 903 (5th Cir.1997)."To plead fraud with particularity a plaintiff must include the 'time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby." ' *United States ex rel. Russell v. Epic Healthcare Mgmt. Group,* 193 F.3d 304, 308 (quoting *Williams v. WMX Tech., Inc.,* 112 F.3d 175, 177 (5th Cir.1997)) (internal quotations omitted). Where the facts are "peculiarly within the perpetrator's knowledge," the Fifth Circuit allows fraud to be "pled on information and belief," but has cautioned that "this exception 'must not be mistaken for license to base claims of fraud on speculation and conclusory allegations." ' *Thompson,* 125 F.3d at 903 (quoting *Tuchman v. DSC Communications Corp.,* 14 F.3d 1061, 1068 (5th Cir.1994), *cert. denied,* 522 U.S. 966 (1997)). "[E]ven where allegations are based on information and belief, the complaint must set forth a factual basis for such belief." *Id.* at 903.The Fifth Circuit has explicitly declined to relax Rule 9(b) further, finding that such a court-crafted exception would be contrary to both Rule 9(b) and

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the FCA. *See* Russell, 193 F.3d at 308-09 (finding no justification to relax Rule 9(b) for FCA *qui tam* relators, particularly given that the FCA grants a private right of action only to those citizens who "have independently obtained knowledge of fraud").

1. *Count One: "Up-Coding"*

***2** In the Second Amended Complaint, as in the original Complaint, relators allege in Count One that the defendants violated the FCA by "up-coding" (*i.e.,* submitting a code that receives a higher level of reimbursement than the appropriate code for the level of service actually provided). In chart form, relators have provided examples (including patients, locations and dates) of "up-coding" involving Drs. Phillips, Bernauer, Manale, O'Keefe, and Watermeier. In its previous ruling, this Court found these allegations to be deficient under Rule 9(b) because relators had failed to specify how or why the codes submitted were false. *See* *Williams,* 112 F.3d at 175 (articulating fraud with particularity "requires a plaintiff to ... explain why the statements were fraudulent").

In Count One of their Second Amended Complaint, relators have added to their charts a column entitled "Analysis," in which the relators allege in summary form why the submitted codes were inappropriate. For example, relators allege that on March 12, 1998, Dr. Phillips submitted Code 99213 instead of 99212 even though the services provided entailed "[n]o expanded problem focused history or expanded problem focused examination, and [the] medical decision making [was] straight forward." 2d Am. Compl. at ¶ 44(b). Relators provide similar statements for the examples of alleged "up-coding" by Drs. Manale, O'Keefe, and Watermeier. Defendants argue that these statements are insufficient because they are just "one person's opinion," produced by an individual other than the physician involved. *See* Defendant's Memo (Rec.Doc.54) at pp. 11-12.The Court disagrees that this renders the allegations infirm. Under the defendants' reasoning, no one other than the offending physician himself could state a claim for knowingly submitting false CPT codes, certainly not without attaching expert reports to his complaint. Nothing in Rule 9 or the FCA requires such a result. Although the relators' explanations of falsity contain little factual detail, they do explain the basic manner in which the codes submitted by Drs. Phillips, Manale, O'Keefe, and Watermeier are alleged to be false.[FN2] At the pleading stage, the Court finds this to be sufficient as to these four defendants.[FN3]

FN2. Relators's allegations still fall short with regard to Dr. Bernauer. The alleged "problem" with his bills, according to relators, is that his "[d]ocumentation does not support [the] level charged."However, they do not contend that the code submitted was false or even that a different code should have been used. The alleged shortcomings in Dr. Bernauer's record-keeping simply do not state a claim actionable under the FCA.

FN3. In so finding, this Court assumes that relators already have evidentiary support for their allegations and that relators' counsel has determined this to be so after a reasonable inquiry. Thus, relators should not view this ruling as carte blanche to conduct a fishing expedition. Although allowing relators to proceed with this "bare minimum" pleading, this Court will remain guided through discovery by the principles behind Rule 9(b).

However, the allegations of Count One are not sufficient with respect to the remaining defendants. One of the purposes of Rule 9(b) is to "guard[ ] against guilt by association." *United States ex rel. Clausen v. Laboratory Corp. of America,* 290 F.3d 1301, 2002 WL 939913 (11th Cir. May 9, 2002) (internal quotations omitted). Thus, allegations that "lump all defendants together, failing to segregate the alleged wrongdoing of one from those of another," do not satisfy the rule. *In re Urcarco Securities Litigation,* 148 F.R.D. 561, 569 (N.D.Tex.1993), *aff'd,* 27 F.3d 1097 (5th Cir.1994); *see also* *Unimobil 84, Inc. v. Spurney,* 797 F.2d 214, 217 (5th Cir.1986) ("[G]eneral allegations, which do not state with particularity what representations each defendant made, do not meet [Rule 9(b)'s] requirement."). In its previous ruling, this Court found Count One to be deficient as to the Clinic and Drs. Bernauer, McSherry, Fattel, and Flood because it failed to apprise them of any up-coding in which they are alleged to have participated. In their Second Amended Complaint, relators have added nothing to cure this deficiency. Instead, relators simply allege "[u]pon information and belief," that "each and every defendant knowingly and intentionally conspired to commit each of the

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acts referenced above." 2d Am. Compl. at ¶ 81. Such a conclusory allegation does not satisfy Rule 9(b) or even Rule 8. "[E]ven where allegations are based on information and belief, the complaint must set forth a factual basis for such belief." Thompson, 125 F.3d at 903. Nothing in relators' complaint provides a factual basis for their supposition of a clinic-wide conspiracy to submit false claims, through "up-coding" or otherwise. Accordingly, the Court finds that the allegations of Count One continue to be deficient as to the Clinic and Drs. McSherry, Fattel, Flood, and Bernauer.

2. *Count Two: Geographic "Zoning"*

***3** In the Second Amended Complaint, as in the original Complaint, relators allege in Count Two that the defendants violated the FCA by "zoning" (*i.e.,* submitting bills that described services performed outside New Orleans as having been performed in New Orleans, resulting in a higher level of reimbursement). Relators provide three examples, all involving Dr. Flood. In its previous ruling, this Court found the allegations of Count Two to be sufficient as to Dr. Flood, but deficient as to the Clinic and Drs. Phillips, Manale, O'Keefe, Bernauer, McSherry, Fattel, and Watermeier, for whom no examples of "zoning" were provided. *See* Urcarco, 148 F.R.D. at 569 (allegations which "lump all defendants together, failing to segregate the alleged wrongdoing of one from those of another," do not satisfy Rule 9(b)); Spurney, 797 F.2d at 217. In their Second Amended Complaint, relators have added no allegations with regard to Count Two, other than the general conspiracy allegation discussed above. Nothing in relators' complaint provides a factual basis for their supposition of a clinic-wide conspiracy to submit false claims, through "zoning" or otherwise. Accordingly, the Court finds that the allegations of Count Two continue to be deficient as to the Clinic and Drs. Phillips, Manale, O'Keefe, Bernauer, McSherry, Fattel, and Watermeier.

3. *Count Three: Waiver of Co-Payments*

In the Second Amended Complaint, as in the original Complaint, relators allege in Count Three that the defendants violated the FCA through "buying patients" (*i.e.,* designating patients as "insurance only" and excusing them, without any proof of financial hardship, from making the required $100 co-payment for services). The one example provided involves Dr. Fattel. In its previous ruling, this Court found the allegations of Count Two to be sufficient as to Dr. Fattel, but deficient as to the Clinic and Drs. Philips, Manale, O'Keefe, Bernauer, McSherry, Flood, and Watermeier, for whom no specific conduct is alleged and for whom no examples of "patient buying" were provided. In their Second Amended Complaint, relators have added no allegations with regard to Count Three, other than the general conspiracy allegation discussed above. Nothing in relators' complaint provides a factual basis for their supposition of a clinic-wide conspiracy to submit false claims, through "patient buying" or otherwise. Accordingly, the Court finds that the allegations of Count Three continue to be deficient as to the Clinic and Drs. Philips, Manale, O'Keefe, Bernauer, McSherry, Flood, and Watermeier.

4. *Count Four: Billing for Unnecessary Services*

In their Second Amended Complaint, as in their original Complaint, relators allege in Count Four that defendants violated the FCA by submitting bills for unnecessary services (*e.g.,* submitting a bill for evaluation or management services on the same visit that a procedure was performed, when no independent evaluation or management services would have been necessary). They have provided two examples, both in chart form and both involving Dr. Manale. In its previous ruling, this Court found these allegations deficient as to Dr. Manale because they failed to specify why the billed-for service was unnecessary such that billing for it amounted to a false or fraudulent claim actionable under the FCA. In their Second Amended Complaint, relators have added to their chart a column entitled "Analysis," in which the relators state that the office visits on October 28 and 29, 1998 did not amount to separately identifiable evaluation and management services above and beyond the other services provided. *See* 2d Am. Compl. at ¶¶ 63, 67; Orig. Compl. at ¶ 44. As with the charts in Count One, this chart is cryptic and short on detail. Nevertheless, the Court finds that Count Four now satisfies the bare minimum requirements of Rules 8(a) and 9(b) as to Dr. Manale. If discovery proves, as relators allege, that Dr. Manale knew his office visits did not qualify as separately identifiable services and yet billed for them as such, then he may be liable under the FCA.

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***4** As to the Clinic and Drs. Philips, O'Keefe, Bernauer, McSherry, Flood, Fattel, and Watermeier, however, for whom no examples of billing for unnecessary services are provided, the Court finds that the allegations of Count Four remain deficient. Relators have added allegations that Dr. Watermeier used a system of canned comments to falsely represent the nature of services rendered and that the defendants, generally, used a particular modifier when their documentation did not establish that a visit was a significant, separately identifiable service. Yet, without alleging a single false claim by any one of these defendants as a result of such methods, such allegations fail to meet "even a bare-bones Rule 9(b) test." United States ex rel. Walsh v. Eastman Kodak Co., 98 F.Supp.2d 141, 147 (D.Mass.2000) (Rule 9(b) not satisfied by allegations "set[ting] out a methodology by which the vendors might have produced false invoices, ... [w]ithout citing a single false claim arising from an allegedly false invoice"); *see also* United States ex rel Schwartz v. Coastal Healthcare Group, Inc., 2000 WL 1595976 (10th Cir. Oct. 26, 2000) (Rule 9(b) not satisfied by allegations of "a general scheme or methodology by which defendants could have violated the False Claims Act," without identifying with particularity any claims for payment that were allegedly fraudulent). Allegations that Dr. Manale submitted such a claim does not suffice to state a claim against the other defendants. *See* Urcarco, 148 F.R.D. at 569 (allegations that "lump all defendants together" do not satisfy Rule 9(b)); Unimobil 84, Inc. v. Spurney, 797 F.2d 214, 217 (5th Cir.1986) ("[G]eneral allegations, which do not state with particularity what representations each defendant made, do not meet [Rule 9(b)'s] requirement.").

5. *Count Five: Billing for Services Performed by Medical Assistants*

In their Second Amended Complaint, as in their original Complaint, relators allege in Count Five that defendants violated the FCA by submitting bills under Dr. McSherry's provider number for services actually performed by medical assistants at times when Dr. McSherry was out of the office. In its previous ruling, this Court found these allegations to be insufficient as to Dr. McSherry because they failed to specify Dr. McSherry's role in the alleged fraud. In their Second Amended Complaint, relators have added sentences stating that relators personally observed this practice on other occasions and that Dr. McSherry, on returning to the office, dictated the procedure notes to read as though she herself had performed the procedure. Although relators do not allege that they personally observed such conduct with respect to the four claims specified in the complaint, the Court finds that the new allegation provides a factual basis for relators' assertions that is sufficient to pass scrutiny under Rules 9(b) and 12(b)(6).

With regard to Drs. Philips, Manale, O'Keefe, Bernauer, Fattel, Flood, and Watermeier, however, against whom not a single specific allegation has been made and for whom no examples are provided, the Court finds that the allegations Count Five remain deficient. Relators have added no allegations with respect to these defendants, other than their general conspiracy allegation. Nothing in relators' complaint provides a factual basis for their supposition of a clinic-wide conspiracy to submit false claims, through improperly billing for assistants' services or otherwise. Accordingly, the Court finds that the allegations of Count Two continue to be deficient as to the Clinic and Drs. Phillips, Manale, O'Keefe, Bernauer, McSherry, Fattel, and Watermeier.

6. *Count Six: Fabricating ICD-9 Codes*

***5** In their Second Amended Complaint, as in their original complaint, relators allege in Count Six that defendants violated the FCA through submitting bills with fabricated ICD-9 (diagnosis codes) for services that Medicaid and/or Medicare already had denied for "lack of medical necessity." In its previous ruling, this Court found the allegations of Count Six to be deficient because they provided no examples of ICD-9 fabrication and failed to specify any of the persons or facts involved in the alleged fraud. In their Second Amended Complaint, relators have added a single sentence, alleging that the defendants, generally, agreed before seeing a patient to allow non-physician staff to insert documentation supporting the medical necessity of certain procedures and maximize reimbursement. *See* 2d Am. Compl. at ¶ 78. This sentence, however, does nothing more than describe a method by which defendants might have submitted a false claim. Without a single false claim resulting from an ICD-9 fabrication, relators' Count Six allegations remain deficient. *See* Walsh, 98 F.Supp.2d at 147; *Schwartz*, 2000 WL 1595976 at *6.

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7. *Count Seven: Conspiracy*

Without describing any aspect of the "conspiracy," relators have attempted to rope in all defendants on every count simply by alleging "[u]pon information and belief" that "each and every defendant knowingly and intentionally conspired to commit each of the acts referenced above." 2d Am. Compl. at ¶ 81. Such "legal conclusions masquerading as factual conclusions" do not suffice to state a claim even under the liberal pleading requirements of Rule 8. *Vulcan Materials Co. v. City of Tehuacana,* 238 F.3d 382, 387 (5th Cir.2001) (quoting *Fernandez-Montes v. Allied Pilots Ass'n,* 987 F.2d 278, 284 (5th Cir.1993)). Certainly, they do not satisfy Rule 9(b). Relators' complaint contains no allegations to provide a factual basis for the "umbrella" under which all defendants allegedly stand, according to Count Seven.

8. *Further Leave to Amend:*

"Federal Rule of Civil Procedure 15(a) provides that leave to amend pleadings 'shall be freely given when justice so requires." ' *In re Southmark Corp.* 88 F.3d 311, 314 (5th Cir.), *cert. denied,* 519 U.S. 1057 (1997). However, leave to amend "is not automatic." *Id.* (internal quotations omitted). "In deciding whether to grant such leave, the court may consider such factors as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party, and futility of amendment." *Id.* at 314-15.This Court finds that the balance of equities in this case weigh against further leave to amend. In its previous ruling, this Court spelled out the deficiencies in relators' allegations. Yet, except as noted above, relators have been unable to assert allegations that would cure them. With the case pending nearly three years, relators have had more than sufficient time to muster their facts. For all of these reasons, the Court finds that the interest of justice do not warrant additional opportunities to satisfy Rule 9(b).

B. *Dr. Flood's Motion for Reconsideration:*

***6** Dr. Flood moves for reconsideration of this Court's previous ruling, in which the Court rejected Dr. Floods' argument that subject matter jurisdiction is lacking under 31 U.S.C. § 3730(e)(4)(A).[FN4] As explained in the previous ruling, "the jurisdictional inquiry under 31 U.S.C. § 3730(e)(4)(A) involves four questions: (1) whether the alleged 'public disclosure' contains allegations or transactions from one of the listed sources; (2) whether the alleged disclosure has been made 'public' within the meaning of the False Claims Act; (3) whether the relator's complaint is 'based upon' this 'public disclosure'; and, if so, (4) whether the relator qualifies as an 'original source' under section 3730(e)(4)(B)." *United States ex. rel. Fine v. MK-Ferguson Co.,* 99 F.3d 1538, 1544 (10th Cir.1996). If the court "answer[s] 'no' to any of the first three questions, its inquiry ends at that point and the qui tam action proceeds."*Id.*"The last inquiry, whether the relator is an original source, is necessary only if the answers to *each* of the first three questions is 'yes,' indicating the relator's complaint is based upon a specified public disclosure."*Id.*

FN4.Section 3730(e)(4)(A) provides that "[n]o court shall have jurisdiction over an action ... based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a ... congressional, administrative, or Governmental Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information."31 U.S.C. § 3730(e)(4)(A). An "original source" is "an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information."31 U.S.C. § 3730(e)(4)(B).

Dr. Flood argues that this Court lacks jurisdiction over Count Two because it is based upon statements by one Sylvia Dogget, a field representative of Blue Cross Blue Shield of Arkansas, who told employees of the Clinic during an informal office visit that they should use separate geographic codes for offices outside New Orleans. In its previous ruling, this Court found no basis for concluding that Ms. Dogget's informal visit constituted an "administrative investigation" or that her instruction to the Clinic staff constituted a "public disclosure" of the allegations in Count Two. Dr. Flood challenges these holdings, arguing that the facts warrant treating Ms. Dogget as an agent

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of the federal government, treating her informal office visit as an "administrative investigation," and treating her instruction to unnamed employees as a "public disclosure." Perhaps a set of facts exists that would justify treating a visit by a Blue Cross/Blue Shield representative as a governmental "administrative investigation" and her comments to clinic employees as a "public disclosure" of fraud allegations. Perhaps discovery will reveal that this is such a case. However, the facts before the Court at this juncture do not support such a conclusion.

C. *Dr. Fattel's Motion for Reconsideration:*

As noted earlier, this Court in its previous ruling found the allegations of Count Three (alleging that defendants violated the FCA by improperly waiving co-payments) to be sufficient as to Dr. Fattel. Dr. Fattel moves for reconsideration of this ruling, arguing that relators have failed to show that the patient in the example provided actually was not indigent and that the waiver was routine. The Court finds no basis to alter its earlier ruling. Relators allege that Dr. Fattel waived this patient's co-payment fifteen times without any attempt to determine financial hardship. Accepting these allegations as true, the Court finds that relators have satisfied the minimum requirements of Rule 9(b). Evidence is not required at this stage of the proceeding.

III. *CONCLUSION*

*7 Accordingly, for the foregoing reasons, IT IS ORDERED that:

(1) the Motion to Dismiss Second Amended and Restated Complaint, filed by The Louisiana Clinic, Inc. (the "Clinic"), Dr. Stewart Phillips, Dr. Bernard Manale, Dr. John O'Keefe, Dr. Robert Bernauer, Dr. Ida Fattel, Dr. Stephen Flood, and Dr. John Watermeier is DENIED IN PART, in that it is denied with respect to Count One as to Drs. Phillips, Manale, O'Keefe, and Watermeier, Count Two as to Dr. Flood, Count Three as to Dr. Fattel, Count Four as to Dr. Manale, and Count Five as to Dr. McSherry, and GRANTED IN PART, in that it is granted in all other respects, without prejudice to the United States;

(2) the Second Motion to Dismiss filed on behalf of Dr. Susan McSherry Pursuant to Rules 12(b)(6) and 9(b) is DENIED IN PART, in that it is denied with respect to Count Five, and GRANTED IN PART, in that it is granted in all other respects, without prejudice to the United States;

(3) the Motion for Reconsideration of Defendant Dr. Stephen Flood's Motion to Dismiss under Rule 12(b)(1) is DENIED; and

(4) the Motion to Reconsider, filed by Dr. Ida Fattel, is DENIED.

E.D.La.,2002.
U.S. ex rel. Stewart v. The Louisiana Clinic
Not Reported in F.Supp.2d, 2002 WL 1066745 (E.D.La.)

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HOnly 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 conference 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

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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-

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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 prepar-

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ing 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

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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

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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,

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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."

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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 investment 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]

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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 contract.

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 affida-

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vits 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

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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 real-estate 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 non-signatories 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 repeated 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
Not Reported in F.Supp.2d, 2007 WL 2791876 (N.D.Tex.)

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