FOR PUBLICATION

IN THE SUPERIOR COURT
OF THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS

BANK OF SAIPAN, **Plaintiff,** **vs.** **BERT DOUGLAS MONTGOMERY, et al.,** **Defendants.**	**CIVIL ACTION NO. 04-0088** **ORDER PARTIALLY GRANTING POOL'S MOTIONS TO DISMISS**

Defendants Ted Pool ("Pool") and Pool, Blakenship, Vincent & Pool ("PBVP"), (collectively, "the Pool Defendants") move to dismiss the Second Amended Complaint ("SAC") filed against them by Plaintiff, Bank of Saipan ("the Bank").

I. BACKGROUND

This case arises from a series of events that lead to the collapse of the Bank in early 2002. On April 30, 2002, in Civil Action 02-0268, this Court placed the Bank in the Receivership. The Receivership was still in effect when the Bank filed its original complaint on February 18, 2004. The Pool Defendants were served several months later. The Bank filed an amended complaint, which the Pool Defendants moved to dismiss under Rule 9(b) and Rule 12(b)(6). Prior to arguments on the motion, the Court granted the Bank's motion to file the SAC. The Pool Defendants now file a motion to dismiss the SAC on the same grounds as their previous motion, and further argue that Plaintiff lacks capacity for want of this Court's authorization to file the SAC.

In opposition to this motion, the Bank has submitted evidence outside of the pleadings. When considering the sufficiency of the complaint, the court may take judicial notice of facts

outside the pleadings. *Cepeda v. Hefner*, Civ. Nos. 88-0682 & 88-0705 (Supr. Ct. Nov. 7, 1990). The Bank's evidence includes, *inter alias*, the following:

1. Documents involving the transactions of Defendants Doug Montgomery and DuSean Berkich on a variety of transactions. Pool apparently provided legal assistance to Montgomery on these transactions.

2. An October 3, 2001 letter from Pool to Montgomery regarding 4 CNMI § 6804(a)(2), which has to do with transactions between a CNMI bank and a person connected with the bank. The letter opines that Montgomery could obtain a loan from the Bank even "if the majority of the shares of the Bank are transferred to you [Montgomery]."

3. An October 8, 2001 letter from Montgomery to Defendant Aldan (the CEO and President of the Bank) and the Bank's Board of Directors endorsing Montgomery's fitness to purchase the Bank and become chairman of its Board of Directors.[1] The letter states that Pool is Montgomery's personal attorney; that Pool has known Montgomery very well since childhood, that Montgomery has held high office in several corporations, that Montgomery always kept the law both in his personal and business life, and that Montgomery has no convictions other than minor traffic violations. The letter recommends Montgomery as a man of principle, honor, integrity and considerable business acumen.

Plaintiff's opposition memorandum compares this letter to Pool's affidavit in support of the Pool Defendants' prior Motion to Dismiss, which states that Pool and Montgomery have had very little social contact since graduation from college; and that Pool occasionally performs some legal or legally related service for Montgomery.

[1] Counsel for the Bank explained at the hearing that this letter was the basis for the allegation in Paragraph 26 regarding "the fraudulent misrepresentations of . . . Pool, PBVP . . . that Montgomery was a reputable and wealthy businessman."

4. A December 11, 2001 email from Berkich informing Pool that Montgomery and Berkich were facing difficulty repaying investors of UFX the funds they used ($2.8 million) to purchase the majority of the Bank's shares.

5. A January 2, 2002 memo to Pool from Berkich and Montgomery emphasizing their urgent need to pay back UFX investors, and referring to proposed deals with D.A. Davidson & Co. and Alco Oil and Gas to obtain funding. The memo also refers to the delay in the finalization of Montgomery's purchase of 61% of the Bank's shares, as the CNMI Banking Commissioner had not yet approved the purchase.

6. A copy of Montgomery's criminal history report from the state of Oklahoma, obtained by Pool and sent to Aldan on January 8, 2002. Pool knew that the criminal history report was to be submitted to the CNMI Department of Commerce Director of Banking so that the Banking Commissioner would approve Montgomery's purchase of the Bank. Based in part on that report, the Banking Commissioner approved the purchase not later than January 11, 2002. Pool did not inform anyone at the Bank or within CNMI's regulatory agencies of Montgomery's and Berkich's crisis over repaying the UFX investors.

7. A February 15, 2002 letter from Pool to Aldan requesting certified true copies of the Banking Commissioner's letter approving Montgomery's purchase and Montgomery's stock certificate.

8. A March 5, 2002 letter that Bank counsel had prepared for Montgomery and faxed to Pool on March 7, 2002. The letter indicates that although the Bank had not yet approved Montgomery's purchase of Bank shares, Montgomery had already taken various actions, including forming with Berkich an International Affairs Department, through which Montgomery processed $5 million in loans to Defendant Wilson, $500,000 to Aldan, and $260,000 to Montgomery. These

activities were done with Aldan's knowledge but without the approval of the Bank's Board of Directors. The letter asked Montgomery to agree to indemnify the Bank in the event of liability arising from these loans.

9. A March 13, 2002 memorandum from Berkich to Pool and Bruce Berline (counsel for Montgomery in federal court) indicating that the loans to Aldan and Montgomery were the subject of criminal investigation.

10. Emails suggesting that Pool continued to represent Defendants Montgomery and Berkich after March 13, 2002; stating that the Bank ultimately did not finalize Montgomery's purchase, and that Aldan was fired.

At the hearing, counsel for Pool noted that although the documents were numbered and stamped with Pool's name, they were not obtained pursuant to a discovery request from the Pool Defendants. It is unclear from whom these documents were procured. Thus, while the Court views the documents in the light most favorable to the Bank (as the non-movant), it does not view the documents as admissions on the part of the Pool Defendants.

II. LEGAL STANDARDS

A. Substantive Pleading Requirements of Rule 12(b)(6)

Under Rule 12(b)(6), a complaint may be dismissed if it fails to state a claim upon which relief can be granted. Com. R. Civ. Pro. 12(b)(6). The complaint must contain either direct allegations on every material point necessary to sustain a recovery on any legal theory, even though it may not be the theory suggested or intended by the pleader, or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial. *In re Adoption of Magofna*, 1 N.M.I. 449, 454 (1990). The court evaluates the complaint in the light

most favorable to the non-movant, and takes its allegations as true. *Cepeda v. Hefner*, 3 N.M.I. 121, 126 (1992).

B. Particularity Requirements of Rule 9(b)

Seven of the SAC's eleven claims relate to fraud on the part of the Pool Defendants: Fraudulent Misrepresentation, Concealment, Fraudulent Non-Disclosure, Negligent Misrepresentation, Innocent Misrepresentation, Damages Arising from Conspiracy to Commit Fraud, and Aiding and Abetting A Breach of Fiduciary Duty (based on Aldan's fraud of the Bank). Because Rule 9(b) applies to claims that sound in fraud or are grounded in fraud,[2] each of these claims triggers the requirements of Rule 9(b).

In all averments of fraud, the circumstances constituting fraud must be stated with particularity. Com. R. Civ. Pro. 9(b). Malice, intent, knowledge, and other conditions of the mind of a person may be averred generally. *Id.* The complaint must state the "who, what, when, where, and how" of the alleged fraud. *Vess v. Ciba-Geigy Corp., USA*, 317 F.3d 1097, 1106 (9th Cir. 2003). In cases of multiple defendants, allegations of fraud "must identify the time, place, and manner of each fraud plus the role of each defendant in each scheme." *Schreiber Distrib. Co. v. Serv-Well Furniture Co*., 806 F.2d 1393, 1401 (9th Cir. 1986).

[2] *See, e.g., In re Daou Sys.*, 411 F.3d 1006, 1027 (9th Cir. 2005) (where plaintiff alleges a unified course of fraudulent conduct, the pleading of that claim as a whole must satisfy the particularity requirement of Rule 9(b)); *Vess v. CIBA-Geigy Corp*, 317 F.3d 1097, 1103-05 (9th Cir. 2003) (applying Rule 9(b) to a conspiracy claim as it was grounded in fraud); *Robison v. Caster*, 356 F.2d 924, 925 (7th Cir. 1966) (if a breach of fiduciary duty claim is based on a "scheme to defraud," the claim must be pleaded with particularity); *Hayduk v. Lanna*, 775 F.2d 441, 443 (1st Cir. 1985) (applying Rule 9(b) to fraud and conspiracy claims); *Segal v. Gordon*, 467 F.2d 602, 607-08 (2d Cir. 1972) (same); *Souran v. Travelers Ins. Co*., 982 F.2d 1497 (11th Cir.1993) (an action for negligent misrepresentation sounds in fraud rather than negligence); *Glen Holly Entm't, Inc. v. Tektronix, Inc*., 100 F.Supp.2d 1086, 1093 (C.D.Cal.1999) (claims for negligent misrepresentation must meet the heightened pleading requirement of Rule 9(b)).

III. ANALYSIS

A. Capacity/Authority

The Pool Defendants note that if a lawsuit is to be filed on behalf of an entity in receivership, it must be brought by the receiver[3] with the authority of the receivership court.[4] The SAC contains no allegation of participation by the Court appointed Receiver, or leave of this Court, which is the receivership Court, to file the instant action. The Bank responds that the Court's May 10, 2002 Clarification of Order Granting Petition for Appointment of Receiver in the receivership action authorizes the Receiver to file actions, suits or other proceedings on behalf of the Bank to recover the assets of the Bank, for the collection of any amounts due and owing the Bank, or to enforce any rights in law or equity that the Bank may have. Further, the Bank submits an affidavit suggesting that the then-Receiver Antonio Muna authorized this lawsuit. Because the Bank is no longer in receivership, however, this issue is irrelevant. The Bank now has the capacity to sue in its own name, without the need for the Court's permission.

B. Statute of Limitations

The Pool Defendants argue that each of the claims against them is based in fraud and therefore sounds in tort. The Pool Defendants urge the Court to apply the two-year statute of limitations under 7 CMC, § 2503(d), which covers "Actions for injury to or for the death of one caused by the wrongful act or neglect of another, or a depositor against a bank for the payment of a forged or raised check, or a check which bears a forged or unauthorized endorsement."

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[3] *See, e.g.*, CLARK ON RECEIVERS, § 579, p. 945.

[4] *Federal Home Loan Mortg. Corp. v. Spark Tarrytown, Inc*., 829 F.Supp. 82 (S.D.N.Y. 1993) (Generally, a receiver may not sue or be sued without the express permission of the court that appointed him); *Davis v. Ladoga Creamery Co., by Talbut, Receiver*, 27 N.E. 494, 495 (Ind. 1891) ("a complaint filed by a receiver which fails to allege that leave of the court to institute and prosecute the action has been obtained is fatally defective").

Paragraphs 21, 29, 30, 31, 32, 34, and 35 contain the time frame of the alleged actions involving the Pool Defendants. All of these paragraphs allege activities or actions in regard to the Pool Defendants that occurred earlier than February 17, 2002. Accordingly, the Pool Defendants argue that when Plaintiffs filed their original complaint on February 18, 2004, the two-year statute of limitations had already expired. The Bank argues that the suit (or at least the claim for breach of fiduciary duty) falls under the six-year statute of limitations described in 7 CMC § 2505.

The Bank relies on *Bank of Saipan v. Carlsmith Ball Wichman Case & Ichiki*, 1999 MP 20, in which the Bank brought claims for fraud, malpractice, and breach of fiduciary duty. The CNMI Supreme Court decided that the six-year limit applied to claims for legal malpractice, and related claims of fraud-intentional misrepresentation, fraud-suppression of fact, negligent misrepresentation and breach of fiduciary duty. *See also EIE Int'l v. Shinsei Bank, Ltd.*, No. 01-0368 (N.M.I. Super. Ct. Apr. 22, 2003), "Order Denying Credit Suisse First Boston Ltd.'s Motion to Dismiss" at 6 (parties did not dispute the application of the six-year statute of limitations to claims of fraud, breach of fiduciary duty, attorney malpractice, and RICO).

The Pool Defendants rely on the later *Zhang v. Commonwealth*, 2001 MP 18, in which the CNMI Supreme Court applied the two-year limitation to a claim filed under Article 1, Section 3(c) of the CNMI Constitution (constitutional tort claim for rape). In ruling that the two-year limit applied, the Supreme Court stated, "In so holding, we announce no new principle of law." *Id.* at ¶29. In the same paragraph, however, the Supreme Court states that, "all tort claims, including those premised on Article I, § 3(c), must be commenced within the two-year limitations." Misrepresentation or fraud is normally classified as a tort. *See* REST (2D) TORTS, § 525; *Camacho v. Demapan*, No. 03-0502 (Super. Ct. Jan.10, 2006). All of the Bank's claims sound in fraud for purposes of Rule 9(b). Thus, the Court applies the two-year limit to all of the Bank's claims.

The Bank argues that it has met the two-year limit, as it did not discover the malfeasance until February 27, 2002. Title 7 CMC Section 2509 provides:

> If any person who is liable to any action shall fraudulently conceal the cause of action from the knowledge of the person entitled to bring it, the action may be commenced at any time within the time limits within this chapter . . . after the person who is entitled to bring the same shall discover or shall have had a reasonable opportunity to discover that he has such a cause of action, and not afterwards.

The Bank argues that because of Defendants' alleged concealment of their actions, the Bank did not discover the alleged wrongdoing until February 27, 2002. SAC at ¶ 53. Assuming for the purposes of this motion that the Bank's allegations regarding concealment are true, the Bank's February 18, 2004 complaint was timely filed within two years of acquiring the necessary knowledge.[5] Because the amended complaint clarifies the allegations in the original complaint rather than adding matters that defendants could not have anticipated, the amended complaint falls within the statute of limitations.[6]

The Bank further argues that it is entitled to an extension of the statute of limitations under 7 CMC § 2508, which provides that: "If at the time a cause of action accrues against any person, that person is out of the Commonwealth, the action may be commenced within the time limits in this chapter after the person comes into the Commonwealth." Pool's declaration in support of the Pool Defendants' prior motion to dismiss, which was executed on June 15, 2005, states that, "Neither I, nor any other person from PBVP has ever physically entered the CNMI." Pool Declaration, ¶ 6. The Bank argues that the Pool Defendants' absence means that the statute of limitations is tolled until the Pool defendants enter the Commonwealth. The Court disagrees, as such interpretation

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[5] The Court need not decide that Pool was the party who engaged in fraudulent concealment in order to apply 7 CMC § 2509, as the statute refers to any person who is the subject of the action.

[6] *See, e.g., Rubin v. Valicenti Advisory Services, Inc*., No. 03-6201, 2007 WL 196680 (W.D.N.Y. Jan. 26, 2007); *Thompson v. Brown & Williamson Tobacco Corp*., 207 S.W.3d 76 (Mo. App. W. Dist. 2006); *Quaak v. Dexia, S.A*., 445 F.Supp.2d 130 (D. Mass. 2006).

would effectively do away with the statute of limitations for any defendant residing outside of the Commonwealth. The Court agrees with Pool's interpretation that the statute was meant to prevent defendants from incurring liability within the Commonwealth and then staying outside of the commonwealth until the expiry of the time limit.

In summary, the Court finds that the two-year statute applies to all of the Bank's claims, but that the statute was tolled until the alleged date of discovery (February 18, 2004). Thus, the suit is timely.

C. Rule 12(b)(6) Analysis of Individual Fraud Claims

1. Fraudulent Misrepresentation v. Negligent Misrepresentation

Under the Second Restatement of Torts § 525, liability for fraudulent misrepresentation requires (1) an intentional misrepresentation of fact, opinion, intention or law[7] (2) for the purpose of inducing another to act or to refrain from action in reliance upon it[8] (3) that is justifiably relied on[9] and (4) causes damage.[10] Because this is an intentional tort, duty need not be alleged.[11] A misrepresentation can be any conduct that amounts to an assertion not in accordance with the truth. 526 at comment b. A representation is a non-actionable opinion if it is "a belief of the maker, without certainty, as to the existence of a fact" or is a "judgment as to quality, value, authenticity or other matters of judgment." RESTATEMENT (SECOND) OF TORTS § 538A.

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[7] *See* REST (2D) TORTS §§ 526-530.

[8] *See id.* at §§ 531-536

[9] *See id.* at §§ 537-545.

[10] *See id.* at § 549.

[11] *See U.S. v. Colton*, 231 F.3d 890, 898 (4th Cir. 2000) (citing Restatement (Second) of Torts § 550) (even in the absence of a fiduciary, statutory, or other independent legal duty to disclose material information, common-law fraud includes acts taken to conceal, create a false impression, mislead, or otherwise deceive in order to prevent other party from acquiring material information); *Purvis v. Hamwi*, 828 F. Supp. 1479, 1483 (D.Colo.1993) ("a finding of duty is necessary only for ... claims in negligence; ... claims for intentional torts require no traditional finding of duty ...."); *Almand v. Benton County, Ark.*, 145 B.R. 608, 617 (W.D.Ark.1992) (an attorney would be liable for negligence only to those to whom he owed a duty but would be liable for intentional misrepresentation or fraud to anyone).

The SAC alleges that the Pool Defendants assisted Montgomery, Nava, and Berkich in misrepresenting their intentions to promote the growth and prosperity of the Bank; misrepresenting both Montgomery's financial position and Montgomery's experience in the banking industry; and misrepresenting Montgomery's source of funds for the stock purchase transaction. SAC at ¶ 21. In reliance on these misrepresentations, the Bank purported to sell Montgomery common stock at $18/share. *Id.* at ¶ 26.

The only affirmative act of alleged misrepresentation on record, however, is Pool's recommendation letter. This is not described in the SAC but in attachments to Plaintiff's opposition memorandum. The letter misleadingly states that Pool is Montgomery's personal attorney; that Pool has known Montgomery very well since childhood, that Montgomery always kept the law both in his personal and business life, and that Montgomery has no convictions other than minor traffic violations. The letter recommends Montgomery as a man of principle, honor, integrity and considerable business acumen. The letter was written with the intent of convincing the Bank to allow Montgomery to purchase the majority of Bank shares. The Bank relied at least partly on the letter, and its transactions with Montgomery resulted in damage.

The Court finds that factual allegations regarding Montgomery's intent to defraud the Bank are lacking. There is no evidence that, at the time Pool wrote the letter (October 8, 2001), he had information regarding Montgomery's financial problems. (This evidence appears in the record in the form of a December 11, 2001 email from Berkich.) It is difficult to construe an intent to deceive from the mere allegation that Pool received benefits, *see* SAC at ¶ 53, given that there are no allegations as to what benefits he received.

Second, the Bank was not justified in ending its inquiry into Montgomery's fitness with the recommendation letter of Montgomery's lawyer. Recommendation letters often contain ego-

boosting statements that might be characterized as "puffing." There are not the same as building inspection permits or credit checks. Plaintiff has cited no cases in which similar actions were construed as material, intentional misrepresentations.

The Court considers whether the statements in the letter could be categorized as negligent misrepresentations. Section 552 of the Second Restatement of Torts (1977) imposes liability for negligent misrepresentation when an attorney "supplies false information for the guidance of others in their business transactions . . . if he fails to exercise reasonable care or competence in obtaining or communicating the information." In *Petrillo v. Bachenberg*, 655 A.2d 1354 (N.J. 1995), the court upheld a claim for negligent misrepresentation upon finding that a lawyer reasonably should have foreseen that third parties would rely on opinion letter issued in connection with securities offering.[12]

Based on Pool's affidavit, it does not appear that Pool knew Montgomery well enough at the time of the October 8, 2001 letter writing to provide such a strong endorsement. Thus, if Plaintiff's allegations are true, Pool's unfounded recommendation resulted in a negligent misrepresentation. Accordingly, there is a cause of action against the Pool Defendants for negligent misrepresentation but not fraudulent misrepresentation.

2. Concealment

Liability for concealment under § 550 requires (1) active concealment or other action (2) that intentionally prevents the other from acquiring material information (3) that he would have otherwise discovered, and (4) pecuniary loss.

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[12] *See First Nat. Bank of Durant v. Trans Terra Corp. Intern*., 142 F.3d 802 (5th Cir. 1998) (lender could assert cause of action against borrower's attorney, law firm, and partner for negligent misrepresentation); *McCamish, Martin, Brown & Loeffler v. F.E. Appling Interests*, 991 S.W.2d 787, 794 (Tex.1999) (nonclient may sue attorney for negligent misrepresentation, as defined in Restatement (Second) of Torts § 552, governing professional's liability for supplying false information, without regard to nonclient's lack of privity with attorney); *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver, N.A.*, 892 P.2d 230, 236 (Colo. 1995) ("by issuing legal opinion letters for the purpose of inducing [reliance], the attorneys may be liable ... for negligent misrepresentation").

Common law distinguishes between concealment and nondisclosure. The former is characterized by deceptive acts or contrivances intended to hide information, mislead, avoid suspicion, or prevent further inquiry into a material matter. *U.S. v. Colton*, 231 F.3d 890, 898 (4th Cir. 2000). The latter is characterized by mere silence. *Id.* Although silence as to a material fact without an independent disclosure duty usually does not give rise to an action for fraudulent nondisclosure, suppression of the truth with the intent to deceive does. *Id.* Thus, the Pool Defendants need not have a duty to disclose if they engaged in affirmative acts of concealment.

The SAC alleges that the Pool Defendants assisted Montgomery, Nava, and Berkich in concealing their plans to use the Bank's assets to pay for a portion of the acquisition cost and to exploit their control of the Bank by enriching themselves and others through fraudulent loans and other transactions. ¶ 21. The only affirmative acts specifically related to the Pool Defendants, however, are Pool's writing a recommendation letter and Pool's sending a clean criminal report.

The sending of a clean criminal report is insufficient to allow for an inference of concealment. The Bank should be sophisticated enough to know that a criminal report from one state is not indicative of all of a person's potential criminal activity, let alone a person's civil liability and financial instability.

The recommendation letter likewise does not meet the standard for concealment. Given that Pool wrote the letter prior to the correspondence from Montgomery regarding his financial problems, and months before the illicit loans occurred, the Bank's attachments to the SAC do not allow the Court to infer that the recommendation letter was intended to conceal Montgomery's true nature from the Bank. Any negligence associated with Pool's writing of the recommendation letter

does not rise to the level of intentional concealment.[13] The claim against the Pool Defendants for concealment is dismissed.

3. Nondisclosure

Liability for nondisclosure under Restatement §551 requires (1) failure to disclose to another (2) a fact that the tortfeasor knows may justifiably induce the other to act or refrain from acting in a business transaction (3) where tortfeasor is under a duty to the other to exercise reasonable care to disclose the matter in question. One party to a business transaction is under a duty to exercise reasonable care to disclose to the other before the transaction is consummated, when there is a fiduciary or other similar relation of trust and confidence between them; and the disclosure is necessary to prevent a partial or ambiguous statement of the facts or a previous representation from being misleading. *Id.*

Paragraphs 28 to 32 allege that Pool was aware of the Wilson transaction; that Montgomery owed money to the UFX investors that he could not pay back; and that Montgomery purported to cause the UFX Brokerage Account to be assigned and/or transferred to the Bank as part payment for Montgomery's purchase of stock shares. Paragraph 80 describes the Pool Defendants' and others'

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[13] *See cases finding concealment, e.g., U.S. v. Colton*, 231 F.3d 890 (4th Cir. 2000) (finding concealment where, in arranging for trust's purchase from Resolution Trust Corporation (RTC) of defaulted note they had guaranteed, defendant and his partner actively sought ways in which to hide or divert attention away from fact that partner was trust's grantor, to foster false impression that RTC was dealing with independent third-party investor, and otherwise to mislead RTC in negotiating sale of note at substantial discount); *Neumann v. Carlson Environmental, Inc.*, 429 F. Supp. 2d 946, 958 (N.D. Ill. 2006) (finding claim for fraudulent concealment where alleged that vendors failed to disclose their awareness of underground storage tanks, environmental contaminants, or hazardous substances on property for sale in order to influence purchase).

Compare with cases not finding concealment, e.g., Cliff v. Loudenslager, No. 01-002, 2006 WL 3186541 (Ohio. App. 2006) (concealment claim against sellers, seller's agent, and others dismissed with respect to sellers where sellers had no actual knowledge of the presence of termites in home when they completed disclosure form stating there was no termite problem; sellers learned of the termite problem after purchasers' agent hired an inspector who discovered the termites): *Newbro v. Freed*, 409 F. Supp. 2d 386 (S.D.N.Y. 2006) (victim of theft whose financial accountant transferred $1,120,000 from his account into other clients' accounts to cover shortfall did not engage in any sort of transaction with other clients that could give rise to a fraud claim against them, where they made no affirmative misrepresentations or material omissions to victim because they were never aware of him until transfer had already occurred, and they did not have a fiduciary relationship with victim).

alleged duty of disclosure to reveal matters known to them that the Bank was entitled to know because of a fiduciary relation or necessary to prevent their partial or ambiguous statement of the facts from being misleading; subsequently acquired information that they knew would make untrue or misleading previous representations; the falsity of a representation if defendants subsequently learned that the Bank was about to act in reliance upon it; and facts basic to the transaction, if defendants knew that the Bank was about to enter into it under a mistake as to them.

A client's attorney typically does not owe a duty to disclose to the party with whom the client enters a transaction.[14] This is particularly so when the third party is a sophisticated businessperson capable of protecting his or her interests.[15] There are few situations in which an attorney for a party has a duty to disclose to a nonparty. One example is where one party to relationship is unable to fully protect its interests and unprotected party has placed its trust and confidence in the other.[16] Another instance may arise when a party in an arm's length transaction

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[14] *E.g., Med Safe Northwest, Inc. v. Medvial, Inc*., 1 Fed. Appx. 795 (10th Cir. 2001) (attorney and law firm, who had taken security interest in patent after they represented owners of patent, did not have a duty to disclose to investors in corporation that had been granted exclusive worldwide license to manufacture patent products the existence of their security interest, even though one of investors had executed "payment guarantee" for owners' legal bills); *Bogle v. Bragg*, 548 S.E.2d 396 (Ga. App. 2001) (investor in mining company had no fiduciary relationship with company's attorney that would impose duty to disclose on attorney; attorney did no legal work for investor and was not paid by him, investor did not ask attorney to represent him in connection with stock purchase, and attorney told investor that he represented company's interests in the purchase transaction).

[15] *Badger Pharmacal, Inc. v. Colgate-Palmolive Co*., 1 F.3d 621 (7th Cir. 1993) (when two corporations with benefit of counsel negotiate commercial transaction at arms length, neither owes nor assumes duty to disclose information to the other); *Taggart v. Ford Motor Credit Co*., 462 N.W.2d 493 (S.D.1990) (franchisor and creditor of farm machinery and implement dealership did not owe duty to dealership's investor to protect his interests, where investor was experienced businessman capable of taking adequate precautions to protect himself in business transactions, and investor took additional precaution by hiring able counsel to represent him in negotiating, structuring, and documenting his investment in dealership).

[16] *Taggart, supra*, at 500; *see also In re Agribiotech, Inc*., 291 F.Supp.2d 1186 (D. Nev. 2003) (general counsel had duty to speak after company president made allegedly false statements to investor-growers regarding company's financial health, where statements were specifically intended to induce growers to turn their seed over to company, and counsel was professional whom growers allegedly trusted based on their positions and specialized knowledge of company's financial health).

undertakes to disclose information. In such situation, at least one court has held that all material facts must be disclosed. *Gutter v. Wunker,* 631 So.2d 1117, 1119 (Fla. App. 4 Dist. 1994).

Here, there was no fiduciary duty between the Pool Defendants and the Bank. (The Pool Defendants note that none is alleged.) The Pool Defendants assert that the only such relationship was between Defendant Pool and Montgomery (attorney-client).

The Bank asserts that there need not have been a fiduciary relationship, as a duty arises when one party to a business transaction knows matters necessary to prevent the partial or ambiguous statement of the facts from being misleading. *See* RESTATEMENT (2D) TORTS §551(b). The Bank argues that, having given the Bank the impression that Montgomery was a man of integrity and later learned that this was not the case, Pool had a duty to correct that impression. The Pool Defendants were not a party to any transaction between the Bank and Montgomery, however, thus no duty arises under this section of the Restatement.[17] The Court is unaware of any other basis for such a duty. The positive endorsement of one's lawyer in a recommendation letter hardly carries such weight as to require a retraction. This is not a situation in which Pool was aware of a threat of imminent bodily harm to a Bank official, such that he might be required to make a disclosure to the Bank. The Pool Defendants had no obligation to disclose facts which the Bank had an opportunity to obtain by virtue of a credit check or employer reference.[18]

The claim against the Pool Defendants for nondisclosure is dismissed.

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[17] As discussed with respect to the theory of negligent misrepresentation, there is a basis for a duty arising from Pool's responsibility to avoid providing false information in a recommendation letter upon which the Bank would rely. This is not the same as a duty to disclose all of the information on Montgomery which Pool later came to know.

[18] *See Keasler v. Natural Gas Pipeline Co. of America*, 569 F.Supp. 1180, 1186, (E.D.Tex.1983), *judgment affirmed*, 741 F.2d 1380 (5th Cir.1984); *Pellegrini v. Cliffwood-Blue Moon Joint Venture*, 115 S.W.3d 577, 580 (Tex. App 2003).

4. Innocent Misrepresentation

Innocent misrepresentation is not a recognized tort under the Restatement (Second) of Torts, although it is referenced in § 552D in a draft describing liability for innocent misrepresentations by the seller of chattels to the public that result in pecuniary loss. This section parallels § 402B, which states the rule as to strict liability for physical harm to a user of the chattel, where the seller makes a misrepresentation to the public concerning its character or quality. As described, innocent misrepresentation is not applicable to this case, thus the cause of action is dismissed.

D. Rule 9(b) Analysis of Individual Fraud Claims

The Bank alleges that it relied on certain misrepresentations and would not have taken certain action if it had known the true facts. *See* SAC at ¶ 60. The Pool Defendants argue that they are entitled to know what these misrepresentations were and what the action was that the Bank would not have taken. *See Anderson v. USAA Casualty Insurance Company*, 221 F.R.D. 250, 255 (D.C. 2004). The Bank contends that the attachments to the affidavit of John Spencer Stewart, which include correspondence between Pool, Aldan, Montgomery, and Berkich, are sufficient to answer all of these questions.

The Court agrees with the Bank respect to Pool. The Court evaluates the attachments under the Rule 9(b) standard, assuming that they are genuine documents accurately reflecting correspondence between the parties. The attachments show that Pool acted as Montgomery's lawyer by providing legal advice with respect to transactions that are the subject matter of this case. The attachments include the documents Pool sent to Bank officials, which contain all of the details pertaining to time and circumstance. The alleged fraudulent acts or omissions include Pool's recommendation letter, the clean criminal report Pool sent, and Pool's failure to convey to the Bank information regarding Montgomery's financial instability.

With respect to PBVP, allegations are insufficient. There are no allegations that PVBP, specifically, participated in an act of fraud, or that Pool was acting in the scope of employment for PBVP when he undertook the alleged acts. Thus, all allegations against PVBP must be dismissed under Rule 9(b).

E. Rule 12(b)(6) Analysis of Joint Actions

The Sixth Claim in Plaintiff's SAC is entitled "Damages Arising From Conspiracy to Commit Fraud" and the Ninth Claim is entitled "Aiding and Abetting A Breach of Fiduciary Duty". The Pool Defendants argue that these are not substantive causes of action under tort law, but rather spread liability from one tortfeasor to another. Both are discussed in the Second Restatement of Torts §876, which contains three subsections. Liability under this section arises when one (a) does a tortious act in concert with the other or pursuant to a common design with him, or (b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or (c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person. Conspiracy stems from subsection (a); and aiding and abetting a breach of fiduciary duty comes from subsection (b). *See* § 876, Comment b.

1. Conspiracy

In order to establish the liability under § 876(a), a conspiracy claim must contain the following elements:

1. D or X commits tortious acts;
2. Pursuant to a common design or plan between D and X;
3. For cooperation in a tortious line of conduct or to accomplish a tortious end;
4. P is harmed by the tortious acts.

The SAC alleges that the Defendants misrepresented, concealed and/or failed to disclose material facts and/or information to the Bank, that each Defendant either (a) committed tortious acts in concert with one another or pursuant to a common design with each other; (b) knew that the other's conduct constituted a breach of duty and gave substantial assistance or encouragement to the other; or (c) gave substantial assistance to another in accomplishing a tortious act, his own conduct, separately considered, constituting a breach of duty. SAC at ¶ 85.

The Pool Defendants allege that since they had no duty to disclose, there is no underlying tort to support a conspiracy. The Court agrees with respect to the tort of nondisclosure, but finds that there was a duty with respect to negligent misrepresentation. However, since there cannot be a conspiracy based on negligence,[19] the Court will not recognize a conspiracy based on negligent misrepresentation. Concealment and intentional misrepresentation are not premised on duty but cannot be the basis for a conspiracy claim, since the Court dismisses these claims pursuant to Rule 12(b)(6). Thus, the claim for conspiracy is dismissed with respect to the Pool Defendants.

2. Assistance in Breach of Fiduciary Duty

In order to establish the liability under § 876(b), a claim alleging assistance in a breach of fiduciary duty must contain the following elements (*see* Comment "d" to § 876(b)):

l. D gives advice or encouragement to a tortfeasor ("X");

2. To do an act which D knows is tortious and a breach of duty to P;

3. The encouragement or assistance is a substantial factor in causing the tort;

4. P is harmed by the X's tort.

The SAC alleges that Defendants Montgomery, Berkich, Nava, Wilson, Pool and PBVP, with full knowledge that Aldan's activities breached his fiduciary duties, gave substantial assistance

[19] *See Firestone Steel Prods. Co. v. Barajas*, 927 S.W.2d 608, 614 (Tex.1996); *Anderson v. Airco, Inc.*, No. 02-12-091, 2004 WL 2827887 (Del. Super. Nov. 30, 2004).

or encouragement to Aldan to breach his duties for his and their benefit and to the Bank's detriment. ¶ 95. The Pool Defendants argue that the allegations of the existence of knowledge and substantial assistance are only conclusory, and lack details such as the time that Defendants found out that "Aldan's activities breached his fiduciary duties," the nature of the "substantial assistance or encouragement to Aldan," and what benefit the Pool Defendants received from their alleged breach. The Pool Defendants suggest that they can not defend against these allegations unless they know which, if any, of their own acts gave rise to their alleged participation in any breach of Aldan's duties.[20]

While the complaint alone does not give sufficient notice of these details, the attachments show that Aldan, as the President of the Bank, had a fiduciary duty to the Bank, and that Pool, when writing a recommendation letter to the President of the Bank, must have been aware of this duty. However, there is no room for inferring that Pool learned of Aldan's breach of fiduciary duty prior to March 7, 2001, when he received the Bank counsel's March 5, 2002 letter referring to Aldan's unauthorized loans. Thus, the Court cannot infer that Pool knew his letter would assist Aldan in breaching his fiduciary duty to the Bank.

Nor is there room for inferring that the letter constituted substantial assistance. Substantial assistance may be found where the alleged aider and abettor "affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *In re Sharp Int'l Corp.*, 403 F.3d 43, 50 (2d Cir. 2005). The mere inaction of an alleged aider and abettor constitutes substantial assistance only if the defendant owes a fiduciary duty directly to the plaintiff. *Id.*; *Schwan's Sales Enterprises, Inc. v. Commerce Bank*, 397 F.Supp.2d 189, 199 (D. Mass. 2005).

[20] *See Vicom, Inc. v. Harbridge Merch. Servs.*, 20 F.3d 771, 777-78 (7th Cir.1994) (recognizing that Rule 9(b) is largely designed to give each opponent notice of his purported role in the alleged fraud); *DiVittorio v. Equidyne Extractive Indus., Inc*., 822 F.2d 1242, 1247 (2d Cir.1987) (same).

Merely alleging that a professional has performed services for other defendants in a fraud action is an insufficient basis for inferring scienter. *Morin v. Trupin*, 711 F.Supp. 97, 110 (S.D.N.Y. 1989). Thus, the claim against the Pool Defendants for substantial assistance to a breach of fiduciary duty is dismissed.

IV. CONCLUSION

Because there are no specific allegations describing the actions of PBVP or the responsibility of PBVP for Pool's actions, the Rule 9(b) motion is granted with respect to PBVP. All claims against PBVP are dismissed. Plaintiff is granted leave to amend to allege specifically the role of PBVP in the alleged torts.

While the SAC also lacks specific allegation with respect to Pool, the attachments provide information sufficient to comply with the Rule 9(b) notification requirements. Accordingly, the Rule 9(b) motion to dismiss Pool is denied.

The Rule 12(b)(6) motion to dismiss the claims for fraudulent misrepresentation is dismissed, as the letter of recommendation does not amount to intentional fraud. Because it is a sufficient basis for negligent misrepresentation, however, the motion to dismiss the claim for negligent misrepresentation is denied. The motion to dismiss the claim for concealment is granted, given the lack of any affirmative act by the Pool Defendants to suppress the truth. Because there was no duty to disclose, the claim for nondisclosure is dismissed. There is no cause of action for innocent misrepresentation. In sum, the Pool Defendants' Rule 12(b)(6) motion is granted for all individual claims except negligent misrepresentation.

Without having committed an underlying intentional tort, the Court cannot infer that the Pool participated in a conspiracy. Thus, this claim is dismissed pursuant to Rule 12(b)(6). Based on

the lack of any knowing, substantial assistance provided by the Pool Defendants to Aldan, the claim for assistance in breach of fiduciary duty must also be dismissed.

SO ORDERED this 27th day of March, 2007.

/S/
Juan T. Lizama
Associate Judge, Superior Court