IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

BALBOA CAPITAL CORPORATION,	§	
	§	
Plaintiff,	§	
	§	
v.	§	No. 3:18-cv-0898-M
	§	**Lead Case**[1]
OKOJI HOME VISITS MHT LLC, *et al*.,	§	
	§	
Defendants.	§	

ASCENTIUM CAPITAL LLC'S REPLY SUPPORTING MOTION TO DISMISS

Ascentium's motion to dismiss (Dkt. 247, the "Motion") establishes that the allegations in Balboa's Complaint[2] fail to state claims for relief under federal pleading standards including Rule 9(b). Balboa's response (Dkt. 249, the "Response") vaguely argues that its allegations "clearly" and "plainly" are sufficient and that they "detail" numerous false statements when "read[] . . . as a whole . . . ."[3] But none of Balboa's sparing references to actual, pled allegations in its Complaint refutes Ascentium's arguments for dismissal. Likewise, much of the caselaw Balboa cites is boilerplate or cumulative, and none of Balboa's cases undermines those cited by Ascentium.

Balboa's fraud-by-misrepresentation claim fails because Balboa fails to identify any instance in the Complaint where it satisfied Rule 9(b) by: (a) alleging, with particularity, a false statement by Ascentium, and (b) explaining, with particularity, why that statement was

[1] Case Nos. 3:18-CV-0898, 0900, 0901, 0902, 0903, 0904, 0907, 0908, 0909, 0910, 0916, 0917, 0918, 0919, 0920, 0921, 1949, 1950, 1952, and 2646 (the "Consolidated Cases") have been consolidated for pretrial purposes only. *See* Amended Scheduling Order (Dkt. 160 in No. 3:18-CV-0898, the "Lead Case").

[2] Unless otherwise indicated, Ascentium's citations to paragraphs in Balboa's Complaint refer to the numbered paragraphs in Balboa's Second Amended Complaint in the Lead Case (Dkt. 169).

[3] *See* Resp., pp. 1-2; *see also id*. at 10 (contending that "Balboa attributed specific false statements to specific individuals" and that "Balboa makes specific allegations of fraud from the statements made by Traversone and McKenzie" without identifying ***which*** of their alleged statements were false or explaining ***how*** they were false).

false. Instead, Balboa continues to focus on what Ascentium allegedly ***did not*** say about the MHT Program. All of these allegations are irrelevant to a fraud-by-misrepresentation claim.

Any fraud-by-omission claim also fails, because Balboa fails to allege that Ascentium owed it a duty to disclose. No responsive brief could change this fact. Balboa never even denies this fatal deficiency. In any event, Ascentium did not owe Balboa a duty to disclose as a matter of law because there was no transaction or fiduciary relationship between Ascentium and Balboa.

Finally, although Balboa attempts to save its negligent misrepresentation claim, Balboa does not dispute that it knew all of the same facts it purportedly knows today in time to plead that claim within the two-year statute of limitations. As a result, the discovery rule cannot save the claim, and Balboa's Complaint should be dismissed with prejudice.

I. Balboa's fraud-by-misrepresentation claim must be dismissed because Balboa's Complaint fails to identify which of Ascentium's statements were false, and also fails to identify any particularized explanations of how those statements were false.

Balboa's Response confirms that, at base, its case is one about fraud-by-omission. Balboa essentially contends that while Ascentium was saying certain things about MHT, it failed to disclose other alleged facts that Balboa highlights in paragraph 19 of its Complaint. In paragraph 19, Balboa alleges that Ascentium "was aware" of, "knew," or "recognized" certain additional information about MHT that it did not disclose to Balboa. Resp., pp. 8-9, quoting Compl., ¶ 19. Even if taken as true, these undisclosed facts are not "false statements" made by Ascentium. At best, they are omissions, and for all the reasons identified in the Motion and in Section II below, Balboa's fraud-by-omission claim fails as a matter of law.

Aside from the omissions, Balboa contends that it "alleges misrepresentations of fact – e.g., that Ascentium had observed 'no hard defaults' and that it was exiting the MHT program due to 'routine portfolio risk management.'" Resp., p. 10. But the Complaint does not allege that Ascentium had experienced "hard defaults," and does not deny that Ascentium had "reached its

portfolio limit of approximately $40 million." *See* Compl., ¶¶ 10-19. Balboa cannot sustain its claims with a single, conclusory allegation that everything Ascentium said was false – Rule 9(b) requires particularity as to what was false and why. *See In re Alamosa Holdings, Inc*, 382 F. Supp. 2d 832, 857-58 (N.D. Tex. 2005) (Cummings, J.).

For this same reason, Balboa's attempt to distinguish *Laura Johnston Family Properties, Ltd. v. Allen Eng'g Contractor, Inc*.[4] misses the mark. The dispositive failure in *Johnston* is the same failure that exists here: the Complaint fails to explain why the complained of statements were false. *See Johnston*, 2017 WL 6459529, at *4 ("The biggest deficiency in [Plaintiff]'s pleadings, however, is the muddled allegation of how [Defendant]'s representation was false.").

Similarly, the fatal defects in the *Alamosa Holdings*[5] complaint are equally present here, because Balboa, like the plaintiffs in *Alamosa Holdings*, improperly relies on: (a) a list of various false statements (the summary of the MHT Program in Compl. ¶¶ 10-17), (b) a conclusory allegation that those statements were false (the first sentence of Compl. ¶ 19), and (c) a second list of other statements that it contends are the true facts (the balance of Compl. ¶ 19). Balboa summarizes *Alamosa Holdings* on Resp. pp. 9-10, but misses the key point that a fraud complaint must identify the defendant's false statements ***and*** explain why they are false. It is not enough to simply allege that other, allegedly undisclosed facts also are true.[6]

[4] No. 3:16-CV-03378-M, 2017 WL 6459529 (N.D. Tex. Dec. 18, 2017) (Lynn, J.) (dismissing the claim because the plaintiff did not explain how the defendant's representation that it "owned the land necessary to gain access to that worksite" was false. The complaint's muddled definition of the term "land" left the court with no basis to find the defendant's statement untrue. Similarly, Balboa's Complaint does not provide any basis for the Court to find Ascentium's alleged representations to be false.).

[5] 382 F. Supp. 2d 832 (N.D. Tex. 2005).

[6] *See* 382 F. Supp. at 857-58; *see also Baker v. Great N. Energy, Inc*., 64 F. Supp. 3d 965, 974 (N.D. Tex. 2014) (Boyle, J.) (similar).

Finally, the opinion statements about which Balboa complains (such as Ascentium allegedly characterizing MHT as "an excellent vendor") are too indefinite to be actionable. As stated in the Motion, these alleged statements are mere puffery. *Trenholm v. Radcliff*, 646 S.W. 2d 927 (Tex. 1983), is not to the contrary, because it addressed false statements concerning whether property was being moved and whether that property had been sold – neither of which is a matter of opinion. *See* Resp., pp. 11-12. To the extent Balboa attempts to distinguish Ascentium's alleged puffing from the puffing in *Fitzgerald v. Water Rock Outdoors, LLC*, 536 S.W. 3d 112, 118 (Tex. App.—Amarillo 2017, pet. denied), it only underscores that its true complaint is what Ascentium allegedly did not disclose, not what Ascentium actually said. *See* Resp., p. 13 (complaining that Ascentium allegedly did not tell Balboa the source of the Doctor LLCs' payments). Tellingly, some of the "opinions" Balboa references are not even Ascentium's alleged statements, but rather Balboa's internal characterization.[7]

Because Balboa fails to identify Ascentium's alleged false statements with particularity and fails to explain, with particularity, how any of those statements were false, its fraud-by-misrepresentation claim must be dismissed.

II. Balboa's fraud-by-omission claim must be dismissed because Balboa's Complaint fails to allege that Ascentium owed a duty to disclose, and also because Ascentium did not owe Balboa a duty to disclose as a matter of law.

Balboa ignores numerous cases from this Court which require plaintiffs to plead the duty to disclose with particularity in order to state a claim for fraud by omission. *See* Mot., p. 10 (citing cases). As shown in the Motion, Balboa's Complaint does not allege ***at all*** – let alone with the requisite particularity – that Ascentium owed a duty to disclose. *Id*. Balboa does not deny this

[7] For example, Balboa claims that Ascentium gave "effusive" praise of MHT and provided a "glowing" recommendation of the program. *See* Resp., pp. 2 & 13.

failure in the Response. But instead of dropping this defective claim, Balboa addresses only Ascentium's second argument – that the governing law ***conclusively establishes*** that Ascentium did not owe a duty to disclose.

Ascentium cited cases, many from Balboa's home state of California, showing that there can be no duty to disclose unless there is a transaction or fiduciary relationship between the parties. *See* Mot., pp. 10-12. Balboa says nothing about these cases. Ascentium also explained, citing cases from this Court and the Northern District of California, that Texas and California law on fraud do not conflict. *See* Mot., p. 5. Balboa also says nothing about this absence of a conflict of law. As a result, Balboa's fraud-by-omission claim should be dismissed under the six California cases cited in the Motion, which unequivocally hold that a duty to disclose can only arise if there is a fiduciary relationship or an underlying transaction between the parties, neither of which Balboa has pled. *See* Mot., pp. 10-11.

Balboa's attempts to distinguish the Texas cases cited in the Motion are just as futile as Balboa's attempt to ignore the California cases. Balboa argues that three situations (in addition to a fiduciary relationship) create an affirmative duty to disclose under Texas law. *See* Resp., p. 14.[8] In fact, Balboa mistakenly suggests that Ascentium "concedes" these three situations create a duty to disclose. *See id.* But Ascentium does not – and could not – concede that point, because "the extent to which a duty to disclose exists absent [a fiduciary or confidential] relationship is," as this

[8] Balboa argues that "an affirmative duty to disclose may arise by operation of law (1) where a person voluntarily discloses some information; (2) when a person makes a representation and new information makes that earlier misrepresentation false or misleading; and (3) when a person makes a partial disclosure and conveys a false impression" (citing *In re Enron Corporation Securities, Derivative & "ERISA" Litigation*, 540 F. Supp. 2d 759, 771 (S.D. Tex. 2007) (citation omitted)).

Court has recognized, "unresolved under Texas law and by the Fifth Circuit."[9] Notwithstanding the unresolved Texas case law, Judge Lindsay has recognized in at least one case that an arm's-length transaction is required to trigger a duty to disclose. *See Admiral Ins. Co., Inc. v. Arrowood Indem. Co.*, 471 B.R. 687, 709-12 (N.D. Tex. 2012) (Lindsay, J.) (holding that any duty to disclose, outside a special, fiduciary, or confidential relationship between the parties, "is limited to [the context of] an arm's length transaction"). Tellingly, all of the cases Balboa cites regarding the duty to disclose involved either: (a) a transaction between plaintiff and defendant,[10] or (b) a situation where the fraud-by-omission claim failed.[11] *See* Resp., pp. 13-15.

Indeed, even an arm's-length transaction may not be enough to trigger a duty to disclose under Texas law. Some cases find that such a duty arises only if there is a confidential or fiduciary relationship. *See* Mot., pp. 11-12; *see also United Teacher Associates Ins. Co.*, 414 F.3d at 564-66, where the Fifth Circuit found that "a reasonable jurist might well conclude . . . that a duty to disclose exists in Texas only in the context of a confidential or fiduciary relationship," citing *Bradford* v. *Vento*, 48 S.W.3d 749, 758 (Tex. 2001); *see also Admiral*, 471 B.R. 687 (Judge Lindsay stated that "[t]he court is not convinced that the Texas Supreme Court has recognized . . . a duty" to disclose in the three situations Balboa cites.).

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[9] *Tornado BUS Co. v. BUS & Coach Am. Corp*., No. 3:14-CV-3231-M, 2015 WL 11120584, at *5 (N.D. Tex. Dec. 15, 2015) (Lynn, J.); *see also United Teacher Associates Ins. Co. v. Union Labor Life Ins. Co*., 414 F.3d 558, 564-66 (5th Cir. 2005).

[10] *See Dorsey v. Portfolio Equities, Inc*., 540 F.3d 333, 337 (5th Cir. 2008) (promissory notes); *Rimade Ltd. v. Hubbard Enterprises, Inc*., 388 F.3d 138, 140 (5th Cir. 2004) (A sale of tires for which "[t]he Plaintiffs required that Hubbard maintain a standard letter of credit"); *Union Pac. Res. Group, Inc. v. Rhone-Poulenc, Inc*., 247 F.3d 574, 577 (5th Cir. 2001) (partnership agreement); *GMAC Commercial Mortg. Corp. v. E. Texas Holdings, Inc*., 441 F. Supp. 2d 801, 803 (E.D. Tex. 2006) (forbearance agreement).

[11] *See In re Enron Corp. Sec., Derivative & "ERISA" Litig*., 540 F. Supp. 2d 759 (S.D. Tex. 2007) (plaintiffs "failed to state claims"); *Manon v. Solis*, 142 S.W .3d 380, 388 (Tex. App.—Houston [14th Dist.] 2004, pet. denied) (former employee brought fraudulent and negligent misrepresentation claims against former employer; court ruled in favor of the former employer).

Simply put, Balboa has not produced a single Texas case (or a California case) where the plaintiff prevailed on a fraud-by-omission claim without an underlying transaction or fiduciary relationship. The Court accordingly should dismiss any fraud-by-omission claim under the case law cited in the Motion.

III. Balboa's Response does not remedy Balboa's failure to plausibly plead reliance and causation because Balboa continues to allege that the obligors' and guarantors' obligations were independent of MHT's performance or viability, but it does solve the mystery of why it sued Ascentium 30 months after suing the obligors and guarantors.

Balboa's Response, like the Complaint, offers no explanation for how Ascentium caused any injury to Balboa. The two alleged misrepresentations (*i.e.*, "no hard defaults" and "portfolio risk management") that Balboa puts forth are wholly unrelated to the obligors and guarantors of the Doctor LLCs that Balboa contracted with (and later sued). Balboa does not allege that Ascentium said (or actionably failed to say) anything at all about the obligors and guarantors. As a result, Balboa has not plausibly pled reliance or causation on its claims against Ascentium.

Balboa quibbles with Ascentium's citation to *Blue Gordon, C.V. v. Quicksilver Jet Sales, Inc*., 444 F. App'x 1 (5th Cir. 2011), but its import is simple. *Blue Gordon* shows that when a plaintiff's damages are caused by something other than the defendant's alleged wrongdoing (there, the plaintiff's own breach of contract), the plaintiff's claim fails, even if the plaintiff alleges that the defendant fraudulently induced the plaintiff to sign the contract on which it suffered the damages. *See id*. at 10-11. As shown in the Motion, the obligors' and guarantors' obligations to pay Balboa are completely independent of anything having to do with MHT's viability or performance under its agreements with the obligors. *See* Mot., pp. 2-4. What Ascentium said or did not say about MHT is not pertinent to those financing contracts or the damages Balboa seeks. Balboa's claims against Ascentium therefore fail for lack of plausibility.

In its Response, at n.26, Balboa explains, for the first time, why it added Ascentium as a defendant thirty months after suing the obligors and guarantors. The reason: the obligors argued that the guarantors would be freed from liability unless Balboa sued Ascentium, citing Section 2485 of the California Civil Code. Indeed, the obligors and guarantors "demanded in writing that Plaintiff proceed against Ascentium." *See* Answer to Second Am. Compl. (Dkt. 219 at ¶ 79). They also argued that Ascentium was a necessary party. *Id*. at ¶ 81. Fearing these defenses, Balboa alleged – for the first time – that Ascentium had contributed to its alleged damages and the obligors' and guarantors' nonpayment.

The first thirty months of this case are more instructive as to how it should be resolved; no matter what Ascentium said or did not say to Balboa, it has no impact on the balance of the claims in this case. The Court should dismiss Ascentium from the case, which will allow Balboa and the other defendants to litigate their claims without Balboa having to fear repercussions from failing to "check a box" by suing Ascentium.

IV. Balboa's negligent misrepresentation claim is facially time-barred, Ascentium negated the discovery rule by citing allegations in the Complaint and matters of which this Court can take judicial notice, and the same bases for dismissal of the fraud claims also apply to the negligent misrepresentation claim.

Balboa does not challenge that, absent the discovery rule, its claim would be time-barred under the two-year Texas statute of limitations. As described in Balboa's cited cases, the discovery rule is a "limited exception to the statute of limitations" that is inapplicable here. *See Doe v. Linam*, 225 F. Supp. 2d 731, 735 (S.D. Tex. 2002). For the discovery rule to apply, "the injury must be inherently undiscoverable and the evidence of the injury must be objectively verifiable." *Id*. (citing *Computer Associates Intern., Inc. v. Altai, Inc.*, 918 S.W.2d 453, 456 (Tex. 1996)). To qualify as inherently undiscoverable, an injury must by its nature be "unlikely to be discovered within the prescribed limitations period despite due diligence." *Id*. at 735.

All of the information underlying Balboa's allegations was discoverable within the two-year limitations period. The discovery rule therefore cannot save the negligent misrepresentation claim because Ascentium proved that Balboa knew, no later than:

- ***April 5, 2017***, that Balboa itself had been sued for fraud on substantially the same allegations now in Balboa's Complaint against Ascentium, which would have triggered a duty at Balboa to investigate these claims. *See* Mot., p. 14;[12] and
- ***June 27, 2017***, that the Doctor LLCs and guarantors all had defaulted on their financing contracts. *See* Mot., p. 14. Indeed, Balboa admits that it had sued all of the Doctor LLCs and guarantors for nonpayment no later than June 2017. *Id*.[13]

Tellingly, Balboa's Response does not deny that Balboa had knowledge of sufficient facts to bring its claims under the two-year statute.

Under this Court's recent decision in *Johnston*, Rule 9(b) applies to negligent misrepresentation claims. *See* Mot., p. 15 (citing *Johnston*, 2017 WL 6459529, at *3). Therefore, even if Balboa's negligent misrepresentation claim were not facially barred by limitations, it still should be dismissed because it fails to satisfy the particularity requirements of Rule 9(b). Balboa tries to argue that Rule 9(b) does not apply by citing cases from fifteen years ago. *See* Resp., p. 20. More recent decisions from this Court have clarified that Rule 9(b) applies to negligent misrepresentation claims, like fraud claims, when "the factual allegations underlying the claims are verbatim." *Berry v. Indianapolis Life Ins. Co.*, 3:08-CV-0248-B, 2010 WL 3422873, at *14 (N.D. Tex. Aug. 26, 2010) (Boyle, J.); *see also Johnston*, 2017 WL 6459529, at *3.

[12] Being sued for fraud put Balboa on notice and required Balboa to exercise due diligence about the MHT Program and how it became involved in that program. *See Tarpley v. Texaco, Inc*., No. CA 3-96-CV-3209-R, 1998 WL 133122, at *5 (N.D. Tex. Mar. 16, 1998) (explaining that the discovery rule does not apply where the "[p]laintiff had sufficient facts within his knowledge that would cause a reasonable person to diligently make inquiry to determine the cause of his injury").

[13] In *Martinez Tapia v. Chase Manhattan Bank, N.A.*, 149 F.3d 404, 411 (5th Cir. 1998), for example, the Fifth Circuit held that the discovery rule did not apply where "a reasonable investor, when informed that redemption of his investment had been suspended, would have immediately investigated the propriety of this action" and "easily discovered" the actionable conduct.

On their face, Balboa's negligent misrepresentation and fraud claims share the same underlying allegations. *See* Compl., ¶¶ 46-57. Nevertheless, Balboa half-heartedly argues that the negligent misrepresentation claim is not intertwined with the fraud claim because it is a separate "count." *See* Resp., pp. 21-22. As this Court has held, however, it does not matter that a plaintiff "label[s] the claims separately as two different counts in the Complaint," when the claims rely on the same set of facts. *Berry*, 2010 WL 3422873, at *14.

The negligent misrepresentation and fraud claims share the same underlying allegations and both should be dismissed under Rule 9(b), in addition to the other grounds in the Motion.

Dated: February 18, 2020.

Respectfully submitted,

/s/ Matthew R. Stammel

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CERTIFICATE OF SERVICE

I certify that on February 18, 2020, a true and correct copy of the foregoing instrument was filed with the Clerk of the Court using the CM/ECF system, which will send electronic notification of such filing to all counsel of record.

/s/ Matthew R. Stammel
Matthew R. Stammel

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