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 MOTION TO DISMISS AND SUPPORTING BRIEF

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[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").

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In the summer of 2017, Balboa sued twenty sets of obligors and guarantors in twenty different lawsuits in what are now these Consolidated Cases. In each case, Balboa seeks to enforce financing contracts between itself, an entity owned by a doctor (a "Doctor LLC"), and the doctor who individually guaranteed the payments owed by his or her Doctor LLC. Approximately thirty months after suing the obligors and guarantors, Balboa now seeks to hold Ascentium – its competitor in the third-party financing business – liable for the same obligations. Ascentium moves to dismiss these claims under Rule 12(b)(6) because Balboa's claims lack the plausibility required under federal pleading standards and the particularity required under Rule 9(b).[2]

Balboa's claims against Ascentium do not, and cannot, plausibly allege that Ascentium caused Balboa's alleged damages. Balboa contends that each guarantor "unconditionally and irrevocably guaranteed" payment of the obligations owed by the Doctor LLCs, and that the Doctor LLCs' obligations were in no way contingent on the viability or performance of America's MHT, Inc. ("MHT"), the home healthcare company whose failure has resulted in litigation in this Court among others. Whatever Ascentium said or did not say about MHT therefore has no bearing on the obligations that the Doctor LLCs and guarantors may owe to Balboa, according to Balboa's own position in this case. Any difficulties Balboa may now face in collecting cannot support Balboa's new claims against Ascentium for the obligations of the Doctor LLCs and guarantors.

Further, and independently, Balboa's fraud-by-misrepresentation claim must be dismissed because Balboa fails to identify which of Ascentium's alleged statements were false and fails to explain how they were false. Relatedly, Balboa's true complaint seems to revolve around what

[2] This motion seeks dismissal of all claims against Ascentium in each Consolidated Case. Balboa's allegations against Ascentium are identical in each case, but the paragraph numbering is not. Unless otherwise indicated, Ascentium's citations to paragraphs in Balboa's Complaint ("Compl.") refer to the numbered paragraphs in Balboa's Second Amended Complaint in the Lead Case (Dkt. 169).

Ascentium allegedly did not say, rather than what Balboa alleges Ascentium actually said. But any fraud-by-omission claim also fails, because Balboa does not allege a required element: that Ascentium owed Balboa a "duty to disclose." Indeed, Ascentium could not have owed Balboa a duty to disclose, because there was no fiduciary relationship or transaction between Ascentium and Balboa. Balboa's negligent misrepresentation claim is facially barred by the applicable two-year statute of limitations, and also fails for the same reasons as its fraud claims.

For these reasons, the Court should dismiss all of Balboa's claims against Ascentium.

I. Balboa fails to state any claims because it fails to plausibly plead reliance and causation.

As shown in Sections II and III, each of Balboa's claims includes the essential elements of justifiable reliance and proximate causation. Balboa's claims fail because Balboa has not plausibly alleged these elements.[3]

Balboa does not plausibly allege that it relied on any false statements or actionable omissions in entering into the transactions giving rise to its claim for damages. There are no allegations that Ascentium said anything (or omitted anything) about the Doctor LLCs or guarantors (*i.e.*, the ones who Balboa transacted with and who allegedly owe Balboa money).[4] All of Balboa's allegations complain about what Ascentium purportedly said or did not say about ***MHT***. *See* Compl., ¶¶ 10-20. And Balboa is steadfast in its position – as evidenced by its thirty-

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[3] "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). "'[A] formulaic recitation of the elements of a cause of action will not do,'" and legal conclusions are not entitled to an assumption of truth. *Id*. at 678-79 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). A complaint which "pleads facts that are 'merely consistent with' a defendant's liability" does not state a plausible claim. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). Instead, the question of plausibility turns on whether the well-pleaded, non-conclusory allegations, taken as true, "plausibly give rise to an entitlement to relief." *See Iqbal*, 556 U.S. at 678-79. If the answer is no, then the complaint does not satisfy Rule 8. *Id*. at 680, 687.

[4] *See* Compl., p. 12 (Balboa alleges that all defendants in each case, "jointly and severally," owe the full amount due under the applicable financing contracts).

plus months of litigation – that the Doctor LLCs and guarantors owe Balboa, regardless of what went on with MHT. For these same reasons, Balboa also has not plausibly alleged that Ascentium caused its losses.

Indeed, Balboa touts the hell-or-high-water nature of its financing contracts, and the irrelevance of MHT's viability to the Doctor LLCs' obligations, by attaching and incorporating the Monthly Payment Agreements ("MPAs") and Installment Payment Agreements ("IPAs") in its Complaints (Compl. Ex. 1.).[5] For example:

- **MPA ¶ 3**: "[Doctor LLC's] obligation to repay the amounts listed in this [MPA] . . . [is] absolute and unconditional, and [Doctor LLC] cannot withhold, set off or reduce such payments for any reason, including non-performance of [MHT's] Services or delivery of the [MHT] Products."[6]
- **MPA ¶ 6**: "[DOCTOR LLC] AGREES THAT [DOCTOR LLC] HAS SELECTED THE SUPPLIER [MHT] AND EACH PRODUCT BASED UPON [DOCTOR LLC'S] OWN JUDGMENT AND DISCLAIMS ANY RELIANCE UPON ANY STATEMENTS OR REPRESENTATIONS MADE BY [BALBOA].
- **MPA ¶ 6**: "[BALBOA] DOES NOT TAKE RESPONSIBILITY FOR THE INSTALLATION OR PERFORMANCE OF THE PRODUCT . . . . [AND] [DOCTOR LLC] WILL CONTINUE TO MAKE ALL PAYMENTS UNDER THIS AGREEMENT REGARDLESS OF ANY CLAIM OR COMPLAINT AGAINST SUPPLIER [MHT]."
- **IPA**: "[Doctor LLC's] obligation to make the Payments to [Balboa] . . . SHALL BE ABSOLUTE, UNCONDITIONAL, . . . AND SHALL NOT BE SUBJECT TO ANY ABATEMENT, SET-OFF, COUNTERCLAIM, REDUCTION OR DEFENSE FOR ANY REASON WHATSOEVER."[7]
- **IPA**: "[Doctor LLC] agrees that it will not assert against [Balboa] any claim that it may have against [MHT], regardless of whether or not (i) the Software performs or

[5] *See* Compl., ¶ 22. Certain Doctor LLCs executed MPAs and others executed IPAs. The differences between these forms are immaterial to the arguments in this motion, because both forms create absolute obligations of the Doctor LLCs and guarantors that are not contingent on MHT's viability or performance.

[6] Balboa's Second Amended Complaint in the Lead Case attaches an MPA as Ex. 1. *See* Lead Case Dkt. 169, pp. 15-16.

[7] Balboa's Second Amended Complaint against the *El-Salibi* defendants attaches an IPA as Ex. 1. *See* Lead Case Dkt. 168, p. 15.

does not perform in accordance with the Software Documents . . . [or] (ii) [MHT] . . . has breached any of its obligations under the Software Documents."

- **IPA**: "[Doctor LLC's] sole remedy, if any, shall be against [MHT] . . . . [and] [DOCTOR LLC] ACKNOWLEDGES THAT [BALBOA] DID NOT SELECT OR CREATE THE SOFTWARE OR PROVIDE ANY SERVICES RELATED TO IT."

Balboa is, and has been, resolute that each IPA and each MPA is backed by an unconditional guaranty of the applicable guarantor defendants. *See* Compl., ¶ 27 & Ex. 3.

It simply cannot be the case that the issues which caused MHT's failure (and what Ascentium allegedly told Balboa about those issues) matter when Balboa is suing Ascentium, but do not matter when Balboa is suing its obligors. To the extent Balboa has experienced losses, they resulted from the Doctor LLCs' and guarantors' failure to pay, not from anything Ascentium said or did not say about MHT. This negates causation in any claim against Ascentium. *See Blue Gordon, C.V. v. Quicksilver Jet Sales, Inc.*, 444 Fed. Appx. 1, 11 (5th Cir. 2011) (fraud claim failed because the plaintiff's damages were caused by the plaintiff's own default on its contract with defendant, which led defendant to terminate the contract, and not by the defendant's allegedly fraudulent statements which led plaintiff to enter into that contract). Balboa's claims therefore must be dismissed.

II. Balboa fails to state any fraud claims, which must be dismissed under Rule 9(b).

Because the elements of fraud-by-misrepresentation[8] and fraud-by-omission[9] do not conflict under California and Texas law, the Court need not perform a conflicts-of-law analysis. *See Eisenstadt v. Tel. Elecs. Corp.*, No. CIV A 306-CV-1196-O, 2008 WL 4386993, at *9 (N.D. Tex. Sept. 26, 2008) (O'Connor, J.) (finding no conflict in California and Texas law with respect to such claims); *Miller v. Uni-Pixel Inc.*, No. 17-CV-02187 NC, 2017 WL 3007082, at *3 (N.D. Cal. July 14, 2017) (finding "no apparent conflict between California and Texas law" as to fraud). Nevertheless, Ascentium includes citations to cases from both states to show that the result – dismissal – is the same under either law.

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[8] Under California law, "[t]he elements of fraud are: (1) a misrepresentation or promise without intent to perform; (2) knowledge of falsity; (3) intent to induce reliance; (4) justifiable reliance; and (5) resulting damage." *Dozier v. Maispace*, No. C-05-1761 PVT, 2007 WL 518622, at *4 (N.D. Cal. Feb. 13, 2007) (citing *Lazar v. Superior Court,* 909 P.2d 981 (Cal. 1996)). Similarly, "[i]n Texas, the elements of fraud by misrepresentation are: (1) the defendant made a representation to the plaintiff; (2) the representation was material; (3) the representation was false; (4) when the defendant made the representation, the defendant knew it was false or made the representation recklessly and without knowledge of its truth; (5) the defendant made the representation with the intent that the plaintiff act on it; (6) the plaintiff [justifiably] relied on the representation; and (7) the representation caused the plaintiff injury." *Coleman v. Bank of New York Mellon*, 969 F. Supp. 2d 736, 751 (N.D. Tex. 2013) (Lynn, J.) (citing *Shandong Yinguang Chem. Indus. Joint Stock Co., Ltd. v. Potter,* 607 F.3d 1029, 1032–33 (5th Cir. 2010) (citation omitted)).

[9] "Under California law, the elements of a common-law cause of action for fraudulent omission are: (1) the defendant concealed or suppressed a material fact; (2) the defendant was under a duty to disclose the fact to the plaintiff; (3) the defendant intentionally concealed or suppressed the fact with intent to defraud the plaintiff; (4) the plaintiff was unaware of the fact and would have acted differently if she had known of the concealed or suppressed fact; and (5) the plaintiff sustained damage as a result of the concealment or suppression." *Wood v. Motorola Mobility, Inc.*, No. C-11-04409-YGR, 2012 WL 892166, at *8 (N.D. Cal. Mar. 14, 2012) (citing *Hahn v. Mirda*, 147 Cal. App. 4th 740, 748 (Cal. App. 2007). Similarly, in Texas, "a plaintiff must show that a party with a duty to disclose (1) conceals or fails to disclose a material fact within the knowledge of that party; (2) knows the other party is ignorant of the fact and does not have an equal opportunity to discover the truth; (3) intends to induce the other party to take some action by concealing or failing to disclose the fact; and (4) the other party suffers injury as a result of acting without knowledge of the undisclosed fact." *Hoffman v. AmericaHomeKey, Inc*., 23 F. Supp. 3d 734, 744 (N.D. Tex. 2014) (Boyle, J.) (quoting *CDI Corp. v. GT Solar Inc*., No. H–11–3487, 2013 WL 873785, at *2 (S.D. Tex. Mar. 7, 2013)).

A. Any "fraud-by-misrepresentation" claim fails because Balboa failed to plead, with particularity, which statements were false and how they were false, and also because the alleged opinion statements cannot support a fraud claim.

Rule 9(b) requires that "when parties allege fraud, they must 'state with particularity the circumstances constituting fraud.'" *Tornado BUS Co. v. BUS & Coach Am. Corp.*, No. 3:14-CV-3231-M, 2015 WL 11120584, at *2 (N.D. Tex. Dec. 15, 2015) (Lynn, J.) (quoting Fed. R. Civ. P. 9(b)). "At a minimum, Rule 9(b) requires that the plaintiff specify the particulars of time, place, and contents of the false representations . . . by enumerating the who, what, when, where, and how." *Id*). (citations omitted). Among other things, "[a]rticulating the elements of fraud with particularity 'requires a plaintiff to specify the statements contended to be fraudulent . . . and explain why the statements were fraudulent.'" *Laura Johnston Family Properties, Ltd. v. Allen Eng'g Contractor, Inc.*, No. 3:16-CV-03378-M, 2017 WL 6459529, at *3 (N.D. Tex. Dec. 18, 2017) (Lynn, J.) (quoting *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997)). A "muddled allegation of how [the defendant's] representation was false" is grounds for dismissal. *See id*. at *4.[10]

Balboa alleges that Cliff McKenzie provided a summary of the MHT program to Balboa's Sales Director, Patrick Ontal, through a series of emails and telephone calls. Balboa further alleges that Ascentium's Chief Credit Officer, Hernan Traversone, provided additional information about MHT. But Balboa does not identify which of McKenzie's and Traversone's statements were allegedly false or explain how they were false. *See* Compl., ¶¶ 10-15. For example:

- McKenzie allegedly told Ontal that "Ascentium had for several years been financing home health care practices through . . . [MHT]" and that "Ascentium had reached its

[10] Ninth Circuit precedent applying Rule 9(b) likewise requires plaintiffs to articulate "the who, what, where, when, and how of the misconduct charged" and "set forth what is false or misleading about a statement, and why it is false." *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1106 (9th Cir. 2003) (citations omitted).

portfolio limit of approximately $40 million and was no longer going to finance the home health care practices." Compl., ¶ 10.

- McKenzie allegedly described MHT's business model to Balboa, explaining that: (a) "MHT would establish a new limited liability company [a Doctor LLC] that would be wholly-owned by the physician," (b) "the physicians would purchase . . . licenses . . . from MHT" and "finance the purchase" through Ascentium or Univest, (c) "MHT would recruit and facilitate the hiring of the nurse practitioners who would conduct the actual home visits, and provide all marketing, billing, collection, and support services," (d) the physicians would provide "a personal guaranty [of the financing arrangement with Ascentium or Univest] . . . as well as a corporate guaranty from the physician's regular practice, if one existed," and (e) "after executed documents . . . were sent back to the lender, the lender would contact the physician by phone to confirm that the physician had in fact purchased the MHT License(s) and understood the payment schedule set forth on the IPA and/or MPA." *See* Compl., ¶¶ 12-14.

- McKenzie allegedly stated that "neither Ascentium nor Univest had experienced a 'hard default' with any borrower, and that they had already funded $12 million in [2016 MHT-related] transactions." Compl., ¶ 15.

- Traversone allegedly told Balboa's President, Phil Silva, that "Ascentium had experienced no default on any of the more than $40 million in financing it had provided since 2012 to more than 200 physicians participating in the MHT program." Compl., ¶ 17.

Balboa fails to satisfy Rule 9(b)'s particularity requirement because it does not identify ***which*** of these statements were false, or explain ***how*** they were false. Instead, Balboa makes a single, conclusory allegation that "Mr. Traversone's and Mr. McKenzie's statements were false, and they knew they were false when they made them." *Id.* at ¶ 19. This does not satisfy Rule 9(b). *See Laura Johnston Family Properties, Ltd.*, 2017 WL 6459529, at *4 (dismissing claims where the "biggest deficiency" was "the muddled allegation of how [the defendant's] representation was false"); *Williams*, 112 F.3d at 179 (dismissing complaint which merely quoted defendant's statements without "specificity as to which portion [was] false"); *Baker v. Great N. Energy, Inc.*, 64 F. Supp. 3d 965, 974 (N.D. Tex. 2014) (Boyle, J.) (dismissing claims because the plaintiff failed to specifically deny the truth of each statement allegedly made by the defendant, and instead argued that other facts concerning the investment that defendant promoted to plaintiff were also true); *In*

re Alamosa Holdings, Inc., 382 F. Supp. 2d 832, 857-58 (N.D. Tex. 2005) (Cummings, J.) (dismissing complaint that used "puzzle pleading" technique which, instead of identifying which specific allegations were false and misleading, "recite[d] a list of allegedly false and misleading statements . . . and then follow[ed] the list with a summary paragraph that charges in a conclusory fashion that all the cited statements were false and misleading because of a separately located second list Plaintiffs label as the true facts").

Balboa also alleges that Ascentium offered various opinions about its experience with MHT. *See, e.g*., Compl., ¶¶ 10 and 17 (alleging that McKenzie "indicated that Ascentium's experience with MHT had been lucrative and positive," and that Traversone characterized MHT as "an excellent vendor"). But, like with the non-opinion statements it complains about, Balboa never pleads that these opinions were false or explains how they were false. These allegations therefore fail to satisfy Rule 9(b).

Otherwise, the opinion statements about which Balboa complains cannot support a fraud claim because they are far too vague and imprecise – classic examples of inactionable puffing.[11] Indeed, several of Balboa's allegations do not identify statements by Ascentium at all, but instead reflect Balboa's own summary of how it perceived other things that Ascentium allegedly said.[12] *See Infowise Sols., Inc. v. Microstrategy, Inc.*, No. CIV.A. 3:04-CV-0553-, 2005 WL 2445436, at *3 (N.D. Tex. Sept. 29, 2005) (Godbey, J.) (explaining that a "statement's lack of specificity, that it contains imprecise or vague representations, is a factor that indicates the presence of opinion rather than factual representations" and dismissing fraud claim based on characterization of

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[11] *See* Compl. ¶¶ 15 and 17 (alleging that McKenzie "was effusive in his praise for MHT," that Traversone gave MHT a "glowing recommendation," and that Traversone observed with respect to MHT and generically that "'[t]he best vendors bring the best obligors'").

[12] McKenzie's allegedly "effusive" praise, and Traversone's allegedly "glowing" recommendation, fit into this category.

plaintiff's past work as "strong"); *Omni USA, Inc*., 798 F. Supp. 2d at 852 (seller's statements claiming to be the "world's leading" manufacturer in the relevant field that produced "precision-engineered solutions" were opinions and "puffing" that could not give rise to a fraud claim); *Fitzgerald v. Water Rock Outdoors, LLC*, 536 S.W.3d 112, 118 (Tex. App.—Amarillo 2017, pet. denied) (defendant's statements that it "is a high quality custom homebuilder with years of experience, is hardworking and honest, and employs top-quality subcontractors . . . were merely 'puffing' or opinion and, as such, cannot constitute actionable fraud").[13] More broadly, "'[p]ure expressions of opinion [generally] are not representations of material fact, and thus cannot provide a basis for a fraud claim.'" *Ginsburg v. ICC Holdings, LLC*, No. 3:16-CV-2311-D, 2017 WL 5467688, at *11 (N.D. Tex. Nov. 13, 2017) (Fitzwater, J.) (quoting *Italian Cowboy Partners, Ltd. v. Prudential Ins. Co. of Am.*, 341 S.W.3d 323, 337-38 (Tex. 2011)).

Accordingly, Balboa's entire fraud-by-misstatement claim must be dismissed because it fails to satisfy Rule 9(b). The deficiencies in Balboa's fraud-by-misstatement claim remain important, however, because they reveal that Balboa's actual complaint appears to lie in its next claim which is based not on what Ascentium allegedly said, but instead on what Ascentium allegedly did not say. Yet, for the reasons shown below, Balboa's fraud-by-omission claim fails as a matter of law.

B. Any "fraud-by-omission" claim fails because Balboa failed to plead the essential element that Ascentium owed Balboa a "duty to disclose."

Balboa vaguely alleges that Ascentium "concealed and failed to disclose material facts . . . as to the viability of MHT and as to Ascentium's experience with financing MHT Licenses."

[13] Under California law, "words like 'strong,' 'robust,' 'well positioned,' 'solid,' and 'improved'" likewise are inactionable matters of opinion. *Tabletop Media, LLC v. Citizen Sys. of Am. Corp*., No. CV 16-7140 PSG (ASX), 2017 WL 10591885, at *6 (C.D. Cal. Mar. 3, 2017).

Compl., ¶ 47; *see also id*. at ¶¶ 19-21. But any fraud-by-omission claim must be dismissed under Rule 9(b) because Balboa failed to plead – ***at all***, let alone with the requisite particularity – that Ascentium owed Balboa a duty to disclose. *See Tornado BUS Co.*, 2015 WL 11120584, at *5 (dismissing fraud-by-omission claim because "[if] there is no duty to disclose, there is no fraud by nondisclosure," the plaintiff "[did] not allege [defendant] had a duty to disclose," and the duty to disclose must be "pled with particularity in order to state a cause of action"); *Sun Life Assurance Co. of Canada v. Hieb*, No. 3:16-CV-03349-M, 2017 WL 5593503, at *3 (N.D. Tex. Nov. 21, 2017) (Lynn, J.) (dismissing fraud-by-omission claim because plaintiff "[did] not allege that [defendant] had a duty to disclose information, let alone with particularity"); *TXI Operations, LP v. Pittsburg & Midway Coal Mining Co*., No. CIV. 3:04-CV-1146-H, 2004 WL 2088911, at *2 (N.D. Tex. Sept. 8, 2004) (Sanders, J.) (dismissing fraud-by-omission claim because the plaintiff failed to "allege Defendant's duty to disclose" in the complaint, despite plaintiff's attempt, in response to motion to dismiss, to recast other allegations in the complaint as satisfying this requirement).

Plaintiff cannot cure this defect by repleading, because Ascentium did not owe Balboa a duty to disclose as a matter of law.

1. As a matter of California law, Ascentium did not owe Balboa a duty to disclose.

Under California law, a duty to disclose requires either "a fiduciary relationship [between] the plaintiff [and the defendant]" or one of three other circumstances, each of which presupposes and requires a "transaction" between the plaintiff and the defendant. *See Deteresa v. Am. Broad. Companies, Inc*., 121 F.3d 460, 467 (9th Cir. 1997) (citing *LiMandri v. Judkins*, 52 Cal. App. 4th 326, 336 (Cal. App. 1997)). These circumstances are "when the defendant had exclusive knowledge of material facts not known to the plaintiff," "when the defendant actively conceals a

material fact from the plaintiff," and "when the defendant makes partial representations but also suppresses some material facts." *Id.*

Balboa admits that "Ascentium is a competitor of Balboa's," and thereby negates any suggestion that Ascentium was its fiduciary. *See* Compl., ¶ 9. Balboa also negates the other three potential bases for finding a duty to disclose, because it does not contend that any transaction took place between itself and Ascentium. Nor could it, because the only relevant transactions were between Balboa, the Doctor LLCs, and the guarantors. As a matter of law, Ascentium did not owe Balboa a duty to disclose. *See LiMandri*, 52 Cal. App. 4th at 337 (holding that, absent a fiduciary relationship, a relationship imposing a duty to disclose "can only come into being as a result of some sort of *transaction* between the parties," and rejecting fraud-by-omission claim based on a conversation that did not result in a transaction between the plaintiff and defendant) (emphasis in original; citing cases); *Deteresa*, 121 F. 3d at 468 (rejecting fraud claim because the plaintiff did not engage in a transaction with the defendant); *Wood*, 2012 WL 892166, at *9 (dismissing fraud-by-omission claim and noting that "[c]ourts uniformly hold that [a duty to disclose] can arise only when there is a transaction between the parties").[14]

2. As a matter of Texas law, Ascentium did not owe Balboa a duty to disclose.

Under Texas law, "[g]enerally, there is no duty to disclose absent a fiduciary or confidential relationship between the parties." *Tornado BUS Co.*, 2015 WL 11120584, at *5 (citing *Ibe v. Nat'l Football League*, No. 3:11-CV-248-M, 2014 WL 4906886, at *10 (N.D. Tex. Sept. 30, 2014)

[14] California federal courts routinely apply *LiMandri* to dismiss fraud-by-omission claims on this basis. *See, e.g., Fulford v. Logitech, Inc.*, No. C-08-2041 MMC, 2009 WL 837639, at *1 (N.D. Cal. Mar. 26, 2009) (dismissing fraud-by-omission claim because, under California law, "no duty to disclose can arise in the absence of either a fiduciary duty or a transaction between the parties"); *Cirulli v. Hyundai Motor Co.*, No. SACV 08-0854 AG MLGX, 2009 WL 4288367, at *4 (C.D. Cal. Nov. 9, 2009) (same); *Platt Elec. Supply, Inc. v. EOFF Elec., Inc.*, 522 F.3d 1049, 1059 (9th Cir. 2008) (affirming finding that defendant did not owe duty to disclose absent a transaction with the plaintiff).

(Lynn, J.)). "The extent to which a duty to disclose exists absent such a relationship is unresolved under Texas law and by the Fifth Circuit." *Tornado BUS Co.*, 2015 11120584, at *5. After one detailed survey of case law, the Fifth Circuit stated 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." *United Teacher Associates Ins. Co. v. Union Labor Life Ins. Co*., 414 F.3d 558, 564-66 (5th Cir. 2005) (citing, *inter alia*, *Bradford v. Vento*, 48 S.W.3d 749, 758 (Tex. 2001)). As noted above, Balboa's admission that Ascentium is its competitor negates any suggestion that a confidential or fiduciary relationship existed.

It is true that some Texas state and federal courts have found that a partial disclosure can create a duty to disclose even without a fiduciary relationship.[15] But they, like the California cases, also require a "transaction" between the plaintiff and defendant that is absent here. *See Admiral Ins. Co., Inc. v. Arrowood Indem. Co*., 471 B.R. 687, 709-12 (N.D. Tex. 2012) (Lindsay, J.) (explaining 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," and affirming judgment for defendant on fraud-by-omission claim because there was no evidence of a transaction between plaintiff and defendant); *Marshall v. Kusch*, 84 S.W.3d 781, 786 (Tex. App.—Dallas 2002, pet. denied) (finding that seller "A" could only have owed a duty to disclose to buyer "B," with whom Seller A transacted, and that seller could not have owed a duty to disclose to plaintiff "C" who later purchased the same property from buyer "B" because seller "A" did not transact with plaintiff "C").

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[15] Similar to the California courts, these courts "have found that a duty to disclose may arise: (1) when one party voluntarily discloses information, which gives rise to the duty to disclose the whole truth; (2) when one party makes a representation, which gives rise to the duty to disclose new information that the party is aware makes the earlier representation misleading or untrue; or (3) when one party makes a partial disclosure and conveys a false impression, which gives rise to a duty to speak." *Tornado BUS Co.*, 2015 11120584, at *5 (citations omitted).

As a result, Balboa's "fraud by omission" claim fares no better under Texas law than it would in California, and should be dismissed with prejudice without leave to replead.

III. Any "negligent misrepresentation" claim is time-barred and fails because of the same deficiencies outlined above.

A. The Texas statute of limitations bars any "negligent misrepresentation" claim.

Texas statutes of limitation apply to Balboa's claims against Ascentium because Texas treats statutes of limitations as procedural matters governed by the law of the forum state. *Cypress/Spanish Ft. I, L.P. v. Prof'l Serv. Indus., Inc.*, 814 F. Supp. 2d 698, 708 (N.D. Tex. 2011) (Boyle, J.) (citing *Johansen v. E.I. Du Pont De Nemours & Co.,* 810 F.2d 1377, 1381 (5th Cir. 1987)).[16] Under Texas law, the statute of limitations for negligent misrepresentation is two years. *See* Tex. Civ. Prac. & Rem. Code § 16.003(a) (establishing general two-year statute of limitations for personal injury claims); *Levels v. Merlino*, 969 F. Supp. 2d 704, 728–29 (N.D. Tex. 2013) (Lynn, J.) ("The statute of limitations is two years for a negligent misrepresentation claim.") (citing § 16.003(a)).

"In Texas, 'a cause of action accrues when a wrongful act causes a legal injury, regardless of when the plaintiff learns of that injury or if all resulting damages have yet to occur.'" *Levels*, 969 F. Supp. 2d at 721 (quoting *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 221 (Tex. 2003)). Ascentium's alleged statements and omissions occurred between August and October of 2016 – more than three years before Balboa sued Ascentium on November 8, 2019. *See* Compl., ¶¶ 10-17. Balboa, which claims to have relied on Ascentium's alleged statements and omissions when entering into the financing contracts with the Doctor LLCs and guarantors, executed the last financing contract on or about February 27, 2017 – more than two years before

[16] As explained in *Cypress/Spanish Ft. I, L.P.*, even if another state's law governs the substance of a party's claims, Texas federal courts sitting in diversity must apply Texas conflict of law rules, under which statutes of limitations "are considered to be procedural, not substantive." 814 F. Supp. 2d 708-09.

Balboa sued Ascentium.[17] Under *Levels*, the statute of limitations on a claim that the defendant's conduct induced the plaintiff to enter a contract begins to run when the contract is executed. *See* 969 F. Supp. 2d at 721, 729. Limitations therefore expired on any negligent misrepresentation claim no later than February 27, 2019, and expired even sooner with respect to all of the financing contracts that Balboa executed on earlier dates.[18]

Applying the statute of limitations is particularly fair on the present facts, because Balboa had been accused of fraud in an MHT-related class action by April 5, 2017,[19] admits that the Doctor LLCs and guarantors all had defaulted on their financing contracts by June 27, 2017,[20] and indeed had sued all of the Doctor LLCs and guarantors for nonpayment no later than June 2017.[21] Balboa could have made all of the same allegations against Ascentium in the middle of 2017 when it sued the obligors, but inexplicably waited until November 8, 2019 – well over two years after Balboa's

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[17] Balboa's complaint against the *Feng* defendants attaches the financing contract with the latest execution date, February 27, 2017. *See* Lead Case Dkt. 184, p. 14.

[18] Balboa's complaint against the *Woldegiorgis* defendants attaches the financing contract with the earliest execution date, October 18, 2016. *See* Lead Case Dkt. 185, p. 14.

[19] *See Patel v. Balboa Capital Corporation, et al.*, No. 3:17-cv-963 (N.D. Tex., filed Apr. 5, 2017). More than two years before Balboa sued Ascentium, the *Patel* complaint publicly alleged that MHT was "akin to a pyramid or Ponzi scheme" and that "Balboa . . . used the agreements they created or obtained . . . to enrich [itself] . . . and to defraud and harm unsuspecting physicians." *See id.* at ¶¶ 61, 65; *see also id.* at ¶ 87 ("Balboa has known about—and accepted and kept the benefits resulting from—the [MHT] Scheme. In addition, Balboa obtained independent knowledge of the conspiracy and scheme as a result of its investigation into . . . MHT's practice."). This Court can take judicial notice of public filings in the *Patel* case, which Ascentium respectfully requests. *See Norris v. Hearst Tr.*, 500 F. 3d 454, 461 n.9 (5th Cir. 2007) ("[I]t is clearly proper in deciding a 12(b)(6) motion to take judicial notice of matters of public record.") (citing *Cinel v. Connick*, 15 F. 3d 1338, 1343 n.6 (5th Cir. 1994)).

[20] Balboa's complaint against the *Feng* defendants alleges that the default occurred "[o]n or about June 27, 2017." *See* Lead Case Dkt. 184, ¶ 38. All of Balboa's other complaints allege earlier defaults, with the earliest occurring "[o]n or about April 18, 2017" as to the *Sozi* and *Woldegiorgis* defendants. *See* Lead Case Dkt. 188, ¶ 37 (Sozi); Lead Case Dkt. 185, ¶ 37 (Woldegiorgis).

[21] *See* Stipulation to Transfer Consolidated Actions to the U.S. District Court for the Northern District of Texas (Lead Case Dkt. 33), at p. 3 (stating that Balboa's collections cases, which later became these Consolidated Cases, were filed "between approximately April 2017 and June 2017").

claim accrued. Accordingly, Balboa's negligent misrepresentation claim is facially barred by the two-year statute of limitations, and must be dismissed.[22]

B. The "negligent misrepresentation" claim is based on the same allegations as the fraud claims, and therefore fails for the same reasons as the fraud claims.

Even if the negligent misrepresentation claim were not barred by limitations, it must be dismissed because it fails to satisfy the particularity requirements of Rule 9(b). The Fifth Circuit and this Court apply Rule 9(b)'s particularity requirements to negligent misrepresentation claims that are based on the same set of alleged facts as a fraud claim. *See Johnston*, 2017 WL 6459529, at *3 (citing *Benchmark Elecs., Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 723 (5th Cir. 2003)); *see also Cypress/Spanish Ft. I, L.P.*, 814 F. Supp. 2d at 707 ("When claims for fraud and negligent misrepresentation are based on the same set of alleged facts, Rule 9(b)'s heightened pleading standard applies."). Therefore, Balboa was required to "allege the 'who, what, where, when, and how'" of its negligent misrepresentation claim. *Johnston*, 2017 WL 6459529, at *3 (internal quotation marks omitted) (quoting *Columbia/HCA Healthcare Corp.*, 125 F.3d at 903).

As with the fraud claims, Balboa fails to plead the negligent misrepresentation[23] claim with particularity. Balboa fails to identify which of Ascentium's alleged representations were false or

[22] The Court can dismiss claims on Rule 12(b)(6) grounds when, as here, they are time-barred on the face of the pleadings. *See Nationwide Bi-Weekly Admin., Inc. v. Belo Corp.*, 512 F.3d 137, 141, 147 (5th Cir. 2007) (citing *Jones v. Alcoa, Inc.*, 339 F. 3d 359, 366 (5th Cir. 2003) and affirming dismissal on Rule 12(b)(6) grounds based on the statute of limitations).

[23] "A claim for negligent representation in Texas consists of four elements: (1) the defendant made a representation in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplied false information for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffered pecuniary loss by justifiably relying on the representation." *Coleman*, 969 F. Supp. 2d at 750–51 (citing *Hurd v. BAC Home Loans Servicing, LP,* 880 F. Supp. 2d 747, 762 (N.D. Tex. 2012)). A claim of negligent misrepresentation in California requires: "(1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce the plaintiff's reliance, (4) ignorance of the truth and justifiable reliance by the plaintiff, and (5) damages." *Garcia v. Ocwen Loan Servicing, LLC*, No. C 10-0290 PVT, 2010 WL 1881098, at *2 (N.D. Cal. May 10, 2010) (citing *Fox v. Pollack,* 181 Cal. App. 3d 954, 962 (Cal. App. 1986)).

how they were false, Balboa improperly relies on opinions to support its purported claim, and Balboa failed to plead that Ascentium owed a duty to disclose any undisclosed facts. Finally, Balboa has not plausibly alleged that Ascentium caused its losses because the Doctor LLCs' and guarantors' obligations were independent of MHT's viability or performance, and failed to plausibly allege that it was justified in relying on alleged statements concerning MHT when its obligors were the Doctor LLCs and guarantors. Because Balboa's negligent misrepresentation claim is neither plausible nor pled with the particularity required by Rule 9(b), it must be dismissed.

CONCLUSION

Balboa's claims against Ascentium fail to satisfy Rule 8(a)(2) and the plausibility requirement contained in *Twombly* and *Iqbal*, and also fail to satisfy Rule 9(b)'s heightened pleading standard. Balboa's negligent misrepresentation claim is barred by limitations and otherwise fails for the same reasons as the fraud claims. Ascentium respectfully asks this Court to grant this motion, dismiss all claims against it with prejudice, and order such other and further relief as the court finds appropriate.

Dated: January 21, 2020.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on January 21, 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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