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

MICHAEL J. QUILLING, Receiver for ABC VIATICALS, INC. and Related Entities,	§	
	§	
Plaintiff,	§	
	§	
v.	§	**CIVIL ACTION NO.**
	§	
INTERNATIONAL FIDELITY & SURETY LIMITED, INTERNATIONAL CONSULTANTS & MANAGEMENT LTD., SURETY MARKETING SOURCE, LLC, KPMG VANUATU, HAWKES LAW, KPMG INTERNATIONAL, BOSWELL, DERMOTT & PAWLETT, LLP, MOHAN & ASSOCIATES, DAVID A. GOLDENBERG, DAG INVESTMENTS, LLC, LPG INVESTMENTS, LLC, WED MARKETING, LLC, GALAX HOLDINGS, LTD, MARK WOLOK, LINDA WOLOK and ARIE KOTLER,	§	**3-07-CV-0421-P** **ECF**
	§	
Defendants.	§	

DEFENDANT ARIE KOTLER'S MOTION TO DISMISS
PLAINTIFF'S COMPLAINT AND BRIEF IN SUPPORT

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

MICHAEL J. QUILLING, Receiver for ABC VIATICALS, INC. and Related Entities, ***Plaintiff*,** **v.** **INTERNATIONAL FIDELITY & SURETY LIMITED, INTERNATIONAL CONSULTANTS & MANAGEMENT LTD., SURETY MARKETING SOURCE, LLC, KPMG VANUATU, HAWKES LAW, KPMG INTERNATIONAL, BOSWELL, DERMOTT & PAWLETT, LLP, MOHAN & ASSOCIATES, DAVID A. GOLDENBERG, DAG INVESTMENTS, LLC, LPG INVESTMENTS, LLC, WED MARKETING, LLC, GALAX HOLDINGS, LTD, MARK WOLOK, LINDA WOLOK and ARIE KOTLER,** ***Defendants.***	§ §	**CIVIL ACTION NO.** **3-07-CV-0421-P** **ECF**

DEFENDANT ARIE KOTLER'S MOTION TO DISMISS
PLAINTIFF'S COMPLAINT AND BRIEF IN SUPPORT

TO THE HONORABLE JORGE A. SOLIS:

Pursuant to Rules 9(b), 12(b)(6), and 12(b)(1) of the Federal Rules of Civil Procedure, Defendant Arie Kotler ("Kotler") moves to dismiss the Complaint of Plaintiff Michael J. Quilling, as Receiver for ABC Viaticals, Inc. and other related entities[1] ("Plaintiff") against Kotler, stating as follows:

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[1] Though Plaintiff does not identify them in his Complaint, these "related" entities are LaMonda Management Family Limited Partnership, Structured Life Settlements, Inc., Blue Water Trust, and Destiny Trust. (*See* Order Appointing Receiver at 1 (attached as Exhibit 1 to Plaintiff's Complaint)) In his Complaint, Plaintiff contends that he was appointed as receiver not only for ABC Viaticals and these "related entities," but also for "a series of numbered trusts held for the benefit of ABC investors."

INTRODUCTION AND SUMMARY OF ARGUMENT

In his Complaint, Plaintiff asserts a number of claims, all based on his allegation that the defendants participated in and facilitated a "Ponzi scheme" with ABC Viaticals, Inc. ("ABC") and the other receivership entities.[2] (Compl. ¶¶ 30, 49) As they relate to Kotler, these claims must be dismissed in their entirety. *First*, Plaintiff's claims for fraud, aiding and abetting breach of fiduciary duty, malpractice, and fraudulent transfer must be dismissed because Plaintiff has not pleaded them with particularity, as required by FED. R. CIV. P. 9(b). All of these claims sound in fraud, and are thus subject to Rule 9(b)'s pleading requirements. Plaintiff offers only impermissible "group pleading" and vague, non-particularized allegations in asserting them against Kotler; he thus fails to meet the standard of Rule 9(b). *Second*, Plaintiff's attempt to impute liability to Kotler for the alleged acts of other defendants under an alter ego theory, as well as Plaintiff's claims for negligent misrepresentation, malpractice, and civil conspiracy, all fail to state a claim under FED. R. CIV. P. 12(b)(6), and must also be dismissed. *Third*, Plaintiff lacks standing to assert his claims for aiding and abetting breach of fiduciary duty and fraudulent transfer. These two claims can only be brought by ABC's customers, not ABC itself or the related entities; in his capacity as equity receiver, Plaintiff is limited to asserting claims for the receivership entities alone. Because Plaintiff cannot assert claims on behalf of the ABC customers, these claims must be dismissed under FED. R. CIV. P. 12(b)(1).

(Compl. ¶ 21) Plaintiff purports to bring his Complaint, however, only as "Receiver for ABC Viaticals, Inc. and [the] other related entities" listed above – not for the "numbered trusts" referred to later in his Complaint. (*Compare id.* at 1 *with id.* ¶ 21)

[2] In his Complaint, Plaintiff defines "ABC" to include ABC Viaticals, Inc. and the four "related entities," as well as "the numbered trusts." (Compl. ¶ 21) Throughout the Complaint, however, Plaintiff's references to "ABC" clearly denote ABC Viaticals alone.

SUMMARY OF ALLEGATIONS

Throughout his fifteen-page pleading, Plaintiff makes only four specific allegations regarding Kotler, other than merely identifying Kotler as a New York resident. (Compl. ¶ 17) First, Plaintiff alleges that Kotler "purported to serve as the managing director and beneficial owner" of two other defendant entities. (*Id.* ¶ 23) Second, Plaintiff similarly alleges that those two entities are "alter egos" for Kotler and two individual defendants. (*Id.* ¶ 24) Third, Plaintiff groups Kotler with several other defendants that Plaintiff labels the "Bonding Company Defendants." (*Id.* ¶ 35) Fourth and finally, Plaintiff alleges that Kotler, along with three other defendants, "owned and controlled" the Bonding Company Defendants. (*Id.* ¶ 46) Every other allegation either concerns parties other than Kotler, or purports to include Kotler (without naming him) in an undifferentiated group like the "Bonding Company Defendants."[3]

According to Plaintiff, ABC was involved in "the life settlement business" (also known as the "viatical business"), in which ABC purchased life insurance policies on the lives of third-party individuals. (Compl. ¶ 21) ABC then sold smaller interests in those policies to its customers. (*Id.*)[4] Plaintiff alleges that payments from the customers were to be used to cover the policies' purchase price, premium payments, and other costs, and the customers were promised sizeable returns (between 30% and 150%) from benefits paid when the insured person died. (*Id.*) According to Plaintiff, ABC attracted its customers by marketing the policies as being backed by a bonding company. (*Id.* ¶ 22) Plaintiff alleges that ABC falsely represented to potential

[3] Defendant Kotler acknowledges that the law requires the Court to accept Plaintiff's allegations of specific facts as true, solely for purposes of this motion to dismiss. But a number of those allegations are simply false, and Kotler strongly denies them. References to those allegations in the course of this motion to dismiss, therefore, should in no way be taken as his acquiescence to or agreement with those allegations – either with respect to Kotler himself or with respect to the other defendants.

[4] In his Complaint, Plaintiff refers to these customers as ABC's "investors," but this characterization is misleading. The "investors" were not shareholders or otherwise investors in ABC itself, but rather were customers who purchased interests in the life insurance policies from ABC. (Compl. ¶ 21)

customers that the bonding company would pay death benefits when they were due, even if the insured person had not yet died. (*Id.*) ABC allegedly raised approximately $121 million from at least 3,300 customers. (*Id.*)

The first such bonding company was Defendant International Fidelity & Surety Limited ("IFS"). (Compl. ¶ 23) According to Plaintiff, Kotler "purported to serve as managing director and beneficial owner" of IFS and its holding company, International Consultants & Management Ltd. ("ICM"). (*Id.*)[5] Plaintiff alleges that IFS and ICM "exist only on paper" as the "alter egos" of Kotler and two other individual defendants, David A. Goldenberg ("Goldenberg") and Mark E. Wolok ("Wolok"). (*Id.* ¶ 24) He claims that IFS and ICM falsely represented that they had an office in Connecticut, when they maintained only a mailbox drop there, without any employees, facilities, or assets. (*Id.*)

Plaintiff alleges that Defendant Surety Marketing Source, LLC ("SMS") "represented that it was the exclusive marketing agent" for IFS and that SMS, along with Goldenberg and Wolok – but not Kotler – engaged in marketing efforts toward "the viatical industry in general and ABC in particular," representing that "IFS and ICM were legitimate entities." (*Id.* ¶ 25) According to Plaintiff, these alleged misrepresentations "convinced ABC to purchase bonds from IFS." (*Id.* ¶ 26) As part of this initial purchase arrangement, IFS issued two bonds for $50 million and $20 million, which served as "a line of credit" and enabled ABC to purchase a number of smaller bonds. (*Id.*) Plaintiff alleges that these bonds were guaranteed by ICM in the event of default by IFS. (*Id.*) Plaintiff claims that ABC, using its customers' money, typically paid premiums of 2.5% on the bonds. (*Id.* ¶ 27) Plaintiff also asserts that Goldenberg and Wolok – but again, not Kotler – knowingly and falsely represented to ABC that they would

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[5] Plaintiff alleges that another defendant, Galax Holdings, Inc. ("Galax"), also served – perhaps at another time – as managing director of both IFS and ICM. (Compl. ¶ 23)

deduct their commission from these premiums and forward the balance to IFS, when instead they spent the money or diverted it to accounts they controlled in the names of other defendants. (*Id.*) Because Goldenberg and Wolok allegedly "treated the investor funds received from ABC as their own," Plaintiff claims that IFS and ICM were those individuals' "alter egos." (*Id.*) Once more, Plaintiff makes no mention of Kotler.

Despite the lack of specific allegations against Kotler, Plaintiff purports to assert claims against him as part of a group of defendants, labeled the "Bonding Company Defendants." (*Id.* ¶¶ 35, 39, 42, 44, 46, 49, 53)[6] In his claim for aiding and abetting ABC's breach of fiduciary duty, Plaintiff alleges that the Bonding Company Defendants "substantially assisted and encouraged" ABC's breach of its fiduciary duty to its customers "by participating in a network of fictitious companies that sold nonexistent bonds through IFS and ICM." (*Id.* ¶ 35) Plaintiff further alleges that these defendants knew that IFS and ICM could not honor their obligations under the bonds, but still accepted "investor" funds as premiums and "allowed" ABC to make false representations to the customers. (*Id.*) Similarly, in his "professional malpractice/ negligence" claim, Plaintiff asserts that these defendants breached their duty "to market and sell bonds that would be honored and backed by a solvent bonding company," but does not specify any act or omission by Kotler. (*Id.* ¶ 39) The negligent misrepresentation and fraud claims follow the same pattern, alleging that the Bonding Company Defendants made false representations about the solvency of the bonding companies, but again making no specific mention of Kotler. (*Id.* ¶¶ 42, 44) In his civil conspiracy claim, Plaintiff repeats many of the same generalized allegations regarding false representations about the bonds, and then adds the somewhat puzzling allegation that the Bonding Company Defendants "were owned and

[6] The other "Bonding Company Defendants" are IFS, ICM, SMS, Galax, Goldenberg, and Wolok. (Compl. ¶ 35)

controlled" by Kotler and three other defendants – meaning that these defendants controlled themselves, among others. (*Id.* ¶ 46) He also alleges a meeting of the minds among "the three" of these defendants, even though the claim previously listed four. (*Id.*) Finally, the fraudulent transfer claim also refers generally to transfers from ABC to the Bonding Company Defendants, but once more without identifying any transfers to Kotler. (*Id.* ¶ 49)

ARGUMENT AND AUTHORITIES

I. Plaintiff's Fraud, Fiduciary Duty, Malpractice, and Fraudulent Transfer Claims Against Kotler Must Be Dismissed Because Plaintiff Has Failed to Plead Them With Particularity, as Required by FED. R. CIV. P. 9(b).

Plaintiff's claims against Kotler for fraud, aiding and abetting breach of fiduciary duty, malpractice, and fraudulent transfer must all be dismissed because Plaintiff has failed to plead them with particularity, as required by FED. R. CIV. P. 9(b). Rule 9(b) of the Federal Rules of Civil Procedure provides that all claims alleging fraud or sounding in fraud must be "stated with particularity." FED. R. CIV. P. 9(b); *see also Southland Sec. Corp. v. Inspire Ins. Solutions, Inc.*, 365 F.3d 353, 362-63 (5th Cir. 2004); *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 349 (5th Cir. 2002). This standard applies to claims asserted under federal and state law. *Williams v. WMX Techs., Inc.*, 112 F.3d 175, 177 (5th Cir. 1997).

Under the Fifth Circuit's "relatively strict interpretation" of Rule 9(b), a plaintiff is required to "specify the statements contended to be fraudulent, identify the speaker, state when and where the statements were made, and explain why the statements were fraudulent." *ABC Arbitrage*, 291 F.3d at 350 (citation omitted).[7] When a claim involves multiple defendants, a plaintiff may not simply group the defendants together, but rather must make specific and separate allegations against each defendant. *E.g.*, *Zuckerman v. Foxmeyer Health Corp.*, 4 F.

[7] Stated another way, a plaintiff should identify the "time, place and contents of the false representations, as well as the identity of the person making the misrepresentation and what [that person] obtained thereby." *ABC Arbitrage*, 291 F.3d at 349 (citation omitted).

Supp. 2d 618, 622 (N.D. Tex. 1998); *see also* 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1297, at 102-03 & n.14 (3d ed. 2004 & Supp. 2007). The court must apply this heightened standard under Rule 9(b), and if the Complaint fails to meet these requirements, the claims *must* be dismissed. *See ABC Arbitrage*, 291 F.3d at 350.

A. The Rule 9(b) Pleading Requirement Applies to All of Plaintiff's Claims That Sound in Fraud.

The Rule 9(b) standard applies not only to Plaintiff's fraud claim, but also to his claims for fraudulent transfer, aiding and abetting ABC's breach of fiduciary duty, and for malpractice. (Compl. ¶¶ 35, 39) This Court has recently "determine[d] that Fifth Circuit precedent favors applying Rule 9(b) to fraudulent transfer actions." *Quilling v. Stark*, No. 3:05-CV-1976-L, 2006 WL 1683442, at *5 n.4 (N.D. Tex. June 19, 2006) (citations omitted). Regarding the fiduciary duty claim, while the Rule 9(b) pleading requirement does not extend to all such claims, it does apply to "breach of fiduciary duty claims that are predicated on fraudulent conduct." *Ingalls v. Edgewater Private Equity Fund III, L.P.*, No. Civ. A. H-05-1392, 2005 WL 2647962, at *5 (S.D. Tex. Oct. 17, 2005) (citations omitted). Plaintiff's breach of fiduciary duty claim is plainly based on allegations of fraud. Plaintiff alleges that the Bonding Company Defendants assisted ABC in breaching its fiduciary duty to its customers by "participating in a network of fictitious companies that sold nonexistent bonds through IFS and ICM," despite knowing that IFS and ICM could not honor the bond obligations, fraudulently accepting investor funds, and "allow[ing]" ABC to make false statements regarding the nature of the bond investments. (Compl. ¶ 35) Because the fiduciary duty claim sounds in fraud, the pleading requirements of Rule 9(b) apply. *Ingalls*, 2005 WL 2647962, at *6.

For the same reasons, Rule 9(b) also applies to Plaintiff's "professional malpractice/negligence" claim, which is framed in terms of the Bonding Company Defendants'

alleged fraudulent conduct. (Compl. ¶ 39) Echoing the allegations in the fiduciary duty claim, Plaintiff contends that these defendants breached an alleged duty "to engage in their business activities in an honest and forthright manner." (*Id.*) The means by which they allegedly breached this purported duty all amount to allegations of fraud: "engaging in a fraudulent financial scheme," marketing "nonexistent bonds in exchange for investor funds," "encouraging" ABC to buy these fraudulent bonds, and misdirecting investor funds. (*Id.*) Sounding in fraud equally with the fiduciary duty claim, this "malpractice" claim is subject to Rule 9(b)'s pleading requirements as well. *See Ingalls*, 2005 WL 2647962, at *6.

B. Plaintiff's Fraud, Fraudulent Transfer, Fiduciary Duty, and Malpractice Claims Against Kotler Must Be Dismissed Because They Do Not Allege Specific Conduct Against Kotler, But Rather Rely on Impermissible "Group Pleading."

Plaintiff's fraud, fraudulent transfer, fiduciary duty, and malpractice claims must all be dismissed, insofar as Kotler is concerned, because they fail to identify the fraudulent conduct specifically attributable to Kotler, as opposed to simply a group of defendants. Under Rule 9(b), "a plaintiff must attribute the misleading statements on which his claim is based to a particular defendant." *Zuckerman*, 4 F. Supp. 2d at 622; *Unimobil 84, Inc. v. Spurney*, 797 F.2d 214, 217 (5th Cir. 1986) (plaintiff's "general allegations, which do not state with particularity what representations each defendant made, do not meet" Rule 9(b)'s requirement); *Haskin v. R.J. Reynolds Tobacco Co.*, 995 F. Supp. 1437, 1440 (M.D. Fla. 1998) (pleading that failed to distinguish between multiple defendants and only referred to "defendants" generally did not satisfy Rule 9(b)); *Ingalls*, 2005 WL 2647962, at *5 ("Group pleading fails to satisfy the requirement that the who, what, where, why, and when of the fraud be specified.") (quoting

Glaser v. Enzo Biochem, Inc., 303 F. Supp. 2d 724, 734 (E.D. Va. 2003)).[8] A plaintiff must "distinguish among" the defendants and "enlighten each defendant as to his or her part in the alleged fraud." *Zuckerman*, 4 F. Supp. 2d at 622 (citation omitted).[9] If a complaint fails to meet this standard, it must be dismissed.

Plaintiff's Complaint consistently groups Kotler with all of the other defendants or with the subset of "Bonding Company Defendants," but rarely mentions Kotler by name. Indeed, the entirety of the Complaint's specific allegations regarding Kotler is as follows:

- Kotler "purported to serve as the managing director and beneficial owner" of IFS and ICM. (Compl. ¶ 23)
- IFS and ICM "exist only on paper as the alter egos" of Kotler, Goldenberg, and Wolok. (*Id.* ¶ 24)
- Kotler was one of the "Bonding Company Defendants." (*Id.* ¶ 35)
- Along with Goldenberg, Wolok, and Galax, Kotler "owned and controlled" the Bonding Company Defendants at some unspecified time. (*Id.* ¶ 46)

These allegations alone cannot state a claim for fraud or any of the other fraud-related causes of action.[10] The Complaint otherwise refers to Kotler only as part of an undifferentiated group of "defendants" or "Bonding Company Defendants." (*Id.* ¶¶ 35, 39, 42, 44, 46, 49, 53, 56) This "group pleading" alleges no specific conduct, such as a particular false representation (or ABC's reliance on such a representation), on the part of Kotler that would state a fraud-related claim

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[8] *But see St. Denis J. Villere & Co. v. Caprock Commc'ns Corp.*, No. Civ.A. 3:00CV1613-N, 2003 WL 21339286, at *1 (N.D. Tex. June 4, 2003) (in an action under the Private Securities Litigation Reform Act ("PSLRA"), stating that "the use of a defined term for a group of individuals, at least in the context of this pleading, does not constitute improper 'group pleading'"). This opinion does not cite the applicable authority regarding group pleading under Rule 9(b) and, in any event, is not binding on this Court.

[9] "Group pleading" has also been rejected for claims asserted under the PSLRA. *Southland*, 365 F.3d at 364-65. But the proscription against group pleading applies to both PSLRA and non-PSLRA claims. *See Zuckerman*, 4 F. Supp. 2d at 622.

[10] As explained below, Plaintiff has failed to allege any facts that, if true, would support a finding that IFS and/or ICM were alter egos of Kotler. (*See* II.B, *infra*)

against him. *Cf. Zuckerman*, 4 F. Supp. 2d at 626 (noting that "Plaintiffs allege who made the misrepresentations, the content of the misrepresentations, when they were made, and where they were reported"). In the absence of any other allegations regarding Kotler himself, Plaintiff's fraud-related claims against him do not meet Rule 9(b)'s pleading requirement and must be dismissed. *See, e.g.*, *Unimobil 84*, 797 F.2d at 217.

C. Plaintiff Has Failed to Plead the Fraud-Related Claims with Particularity.

Even if these group allegations could be imputed to Kotler, Plaintiff still has not pleaded the various fraud-related claims with sufficient particularity to satisfy Rule 9(b). In connection with the fraud claim, Plaintiff alleges that the Bonding Company Defendants made material representations "that they belonged to a legitimate and solvent network of companies selling bonds backed by IFS and ICM." (Compl. ¶ 44) This vague and conclusory assertion does not identify where or when these "representations" took place, or to whom they were directed. The only other allegations regarding this claim appear earlier in the Complaint but, as noted above, identify only SMS, Goldenberg, and Wolok as having made the representations in question. (Compl. ¶¶ 25-26) To the extent these representations included the alleged false financial statements, Plaintiff identifies only ICM and IFS as Bonding Company Defendants that retained the various accountants for that purpose. (*Id.* ¶ 29) The remaining allegations in support of this claim are simply conclusory assertions that unspecified "Defendants" knew the statements were false and intended ABC and others to rely on them. (*Id.* ¶ 44) Even under the lesser pleading standard of FED. R. CIV. P. 8, such bare legal conclusions, bereft of any factual support, are insufficient to state a claim. *Bell Atl. Corp. v. Twombly*, 127 S. Ct. 1955, 1965 (2007) (under Rule 8, a complaint must provide "more than labels and conclusions"); *Campbell v. City of San Antonio*, 43 F.3d 973, 975 (5th Cir. 1995) ("[C]onclusory allegations or legal conclusions

masquerading as factual conclusions will not suffice to prevent a motion to dismiss.") (citation omitted).

Plaintiff's claim against the Bonding Company Defendants for aiding and abetting ABC's breach of fiduciary duty fails for similar reasons. As discussed above, Plaintiff alleges that the Bonding Company Defendants assisted and encouraged this breach "by participating in a network of fictitious companies" selling nonexistent bonds, "allow[ing]" ABC to make false representations to customers, and accepting investor funds, all with the knowledge that IFS and ICM could not honor the bonds. (Compl. ¶ 35) These vague allegations do not identify the network of companies, the basis for Kotler's (or any other Defendant's) knowledge regarding IFS and ICM, the circumstances under which the Defendants "allowed" ABC to make the representations, or the contents or circumstances surrounding the representations themselves. Again, the specific allegations earlier in the Complaint do not implicate Kotler in any of these acts. Only SMS, Goldenberg, Wolok, IFS, and ICM are alleged to have fraudulently marketed the bonds, and only Goldenberg and Wolok – not Kotler – are alleged to have improperly diverted funds. (*Id.* ¶¶ 25-28)

The "professional malpractice/negligence" claim follows the same pattern. Plaintiff asserts that the Bonding Company Defendants "had a duty to market and sell bonds that would be honored and backed by a solvent bonding company" (Compl. ¶ 39), but offers no factual allegations to show the existence of this duty. Plaintiff then recites a familiar litany of alleged acts constituting breach of that duty: the Bonding Company Defendants engaged in a fraudulent financial scheme, marketed "nonexistent bonds," encouraged ABC to buy these fraudulent bonds, and misdirected investor funds. (Compl. ¶ 39) Standing alone, these allegations fail to identify most, if not all, of the requisite details required by Rule 9(b). Instead, they are simply

"legal conclusions resting on [] prior allegations" that do not reference Kotler, and thus fail to meet even the more relaxed standard under Rule 8. *Twombly*, 127 S. Ct. at 1970.

Similarly, the fraudulent transfer claim contains only conclusory assertions that the Bonding Company Defendants received transfers from ABC that were "fraudulent," but provides no further detail. (Compl. ¶ 49) And the Complaint only identifies IFS, ICM, Goldenberg, and Wolok as the recipients of any such transfers. (*Id.* ¶¶ 26-28) In short, Plaintiff's fraud-related claims that purportedly include Kotler are vague, conclusory, and unsupported by particularized facts, and therefore must be dismissed with respect to him, pursuant to FED. R. CIV. P. 9(b).

II. Plaintiff's Claims Must Be Dismissed Under FED. R. CIV. P. 12(b)(6) For Failure to State a Claim.

Plaintiff's claims against Kotler must be dismissed for the additional reason that Plaintiff has failed to allege facts which, if proved, would support liability against Kotler. Specifically, Plaintiff has not pleaded facts to create liability on Kotler's part for the alleged acts of IFS or ICM under an "alter ego" theory; the claims for professional malpractice and negligent misrepresentation consist of bare legal conclusions without any factual support; and the civil conspiracy claim fails because Plaintiff has not properly pleaded an underlying tort.

A. Rule 12(b)(6) Standard.

Under FED. R. CIV. P. 12(b)(6), this Court must presume all factual allegations in Plaintiff's Complaint to be true and resolve any ambiguities or doubts regarding the sufficiency of the claim in favor of Plaintiff. *Fernandez-Montes v. Allied Pilots Ass'n*, 987 F.2d 278, 284 (5th Cir. 1993). "However, 'the complaint must contain either direct allegations on every material point necessary to sustain a recovery . . . or contain allegations from which an inference fairly may be drawn that evidence on these material points will be introduced at trial.'" *Campbell*, 43 F.3d at 975 (citation omitted). In meeting this requirement, the complaint must

provide "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 127 S. Ct. at 1965. The complaint must exhibit sufficient factual "allegations plausibly suggesting (not merely consistent with)" the claims to be established. *Id.* at 1959.

B. Plaintiff Has Failed to Allege Facts Upon Which This Court Could Conclude that IFS or ICM Are "Alter Egos" of Kotler.

Plaintiff cannot maintain any claims against Kotler based on the actions of either IFS or ICM, despite Plaintiff's allegation that these entities were Kotler's "alter egos." For example, though Plaintiff does not expressly assert a breach of contract claim against Kotler, he contends that IFS and ICM breached their bonds and guarantee, respectively, by "failing to pay" death benefits when they became due. (Compl. ¶ 32) Earlier in his Complaint, Plaintiff asserts that IFS and ICM "exist only on paper as the alter egos" of Kotler and two other defendants. (*Id.* ¶ 24)[11] To the extent Plaintiff seeks to impute the alleged breach of contract – or any other alleged conduct – by IFS or ICM to Kotler based on an alter ego theory, Plaintiff has wholly failed to allege facts which, if proved, would support doing so.

Under Texas law, corporate formalities may be disregarded and an individual held liable for the acts of a corporation "when there is such unity between" the corporation and individual "that the separateness of the corporation has ceased and holding only the corporation liable would result in an injustice." *Hoffmann v. Dandurand*, 180 S.W.3d 340, 347 (Tex. App. – Dallas 2005, no pet.) (citation omitted). The existence of this "unity" is based on the analysis of a number of factors, including the payment of alleged corporate debts with personal checks or other commingling of funds, representations that the individual will financially back the

[11] As noted above, however, Plaintiff alleges later in the Complaint that IFS and ICM are alter egos of Goldenberg and Wolok only. (Compl. ¶ 27)

corporation, the diversion of company profits for personal use, inadequate capitalization, and other failure to keep corporate and personal assets separate. *See id.*

With regard to Kotler, Plaintiff has failed to allege any facts to this effect. Plaintiff has pointed to Kotler's role as "purported" managing director and "beneficial owner," but an individual's status as an officer, director, or majority shareholder of an entity alone – even if true – is insufficient to support a finding of alter ego. *Goldstein v. Mortenson*, 113 S.W.3d 769, 781 (Tex. App. – Austin 2003, no pet.). Otherwise, Plaintiff has not pleaded any facts, such as commingling funds, inadequate capitalization, or failing to observe corporate formalities. *Hoffmann*, 180 S.W.3d at 347. Indeed, Plaintiff merely posits the existence of this alleged alter ego relationship without further factual support. (Compl. ¶ 24 ("To date, the Receiver's investigation indicates that IFS and ICM exist only on paper as the alter egos of Defendants Kotler," Goldenberg, and Wolok.)) This assertion is simply a legal conclusion, which cannot state a valid claim. *Twombly*, 127 S. Ct. at 1965, 1970; *Campbell*, 43 F.3d at 975. A corporate form may also be disregarded under an alter ego theory "when fraud is involved." *Hoffmann*, 180 S.W.3d at 351. Though Plaintiff has alleged that IFS and ICM were involved in fraudulent activity, he has not alleged any fact to show that Kotler used these entities "as part of an unfair device to achieve an inequitable result." *Id.* at 347. Moreover, because Plaintiff's fraud claim fails on its own merits, as discussed above, it cannot form the basis for his alter ego theory.

C. Plaintiff's Professional Malpractice/Negligence Claim Must Be Dismissed Because The Bonding Company Defendants Owed ABC No Professional Duty.

In addition to Plaintiff's failure to plead it with the requisite specificity under Rule 9(b), the "professional malpractice/negligence" claim must be dismissed for the additional reason that, as a matter of law, the Bonding Company Defendants owed ABC no duty that would give rise to

a claim for professional malpractice. While malpractice claims have been asserted in a wide context of professions, the common link among those claims is a standard of care based on the professional's special knowledge and ability. *See, e.g.*, *Rehabilitative Care Sys. of Am. v. Davis*, 43 S.W.3d 649, 657 (Tex. App. – Texarkana 2001) ("Because physicians and other medical care givers possess greater skill and knowledge than laypersons, and because matters involving such professional skill are not readily comprehensible to laypersons, such individuals' conduct is in a large measure evaluated by professional standards."), *pet. denied*, 73 S.W.3d 233 (Tex. 2002) (per curiam). Accordingly, establishing proof of this standard of care generally requires expert testimony. *Id.* The professionals subject to these claims are usually regulated by governmental or quasi-governmental entities, such as bar associations and medical boards. And a malpractice claim is a tort "governed by negligence principles." *Barcelo v. Elliott*, 923 S.W.2d 575, 579 (Tex. 1996).

Plaintiff's claim exhibits none of these traditional indicia of a malpractice claim. According to the Complaint, the Bonding Company Defendants are individuals and business entities without a specialized area of knowledge and ability (at least as identified by Plaintiff), and are not subject to the usual licensing or other regulatory controls. Plaintiff describes the alleged duty not as one to exercise a degree of care commensurate with the knowledge and skill required of an ordinarily prudent member of the profession, but rather simply as one of honest business dealing: "a duty to market and sell bonds that would be honored and backed by a solvent bonding company." (Compl. ¶ 39) Determining whether the defendants complied with this rule – *i.e.*, whether they engaged in fraud – is a question that plainly will not require the assistance of an expert. Moreover, Plaintiff's allegations are all premised on the Bonding Company Defendants' alleged intentional, fraudulent conduct, instead of negligent failure to

meet a usual standard of care. (*Id.* (alleging fraudulent financial schemes, marketing and selling nonexistent bonds, "encouraging" ABC to make misrepresentations, and misapplying funds)) In short, this claim constitutes an unsuccessful attempt by Plaintiff to replead his fraud claim under a "malpractice" label and must be dismissed under Rule 12(b)(6). *Cf. Greathouse v. McConnell*, 982 S.W.2d 165, 171-72 (Tex. App. – Houston [1st Dist.] 1998, pet. denied) (rejecting attempt to "fracture" legal malpractice claim into separate claims such as breach of contract and fraud).[12]

D. Plaintiff's Negligent Misrepresentation Claim Against Kotler Must Be Dismissed Because It Is Based Only On Legal Conclusions, Unsupported By Specific Factual Allegations.

This Court should dismiss Plaintiff's claim against Kotler for negligent misrepresentation because the allegations consist of little more than bare "labels and conclusions" and a "formulaic recitation of the [claim's] elements." *Twombly*, 127 S. Ct. at 1965. To state a claim under Texas law for negligent misrepresentation, a plaintiff must allege facts that, if proved, would establish: (1) a representation made by a defendant 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) that plaintiff suffered pecuniary loss by justifiably relying on the representation. *Fed. Land Bank Ass'n of Tyler v. Sloane*, 825 S.W.2d 439, 442 (Tex. 1991).

[12] To the degree Plaintiff asserts a conventional "negligence" claim, that claim fails because it is based on allegations of intentional conduct (Compl. ¶ 39) and because Plaintiff has not pleaded cognizable damages. Under the "economic loss rule," to recover damages for negligence, a plaintiff must show either a personal injury or property damage and not merely economic harm. *E.g.*, *Express One Int'l, Inc. v. Steinbeck*, 53 S.W.3d 895, 898-99 (Tex. App. – Dallas 2001, no pet.); *Coastal Conduit & Ditching, Inc. v. Noram Energy Corp.*, 29 S.W.3d 282, 285-86 (Tex. App. – Houston [14th Dist.] 2000, no pet.). In this case, Plaintiff has claimed only economic damages and thus cannot assert a "negligence" claim. (Compl. ¶¶ 49, 51)

As with his fraud claim, Plaintiff has failed to sufficiently plead even the first element against Kotler. He alleges that the Bonding Company Defendants "represented that they were part of a network of solvent, legitimate companies selling bonds backed by IFS and ICM" (Compl. ¶ 42), but this blanket allegation is belied by the Complaint's earlier allegations, which attribute any such representations to SMS, Goldenberg, Wolok, IFS, and ICM (*id.* ¶¶ 25-26). And Plaintiff's allegations regarding the third and fourth criteria are simply "recitation[s] of the elements." *Twombly*, 127 S. Ct. at 1965. Without further elaboration, Plaintiff alleges that "[t]he Defendants did not exercise reasonable care or competence in obtaining or communicating" the information and that ABC "justifiably relied" on the statements. (Compl. ¶ 42) Plaintiff has also pleaded no facts to establish that ABC's alleged reliance was "justified," which requires a showing that the reliance was "reasonable." *Scottish Heritable Trust, PLC v. Peat Marwick Main & Co.*, 81 F.3d 606, 615 (5th Cir. 1996). In the absence of any particularized allegations to this effect, Plaintiff has failed to adequately plead this claim, and it must be dismissed.

E. Plaintiff's Civil Conspiracy Claim Fails Because Plaintiff Has Not Adequately Pleaded an Underlying Tort.

Finally, Plaintiff's claim for civil conspiracy must be dismissed because Plaintiff has failed to adequately plead a predicate tort for that claim. Under Texas law, civil conspiracy is a "derivative tort." *Tilton v. Marshall*, 925 S.W.2d 672, 681 (Tex. 1996). Liability for civil conspiracy will attach only upon "participation in some underlying tort for which the plaintiff seeks to hold at least one of the named defendants liable." *Id.* In his civil conspiracy claim, Plaintiff has alleged underlying torts that sound in fraud: Kotler and other defendants "sought to market, sell, and manage underfunded bonds through fictitious companies," made false

representations, and applied ABC's premium payments to transfers unrelated to the bonds.[13] (*Id.* ¶ 46) But, as discussed above, Plaintiff has not pleaded any of his fraud-related claims with the particularity required by FED. R. CIV. P. 9(b). Because these underlying claims against Kotler cannot survive, the civil conspiracy claim must be dismissed as well. *Ingalls*, 2005 WL 2647962, at *6.

III. Plaintiff's Fiduciary Duty and Fraudulent Transfer Claims Must Be Dismissed for Lack of Standing.

In addition to the reasons stated above, Plaintiff's claims for aiding and abetting breach of fiduciary duty and for fraudulent transfer must also be dismissed because Plaintiff lacks standing to assert them. While Plaintiff purports to assert his other claims on behalf of ABC, he necessarily makes these two claims on behalf of ABC's customers. (Compl. ¶¶ 34-35, 49) These claims must be dismissed under FED. R. CIV. P. 12(b)(1).

Under Article III of the United States Constitution, a plaintiff must establish standing to sue by alleging a personal injury to himself that is "fairly traceable to the defendant's allegedly unlawful conduct and [is] likely to be redressed by the requested relief." *Allen v. Wright*, 468 U.S. 737, 751 (1984). As an equity receiver, Plaintiff "can assert only those claims which the corporation [in receivership] could have asserted." *Lank v. New York Stock Exch.*, 548 F.2d 61, 67 (2d Cir. 1977). "Because they stand in the shoes of the entity in receivership, receivers have been found to lack standing to bring suit unless the receivership entity could have brought the same action." *Javitch v. First Union Sec., Inc.*, 315 F.3d 619, 625 (6th Cir. 2003) (citations

[13] In his conspiracy claim, Plaintiff also asserts that the Bonding Company Defendants "refused to pay amounts due under the bonds and guarantee." (Compl. ¶ 46) This allegation about the failure to pay an amount due under certain instruments sounds in contract, not tort. As such, any "conspiracy" not to pay these amounts fails as a matter of law because Texas law does not recognize a cause of action for conspiring to breach a contract. *Grizzle v. Tex. Commerce Bank, N.A.*, 38 S.W.3d 265, 284-85 (Tex. App. – Dallas 2001), *rev'd in part on other grounds*, 96 S.W.3d 240 (Tex. 2002).

omitted). As the receivership entity, ABC could not have asserted either of these claims itself because the only parties to have allegedly suffered a personal and redressible injury were ABC's customers and creditors, not ABC itself. Accordingly, Plaintiff lacks standing to assert these claims on behalf of ABC, and the claims must be dismissed.

A. Aiding and Abetting Breach of Fiduciary Duty

By its terms, Plaintiff's claim against the Bonding Company Defendants (including Kotler) for aiding and abetting ABC's alleged breach of fiduciary duty to its customers is a claim that could only be asserted by the customers themselves. In his Complaint, Plaintiff alleges that ABC "occupied a position of confidence with respect *to its investors* [customers]" and therefore owed them a fiduciary duty. (Compl. ¶ 34 (emphasis added)) Plaintiff further alleges that ABC – "substantially assisted and encouraged" by the Bonding Company Defendants (*id.* ¶ 35) – "betrayed the trust and confidence *of its investors* [customers]" by engaging "in a fraudulent financial scheme that improperly diverted investor [customer] funds" (*id.* ¶¶ 34-35 (emphasis added)). This claim thus seeks to hold the Bonding Company Defendants jointly liable with ABC for this breach of fiduciary duty. *See Juhl v. Airington*, 936 S.W.2d 640, 644 (Tex. 1996) (discussing aiding and abetting theory of liability). But, under Texas law, the only parties that could seek to hold ABC and these defendants jointly liable for this breach are the parties that were allegedly harmed – ABC's customers. *See, e.g.*, *Burrow v. Arce*, 997 S.W.2d 229, 237 (Tex. 1999) (party to whom fiduciary duty was owed may assert claim for breach of that duty).

Under constitutional and prudential rules of standing, Plaintiff is precluded from bringing causes of action, such as this fiduciary duty claim, that belong to ABC's customers. In *Goodman v. FCC*, 182 F.3d 987 (D.C. Cir. 1999), for example, the D.C. Circuit held that a receiver lacked standing to sue the FCC over certain regulations because the receivership entities were not

injured by those regulations. *Id.* at 991-92. The receivership entities had operated as "application mills" assisting individuals in obtaining mobile radio service licenses; under the regulations at issue, the individual licensees would lose their broadcasting rights if they failed to meet certain construction requirements. *Id.* at 990. The receiver did not have standing to challenge those regulations because he "[did] not represent the parties who sustained the injury of which he complains." *Id.* at 992. The same dynamic exists here: Plaintiff does not represent the parties (ABC's customers) who were injured by the alleged breach of ABC's fiduciary duty, and thus lacks standing to assert the claim. *See id.* at 991-92; *Scholes v. Schroeder*, 744 F. Supp. 1419, 1421-24 (N.D. Ill. 1990) (holding that receiver lacked standing to bring causes of action on behalf of creditors and investors of receivership entity).

The fact that the Order Appointing Receiver purports to authorize Plaintiff to assert claims on behalf of ABC's customers does not change this analysis. That Order "specifically authorized" Plaintiff "to pursue such actions on behalf of and for the benefit of the constructive trust beneficiaries, including without limitation any and all [customers] who may be the victims of the fraudulent conduct alleged" by the SEC. (Order Appointing Receiver ¶ 14) Despite this purported authorization, "the appointment of a receiver is inherently limited by the jurisdictional constraints of Article III and all other curbs on federal court jurisdiction." *Scholes*, 744 F. Supp. at 1421. To the extent that the Order Appointing Receiver purports to authorize Plaintiff, as equity receiver to ABC, to assert claims on behalf of non-receivership entities like ABC's customers, that Order is "at odds with the fundamental command of Article III." *Id.*

B. Fraudulent Transfer

For similar reasons, Plaintiff lacks standing to assert his claim for fraudulent transfer. Plaintiff alleges that ABC "made numerous undisclosed transfers of investor [customer] funds"

to finance the alleged Ponzi scheme, and seeks recovery of those funds as fraudulent transfers. (Compl. ¶ 49) Under the Texas Uniform Fraudulent Transfer Act ("UFTA"), only creditors may seek remedies for fraudulent transfers. TEX. BUS. & COM. CODE §§ 24.005 (transfers as to present and future creditors), 24.006 (transfers as to present creditors), 24.008 (remedies); *see Mladenka v. Mladenka*, 130 S.W.3d 397, 405 (Tex. App. – Houston [14th Dist.] 2004, no pet.) (judgment creditor has burden to establish fraudulent conveyance by preponderance of the evidence). In apparent recognition of this fact, Plaintiff has pleaded that the parties injured by the allegedly fraudulent transfers from ABC to the Bonding Company Defendants were unnamed "creditors." (Compl. ¶ 49) But Plaintiff has not asserted that any of the receivership entities is a creditor of ABC. In reality, Plaintiff is suing "third part[ies] on behalf of [ABC's] creditors to enforce a personal right of theirs, not a right of [ABC's] in which they have an interest by virtue of being [ABC's] creditors." *Troelstrup v. Index Futures Group, Inc.*, 130 F.3d 1274, 1277 (7th Cir. 1997) (holding that receiver lacked standing to recover funds of defrauded investors whom receiver did not represent).

The limitation on a receiver's ability to assert fraudulent transfer or similar claims on behalf of the defrauded investors of a receivership entity is well established. *See id.*; *Fleming v. Lind-Waldock & Co.*, 922 F.2d 20, 25 (1st Cir. 1990) (receiver lacked standing to assert claims on behalf of receivership entity's investors because the funds in question "belonged entirely to investors," not the receivership entity); *Scholes*, 744 F. Supp. at 1421-24 (receiver lacked standing to assert fraudulent transfer claim; "fraud on *investors* that damages those *investors* is for those *investors* to pursue – not the receiver") (emphasis in original); *B.E.L.T., Inc. v. Lacrad Int'l Corp.*, No. 01 C 4296, 2002 WL 1905389, at *2 (N.D. Ill. Aug. 19, 2002) (receiver lacked standing to assert fraudulent conveyance and other claims against defendant who allegedly

accepted fraudulent funds from the receivership entity because the claims for those funds belonged only to the defrauded investors, whom the receiver did not represent).[14] This case fits that pattern: Plaintiff is properly empowered to assert claims only on behalf of ABC – one of the parties that allegedly perpetrated these transfers – and not the customers or creditors whose money was allegedly taken. Because such a claim belongs only to those defrauded individuals, Plaintiff lacks standing to assert it; as with claims on behalf of ABC's customers, claims on behalf of "creditors of" the receivership entity "miss the jurisdictional boat." *Scholes*, 744 F. Supp. at 1424. Accordingly, both the fiduciary duty and fraudulent transfer claims by the Plaintiff should be dismissed pursuant to FED. R. CIV. P. 12(b)(1) for lack of standing.

CONCLUSION AND PRAYER

For the foregoing reasons, Defendant Arie Kotler respectfully prays that this Court dismiss all claims against him pursuant to FED. R. CIV. P. 9(b), 12(b)(6), and 12(b)(1), and for any and all further relief to which he may be entitled.

[14] In contrast, the Seventh Circuit has held in a widely-cited case, *Scholes v. Lehmann*, that a receiver had standing to assert fraudulent transfer claims arising from a Ponzi scheme, but in that case the claims actually belonged to receivership entities and not simply to the creditors of a receivership entity. 56 F.3d 750, 754-55 (7th Cir. 1995); *see also Troelstrup*, 130 F.3d at 1277 (distinguishing *Scholes v. Lehmann*); *Quilling v. Grand Street Trust*, No. 3:04 CV 251, 2005 WL 1983879, at *5 (W.D.N.C. Aug. 12, 2005) (under *Scholes v. Lehmann*, receiver had standing to assert fraudulent transfer claims because "the transferred funds were owned" by receivership entities). Despite these crucial differences, some courts (including another judge of this Court, in unpublished opinions) have allowed a receiver to assert fraudulent transfer claims regardless of the receivership entity. *See Warfield v. Carnie*, No. 3:04-cv-633-R, 2007 WL 1112591, at *9 (N.D. Tex. Apr. 13, 2007) ("A receiver of an alleged Ponzi scheme may sue under the UFTA to recover funds paid from the entity in receivership.") (citing *Scholes v. Lehmann*); *SEC v. Cook*, No. CA 3:00-CV-272-R, 2001 WL 256172, at *2 (N.D. Tex. Mar. 8, 2001). Kotler respectfully submits that those decisions are not binding on this Court and do not properly account for the differences between *Lehmann* and this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 16, 2007, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Northern District of Texas, using the electronic case files system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the following individuals who have consented in writing to accept this Notice as service of this document by electronic means:

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