

EXHIBIT A

IN THE 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.	§	Civil Action No. 3:07-CV-00421-P
	§	
Defendants.	§	

ORDER

Now before the Court is Defendant Arie Kotler’s (“Defendant”) Motion to Dismiss Plaintiff’s Complaint (“Motion to Dismiss”), filed July 16, 2007. Plaintiff Michael J. Quilling (“Plaintiff”), Receiver for ABC Viaticals, Inc. (“ABC”) and Related Entities filed a response on August 6, 2007, and Defendant replied on August 21, 2007. After reviewing the briefing and applicable law, the Court GRANTS in PART and DENIES in PART Defendant’s Motion to Dismiss. Further, the Court GRANTS Plaintiff’s request for leave to amend its Complaint pursuant to this Order.

I. Background and Procedural History

Plaintiff asserts that ABC was involved in the viatical business. (Compl. at 5.) In that business, ABC purchased insurance policies on the lives of insured third-parties. Fractionalized interests in those policies were then sold to customers. (*Id.*) ABC solicited customers by promising a return and representing to them that after a certain time a bonding company would pay the death benefit due on a policy even if the insured had not yet died. As a result, ABC raised approximately \$121 million from at least 3,300 customers. (*Id.*) Plaintiff alleges that ABC falsely represented to potential customers that the bonding company would pay death benefits when they were due, even if the insured person had not yet died. (*Id.* at ¶ 22.)

Plaintiff alleges ABC initially purchased its bonds through International Fidelity & Surety Limited (“IFS”). Defendant served as the managing director and beneficial owner of IFS and IFS’s holding company, International Consultants & Management Ltd. (“ICM”). (Compl. at ¶ 23.) Plaintiff asserts that neither ICM or IFS have actual offices and that they only exist on paper as the alter egos of Defendant, David A. Goldenberg and Marl E. Wolok. (*Id.* at ¶ 24.)

Plaintiff further alleges that Surety Marketing Source, LLC (“SMS”) represented that it was the exclusive marketing agent for IFS and that SMS, along with Goldenberg and Wolok, engaged in marketing efforts toward ABC representing that IFS and ICM were legitimate entities. (*Id.* at ¶ 25.) According to Plaintiff, these alleged misrepresentations convinced ABC to purchase bonds from IFS. (*Id.* at ¶ 26.) As part of the initial purchase agreement, 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.*) For these bonds from IFS, ABC typically paid premiums equal to 2.5% of the bond’s face amount. (Compl. at ¶ 17.) Plaintiff also asserts that Goldenberg and Wolok knowingly and falsely represented to ABC that they would deduct their

commission from these premium payments and forward the balance to IFS. Instead, they spent the money or diverted it to accounts they controlled in the names of other defendants. (*Id.* at ¶ 27.)

Plaintiff asserts claims against Defendant as part of a group of defendants, labeled the “Bonding Company Defendants.” (*Id.* at ¶¶ 35, 39, 42, 44, 46, 49, 53.) The claims asserted by Plaintiff include: (I) breach of contract; (II) aiding and abetting ABC’s breach of fiduciary duty; (III) professional malpractice/negligence; (IV) negligent misrepresentation; (V) fraud; (VI) civil conspiracy; (VII) fraudulent transfer; (VIII) constructive trust and disgorgement; (IX) exemplary damages; and (X) fees, expenses, costs, and interest. 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 fiduciary duty by participating in a network of fictitious companies that sold nonexistent bonds through IFS and ICM.” (*Id.* at ¶ 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 the Bonding Company Defendants breached their duty “to market and sell bonds that would be honored and backed by a solvent bonding company.” (*Id.* at ¶ 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. (*Id.* at ¶¶ 42, 44.) In his civil conspiracy claim, Plaintiff repeats many of the same generalized allegations regarding false representations about the bonds, and adds that the Bonding Company Defendants “were owned and controlled” by Kotler

and three other defendants (*Id.* ¶ 46.) Finally, Plaintiff alleges a fraudulent transfer claim which also refers generally to transfers from ABC to the Bonding Company Defendants. (*Id.* ¶ 49.)

On July 16, 2007, Defendant filed a Motion to Dismiss. First, Defendant asks the Court to dismiss Plaintiff's claims (II), (III), (V), and (VII), arguing that Plaintiff failed to plead with the requisite particularity under Rule 9(b)'s heightened pleading requirement. Second, Defendant requests that the Court dismiss Plaintiff's claims (III), (IV), (VI) and all other claims based on allegations that ICF and ICM are the alter egos of Defendant pursuant to Fed. R. Civ. P. 12(b)(6). Third, Defendant requests that the Court dismiss Plaintiff's claims (II) and (VII) because Plaintiff lacks standing to assert those claims.

II. Rule 12(b)(6) and Rule 9(b) Legal Standard

Fed. R. Civ. P. ("Rule") 12(b)(6) provides for the dismissal of a complaint when a defendant shows that the plaintiff has failed to state a claim for which relief can be granted. A motion to dismiss for failure to state a claim is viewed with disfavor and should rarely be granted. *Lowrey v. Texas A&M Univ. Sys.*, 117 F.3d 242, 247 (5th Cir. 1997); *Kaiser Aluminum & Chemical Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1050 (5th Cir. 1982).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 127 S.Ct 1955, 1964-65 (2007) (internal citations and quotations omitted). "Fact allegations must be enough to raise a right to relief above the speculative level." *Id.* at 1965. There must be "plausible ground" on which the claim rests such that there is "enough fact to raise a reasonable expectation that discovery will reveal evidence" in support of the claim. *See id.* The Court must render its decision taking the

complaint in the light most favorable to the plaintiff and taking its allegations as true. *Leatherman v. Tarrant County Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 164 (1993); *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996). While the district court must accept as true all factual allegations in the complaint, it need not resolve unclear questions of law in favor of the plaintiff. *Kansa Reinsurance Co. v. Congressional Mortgage Corp.*, 20 F.3d 1362, 1366 (5th Cir. 1994).

The Court limits its inquiry to whether plaintiff is entitled to offer evidence to support its claims and does not address whether plaintiff will ultimately prevail on the merits. *Johnson v. Dallas Ind. School Dist.*, 38 F.3d 198, 199 (5th Cir. 1994). However, dismissal is proper when “even the most sympathetic reading of [the] pleadings uncovers no theory and no facts that would subject the present defendants to liability.” *Jacquez v. Proconier*, 801 F.2d 789, 791-92 (5th Cir. 1986).

Rule 9(b) provides that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.” Fed. R. Civ. P. 9(b). The requisite degree of particularity necessarily depends upon the underlying facts of each particular case, so that no exact rule can be articulated. *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1067-68 (5th Cir. 1994). However, in order to satisfy the requirement of particularity, the complaint must set forth 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.” *Tuchman*, 14 F.3d at 1068 (quoting *Tel-Phonic Services, Inc. v. TBS Int’l, Inc.*, 975 F.2d 1134, 1139 (5th Cir. 1992) (internal quotations omitted)). In other words, “Rule 9(b) requires the who, what, when, where, and how to be laid out.” *Benchmark Electronics, Inc. v. J.M. Huber Corp.*, 343 F.3d 719, 724 (5th 2003) (quoting *Williams v. WMX Techs.*, 112 F.3d 175, 179 (5th Cir.

1997) (internal quotations omitted)). Allegations about conditions of the mind, such as defendant's knowledge of the truth and intent to deceive, however, may be pled generally. Fed. R. Civ. P. 9(b); *Tel-Phonic Servs., Inc.*, 975 F.2d at 1139. Rule 9(b) is read in connection with Rule 8 which requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." *See Landry*, 901 F.2d at 430.

III. Analysis

a. Defendant's Rule 9(b) Assertions as to Plaintiff's Claims (II), (III), (V), and (VII)

Defendant moves the Court to dismiss Plaintiff's claims (II), (III), (V), and (VII). Defendant claims that dismissal is justified because Plaintiff has failed to plead with particularity, as required by Rule 9(b) of the Federal Rules of Civil Procedure.

1. Pleading requirements of Rule 9(b) apply to Plaintiff's claims (II), (III), (V), and (VII)

Plaintiff argues that the pleading requirements of Rule 9(b) do not apply to Plaintiff's claims (II), (III), (V), and (VII) for fraudulent transfer, aiding and abetting ABC's breach of fiduciary duty, and negligence because Rule 9(b) only applies to "averments of fraud or mistake" and that "case law does not favor extending [the] rule to other claims." (Resp. at 5.) Although Rule 9(b) does not expressly apply to claims for fraudulent transfer, aiding and abetting ABC's breach of fiduciary duty, or negligence, the Fifth Circuit has applied the heightened pleading requirements of Rule 9(b) when the claim "sounds in fraud." *See Lonestar Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001). A claim "sounds in fraud" when it relies on the same misrepresentations as those pled in an accompanying fraud claim. *See Melder v. Morris*, 27 F.3d 1097, 1100 (5th Cir. 1994). Further, Rule 9(b) applies "to all *averments* of fraud, whether they are part of a claim of fraud or not." *Lonestar Ladies Inv. Club*, 238 F.3d at

368 (emphasis added). Therefore, this Court disagrees with Plaintiff and finds that the particularity requirements of Rule 9(b) apply to claims that are predicated on fraudulent conduct. See e.g. *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); see also *Quilling v. Stark*, 05 Civ.1976, 2006 WL 1683442, at *2 (N.D.Tex. June 19, 2006) (finding claim for fraudulent transfer adequately pleaded under Rule 9(b)). The Court agrees with Defendant in that when a plaintiff asserts fraudulent conduct exclusively in support of a claim, as is the case here, then Rule 9(b) should apply to put defendant on notice. Therefore, the Court finds that the particularity requirements of Rule 9(b) apply to Plaintiff's claims (II), (III), (V), and (VII).

2. Plaintiff has not satisfied the pleading requirements of Rule 9(b) with respect to Defendant.

While the exact pleading requirements of Rule 9(b) are case-specific, there are some essential core requirements that can be distilled from Fifth Circuit precedent. See *Guidry v. Bank of LaPlace*, 954 F.2d 278, 288 (5th Cir.1992). In every case based on fraud, Rule 9(b) requires the plaintiff to allege as to **each individual defendant** "the nature of the fraud, some details, a brief sketch of how the fraudulent scheme operated, when and where it occurred, and the participants." *Askanase v. Fatjo*, 148 F.R.D. 570, 574 (S.D.Tex.1993); see also *Zuckerman v. Foxmeyer Health Corp.*, 4 F. Supp. 2d 618, 622 (N.D.Tex.1998) ("The plaintiff is obligated to distinguish among those they sue and enlighten each defendant as to his or her part in the alleged fraud" (citations omitted).)

Because Plaintiff's Complaint fails to delineate "the who, what, when, where, and how" of Defendant's alleged misrepresentation, the pleading requirements of Rule 9(b) have not been satisfied. See, e.g., *Williams v. WMX Technologies, Inc.*, 112 F.3d 175, 179 (5th Cir.), cert. denied, 522 U.S. 966, 139 L. Ed. 2d 315, 118 S. Ct. 412 (1997). In its complaint, Plaintiff fails to

identify a single specific misrepresentation by Defendant. Instead, Plaintiff identifies specific misrepresentations by IFS and ICM and then attributes those misrepresentations to Defendant based on his capacity as managing director of IFS and based on an alter ego theory. (*See* Compl. ¶ 23-24.) However, Plaintiff does not plead any specific facts with respect to Defendant that would substantiate Plaintiff's allegations and conclusions. Plaintiff has transposed its misrepresentation allegations against IFS and ICM into "group allegations" against Defendant. (*See* Mot. to Dismiss at 6; Compl. at 21.) Consequently, the Court finds that Plaintiff has failed to satisfy Rule 9(b) as to Defendant.

Because Plaintiff did not plead fraudulent conduct with the requisite particularity against Defendant, the Court GRANTS Defendant's Motion to Dismiss under Rule 9(b) with respect to Plaintiff's claims (II), (III), (V), and (VII). However, for reasons discussed below, Plaintiff is granted leave to amend its Complaint as to claims (III), (V), and (VII). *See infra* p. 12.

b. Defendant's Motion to Dismiss Plaintiff's claims (III), (IV), (VI) and all other claims based on allegations that ICF and ICM are the alter egos of Defendant pursuant to Fed. R. Civ. P. 12(b)(6).

1. Plaintiff's claim (III) for professional malpractice/negligence

Defendant argues that Plaintiff's claim (III) for "professional malpractice/negligence" must be dismissed under Rule 12(b)(6) because, as a matter of law, Defendant did not owe ABC a duty of care that would give rise to a claim for professional malpractice. (Mot. to Dismiss at 14-15.) Plaintiff asserts that only a negligence claim has been made against Defendant and that Plaintiff's claim for professional malpractice only applies to the accounting firm defendants. (Resp. at 15.) The Court agrees with Plaintiff in that the Complaint does not allege a professional malpractice claim against Defendant. As stated earlier, Plaintiff is granted leave to amend its Complaint to plead its negligence claim with sufficient particularity.

2. Plaintiff's claim (IV) for Negligent Misrepresentation

Although Rule 9(b) does not expressly apply to claims for negligent misrepresentation, the Fifth Circuit has applied the heightened pleading requirements of Rule 9(b) when the claim for negligent misrepresentation “sounds in fraud.” *See Lonestar Ladies Inv. Club v. Schlotzsky's Inc.*, 238 F.3d 363, 368 (5th Cir. 2001). A negligent misrepresentation claim “sounds in fraud” when it relies on the same misrepresentations as those pled in an accompanying fraud claim. *See Melder*, 27 F.3d at 1100. Further, Rule 9(b) applies “to all *averments* of fraud, whether they are part of a claim of fraud or not.” *Lonestar Ladies Inv. Club*, 238 F.3d at 368 (emphasis added).

Plaintiff expressly incorporates all of the allegations of its fraud claim for the purpose of setting forth its negligent misrepresentation claim. (*See* Compl. ¶ 41.) In addition, the negligence claim relies on the same “misrepresentation” as that of the fraud claim, namely that the Bonding Company Defendants “represented that they were part of a network of solvent, legitimate companies selling bonds backed by IFS and ICM.” (*Id.* ¶ 42.) Because Plaintiff's negligent misrepresentation claim “sounds in fraud,” the stringent pleading requirements of Rule 9(b) apply. Since the Court has found that the Complaint does not sufficiently allege fraudulent conduct with the requisite particularity, the Court GRANTS Defendant's Motion to Dismiss under Rule 9(b) and 12(b)(6) with respect to Plaintiff's claim (IV) for negligent misrepresentation. However, for reasons discussed below, Plaintiff is granted leave to amend its Complaint. *See infra* p. 12.

3. Plaintiff's claim (VI) for Civil Conspiracy

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. Defendant argues that Plaintiff has failed to adequately plead a predicate tort for a civil conspiracy claim. (Mot. to Dismiss at 17.) Plaintiff asserts that the Complaint alleges predicate torts, including fraud, negligent misrepresentation, and aiding and abetting breach of fiduciary duty. The Court has found that these predicate torts were not sufficiently pled in the Complaint. Therefore, the Court finds that Plaintiff has failed to adequately plead a predicate tort for Plaintiff's civil conspiracy claim. Hence, the Court **GRANTS** Defendant's Motion to Dismiss under Rule 12(b)(6) with respect to Plaintiff's claim (VI) for civil conspiracy. However, for reasons discussed below, Plaintiff is granted leave to amend its Complaint. *See infra* p. 9.

4. Plaintiff's claim that IFS and ICM are the "alter egos" of Defendant

Defendant claims that "Plaintiff cannot maintain any claims against [Defendant] based on the actions of either ICF or ICM, despite Plaintiff's allegations that these entities were [Defendant]'s 'alter egos'." (Mot. to Dismiss at 13.) The Court agrees with Defendant because the Complaint does not allege any facts to support Plaintiff's conclusion. Alter ego doctrine "applies when there is such unity between the parent corporation and its subsidiary that the separateness of the two corporations has ceased and holding only the subsidiary corporation liable would result in injustice." *Gardemal v. Westin Hotel Co.*, 186 F.3d 588, 593 (5th Cir.1999) (internal quotation marks and citation omitted). Though the Complaint alleges that IFS and ICM had no known facilities, employees, or assets, there are no facts pled in the Complaint that if believed would satisfy the requirements of the alter ego doctrine. (Compl. at ¶ 24.) Plaintiff states that "[a]t all times, premium payments due to IFS were simply diverted for the personal use of Kotler's associates." (Resp. at 20.) However, the Complaint does not state that. The Complaint alleges that premium payments due to IFS were diverted for personal use by Goldenberg and Wolok, not Defendant. (*Id.* at ¶ 27.) Finally, Defendant argues that a corporate

form may also be disregarded under an alter ego theory when fraud is involved. (Mot. to Dismiss at 14.) Though Defendants statement of the law is true, since Plaintiff has not successfully pled the requisite elements of a fraud claim with respect to Defendant, fraud cannot form the basis for Plaintiff's alter ego theory. Therefore, the Court finds that Plaintiff has pled insufficient facts to form the basis for an alter ego theory with respect to Defendant. The Court hereby GRANTS Defendant's Motion to Dismiss with respect to Plaintiff's claims based on an alter ego theory. However, for reasons discussed below, Plaintiff is granted leave to amend its Complaint. *See infra* p. 9.

c. Defendant's Motion to Dismiss Plaintiff's claims (II) and (VII) for Lack of Standing

Pursuant to the authority granted to him by the Court, Plaintiff alleges that all transfers from ABC to the Bonding Company Defendants were fraudulent transfers under the Uniform Fraudulent Transfer Act ("UFTA") (Compl. ¶ 49.) In addition, Plaintiff alleges that Defendant aided and abetted ABC in breaching its fiduciary duty to its customers. (*Id.* ¶ 34.) Defendant claims that Plaintiff's claims against Defendant for aiding and abetting ABC's breach of fiduciary duty and for fraudulent transfer must be dismissed because Plaintiff lacks standing to assert such claims. (Mot. to Dismiss at 18.) Defendant bases its attack on the assertion that Plaintiff is "precluded from bringing causes of action . . . that belong to ABC's customers." (*Id.* at 19.)

The Court agrees with Defendant in that the general rule is that the receiver may only bring actions that could have been brought by the entity in receivership. However, for the purpose of securing assets for ultimate payment to creditors, a receiver represents not only the entity in receivership, but also the interests of its creditors. *SEC v. Cook*, 2001 U.S. Dist. LEXIS

2601, 2001 WL 256172 *3 (N.D. Tex. 2001) (stating that “[t]he very purpose of receivership is to secure the assets of the corporation for ultimate payment to the creditors”). Therefore, “a receiver of an alleged Ponzi scheme may sue under the UFTA to recover funds paid from the entity in receivership.” *Warfield v. Carnie*, No. 04-633, 2007 U.S. Dist. LEXIS 27610, 2007 WL 1112591 (N.D. Tex. Apr. 13, 2007) (citing *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir.1995)). Given the foregoing exception, the Court holds that Plaintiff has standing to assert claim (VII) for fraudulent transfers on behalf of the investors of ABC. Accordingly, the Court DENIES Defendant’s Motion to Dismiss with respect to Plaintiff’s claim (VII) for lack of standing.

With regards to Plaintiff’s claim (II) for aiding and abetting breach of fiduciary duty, in his Response, Plaintiff argues that the fiduciary duties ABC owed to its investors included “careful and competent management of their investor trusts.” (Resp. at 13.) Because the investor trusts as separate entities are represented by Plaintiff, Plaintiff argues that he has standing to assert breach of fiduciary duty on behalf of the investor trusts against ABC. (*Id.*) The Court does not agree with Plaintiff. The investor trusts were created by ABC and Kieth LaMonda to hold insurance policies for investment purposes. (Compl. ¶ 10-11.) Both the investor trusts and ABC owed a fiduciary duty to their investors. Any breach of that duty is actionable only by the investors to whom the duty was owed. Therefore, the Court finds that only the investors have standing to assert claims based on a breach of fiduciary duty. The Court does not find an applicable exception as with the claim for fraudulent transfer and hence Plaintiff lacks standing to assert this claim on behalf of the investors in this case. As such, the Court hereby GRANTS Defendant’s Motion to Dismiss with respect to Plaintiff’s claim (II).

IV. Leave to Amend

In its Response, Plaintiff requests that if the Court finds its Complaint insufficient, the Court grant Plaintiff leave to amend its Complaint. (Resp. at 8-9.) Defendant argues that as a result of Plaintiff's failure to file a proper motion to amend and Plaintiff's failure to cure deficiencies upon learning of Defendant's objections, the Court should not grant Plaintiff leave to amend. (Rep. at 11.) The Court does not find Defendant's arguments persuasive.

Rule 15(a) provides that "leave to amend shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). The Fifth Circuit has held that when a cognizable claim can be established, leave to amend should be granted. *See Hart v. Bayer Corp.*, 199 F.3d 239, 248 (5th Cir. 2000). While the Court has discretion to grant or deny leave, *Parish v. Frazier*, 195 F.3d 761, 763 (5th Cir. 2000), denial is improper unless: (1) "the [pleading] defect is simply incurable," *Hart v. Bayer Corp.*, 199 F.3d 239, 248 (5th Cir. 2000); (2) "the plaintiff has failed to plead with particularity after being afforded repeated opportunities to do so," *id.*; or (3) any attempt to "allege the necessary 'who, what, when, where, and how' elements would be futile." *United States ex rel. Willard v. Humana Health Plan*, 336 F.3d 375, 387 (5th Cir. 2003). Finally, Rule 15(a) applies when a party has "expressly requested" leave to amend even though "their request was not contained in a properly captioned motion paper." *Ballisteri v. Pacifica Police Dep't*, 901 F.2d 696, 701 (5th Cir. 1988).


The facts included in Plaintiff's Response indicate to the Court that Plaintiff will be able to sufficiently cure the lacking elements of its claims if given the opportunity to amend its Complaint. Hence, the Court GRANTS Plaintiff's request for leave to amend with respect to claims (III), (IV), (V), (VI), and (VII).

V. Conclusion

For the foregoing reasons, the Court GRANTS in PART and DENIES in PART Defendant's Motion to Dismiss. Further, the Court GRANTS Plaintiff's request for leave to amend pursuant to this Order. Plaintiff shall amend its pleadings in accordance with this Order within twenty (20) days of the issuance of this Order.

IT IS SO ORDERED.

Signed this 26th day of September 2007.



JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE