

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.	§	No. 3:07-CV-1153-P
	§	
ERWIN & JOHNSON, LLP, and	§	
CHRISTOPHER R. ERWIN,	§	
	§	
Defendants.	§	

ORDER

Now before the Court is Defendants Erwin & Johnson, LLP (“E&J”) and Christopher R. Erwin’s (“Erwin”) Rule 12(b)(1) Motion to Dismiss for Lack of Standing, filed September 24, 2007. Plaintiff Micheal J. Quilling (“Plaintiff” or “Receiver”) filed his Response on October 25, 2007. Defendant then filed its Reply on November 9, 2007. Also before the Court is Defendants 12(B)(6) and 9(B) Motion to Dismiss, also filed September 24, 2007. Plaintiff filed his Reponse on October 25, 2007 and Defendant filed its Reply on November 9, 2007. After reviewing Defendant’s Motion, the evidence, and the applicable law, the Court GRANTS in PART and DENIES in PART Defendants’ Motion to Dismiss for Lack of Standing and GRANTS in PART and DENIES in PART Defendants’ 12(b)(6) and 9(B) Motion to Dismiss. Further, the Court DENIES Plaintiff’s request for leave to amend.

I. Background and Procedural History

On November 17, 2006, the Securities and Exchange Commission (“SEC”) filed suit alleging that ABC Viaticals, Inc. (“ABC”) and other defendants fraudulently sold life settlement policies and made numerous misrepresentations to investors. ABC represented to investors that their contributions would be tied to a particular insurance policy; however, according to Plaintiff, from the beginning, ABC commingled investor contributions in order to pay premiums and expenses on numerous policies. Additionally, the commingled accounts were allegedly underfunded, so that ABC had to solicit funds from additional investors in order to cover its obligation to the initial investors. (*Id.*)

On November 17, 2006, this Court appointed Michael J. Quilling as Receiver for ABC, in order to protect the interests of those who had invested with ABC. (Order Appointing Receiver (“Order”).) In accordance with that Order, Plaintiff has examined the business records of ABC and determined that, as ABC was insolvent and required new investments to honor obligations made to earlier investors, it was operating as a *Ponzi* scheme.

The scheme involved the services of an independent trustee/escrow agent that handled all investor funds. One of the trustees was Defendant Erwin & Johnson, LLP, who allegedly conducted its services through Defendant Erwin. Investors were instructed to send their funds directly to Erwin & Johnson, LLP, where those funds were held in the law firm’s trust account and disbursed in accordance with the investor’s purchase agreement with ABC. Plaintiff alleges that ABC paid Erwin \$500,000 directly to ensure continued participation in ABC’s scheme. (Compl. at ¶ 16.)

Plaintiff makes the following claims against Defendants: (I) breach of contract; (II) breach of fiduciary duty; (III) aiding and abetting breach of fiduciary duty; (IV) aiding and abetting corporate waste; (V) professional malpractice or negligence; (VI) gross negligence; and (VII) fraudulent transfer. (*See generally* Compl.) Defendants now move the Court to: (1) dismiss Plaintiff's Complaint for lack of standing; (2) dismiss Plaintiff's Complaint for failure to state a claim; and (3) in the event a claim is not dismissed, require Plaintiff to plead with more particularity pursuant to Fed. R. Civ. P. ("Rule") 9(b).

With respect to Defendants' lack of standing argument, Defendants specifically argue that: (1) Plaintiff advances claims solely and entirely on behalf of ABC's investors, not ABC itself; (2) Defendants did not engage in wrongful conduct and so the causal connection between an injury and ABC is absent; and (3) this action is premature because the alleged injury rests on speculation and conjecture. (Mot. at 2-3.) Argument (2) speaks to the merits of the case and can properly be taken into account at the summary judgment stage of litigation. In addition, the Court finds that any determination of the amount of injuries in this case is premature at this stage of the litigation. Therefore, the Court will only address whether Plaintiff's claims are solely and entirely brought on behalf of ABC's investors.

With respect to Defendants' 12(b)(6) and 9(b) arguments, Defendants offer many of the same arguments applicable to their arguments on lack of standing. In addition to those arguments, Defendants specifically argue that Plaintiff's claims (III) and (IV) are barred for failure to satisfy California Civil Code § 1714.10. In addition, Defendants' argue that claims (I), (II), (V), and (VII) should be dismissed against Defendant Erwin because he was not a party to

the contract between ABC and E&J, and because he is not individually liable for the acts of E&J. Finally, Defendants argue that all of Plaintiff's claims should be dismissed for failure to comply with the particularity requirements of Rule 9(b) of the Federal Rules of Civil Procedure.

II. Legal Standards

A. Rule 12(b)(1) Legal Standard

A motion to dismiss for lack of standing is properly analyzed under Fed. R. Civ. P. 12(b)(1) ("Rule 12(b)(1)"). *Access 4 All, Inc. v. Wintergreen Comm'l P'ship, Ltd.*, No. 3:05-CV-1307-G, 2005 WL 2989307, at *2 (N.D. Tex. Nov. 7, 2005) (citing *Chair King, Inc. v. Houston Cellular Corp.*, 131 F.3d 507, 509 (5th Cir. 1997)). When presented with a jurisdictional challenge under Rule 12(b)(1), the Court is "free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir. 1981).

At issue is whether the Plaintiff has standing, which is a question of "whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Under Article III of the United States Constitution, standing must be established by showing a legally protected interest in the subject matter of the litigation when it filed suit. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560, 569-70 & nn. 4-5.

The Fifth Circuit has recently reemphasized three required elements to establish standing: (1) that the plaintiff has suffered an injury in fact, an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, (2) that there is a causal connection between the injury and the conduct complained of, and (3) that the injury is likely to be redressed by a favorable decision. *Hosein v. Gonzales*, No. 05-20460, 2006 WL 1586658, at

*2 (5th Cir. June 12, 2006) (citing *Fla. Dep't of Ins. v. Chase Bank of Tex. Nat'l Ass'n*, 274 F.3d 924, 929 (5th Cir.2001)).

The burden is on the plaintiff to show that it has “such a personal stake in the outcome of the controversy as to warrant [the] invocation of federal-court jurisdiction and to justify exercise of the court’s remedial powers on his behalf.” *Warth*, 422 U.S. at 498-99. The injury must be “actual or imminent and not abstract, conjectural, or hypothetical.” *Doe v. Beaumont Indep. Sch. Dist.*, 240 F.3d 462, 466 (5th Cir.2001). Furthermore, to establish standing, the plaintiff must “assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights and interests of third parties.” *Warth*, 422 U.S. at 499-500.

Furthermore, the burden is on the plaintiff to allege facts sufficient to support standing. *Ward v. Santa Fe Indep. Sch. Dist.*, 393 F.3d 599 (5th Cir. 2004). Standing must affirmatively appear in the record,” so that, on a motion to dismiss, the plaintiff “clearly to allege facts” to establish it is a “proper party to invoke jurisdictional resolution of the dispute.” *FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990). If that standing “does not adequately appear from all materials of record, the complaint must be dismissed.” *Warth*, 422 U.S. at 501-02.

B. Rule 12(b)(6) 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. Procunier*, 801 F.2d 789, 791-92 (5th Cir. 1986).

C. Rule 9(b) Legal Standard

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. Discussion

A. Defendant’s Rule 9(b) Assertions as to Plaintiff’s Claims

Defendant moves the Court to dismiss Plaintiff’s claims because Plaintiff has failed to plead with particularity, as required by Rule 9(b) of the Federal Rules of Civil Procedure.

1. The pleading requirements of Rule 9(b) are applicable to Plaintiff's claims for breach of fiduciary duty and fraudulent transfer.

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 agrees with Defendants 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 as to some of the claims, then Rule 9(b) should apply to put defendant on notice. In addition, Plaintiff does not argue that the pleading requirements of Rule 9(b) do not apply to Plaintiff's claims. Therefore, the Court finds that the particularity requirements of Rule 9(b) apply to Plaintiff's claims (II) and (VII).

2. Plaintiff has satisfied the pleading requirements of Rule 9(b) with respect to both Defendants.

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).)

It is clear that Plaintiff’s Complaint delineates “the who, what, when, where, and how” of E&J’s alleged misrepresentation, and so the pleading requirements of Rule 9(b) have been satisfied as to E&J. *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 addition, in his Complaint, Plaintiff alleges that E&J conducted its services through Erwin. (Compl. at ¶ 9.) . Therefore, Plaintiff alleges that all of the specific misrepresentations made by E&J, were made through Erwin. (*See* Compl.) Consequently, the Court finds that Plaintiff has satisfied Rule 9(b) as to Defendant Erwin.

Because Plaintiff pleads fraudulent conduct with the requisite particularity against Defendants, the Court DENIES Defendants’ Motion to Dismiss under Rule 9(b) with respect to Plaintiff’s claims.

B. Defendant's Motions to Dismiss Plaintiff's claims for Lack of Standing and for failure to state a claim pursuant to Rule 12(b)(6).

The law is clear that the general rule is that a receiver may only bring actions that could have been brought by the entity in receivership. Defendant argues that ABC or the investor trusts could not have asserted any of the claims that Plaintiff has asserted in this action. The Court will address each of Plaintiff's claims in turn.

1. Breach of Contract

Defendants admit that an agreement between ABC and E&J exists. Plaintiff's breach of contract claim is based on the contracts that exist between ABC, the investor trusts, and E&J. Defendants argue that they did not breach the agreement for various reasons. The Court finds that the arguments offered by Defendant speak to the merits of the Receiver's breach of contract claim rather than the Receiver's standing to bring it. Given that the contractual relationship is uncontroverted, the Court finds that the Receiver has standing to bring the breach of contract claim against E&J.

Now the Court turns to Defendants argument that because Erwin is not a party to the contracts at issue, he cannot be held individually liable for E&J's breach of contract. Plaintiff does not address this issue or cite to any law that would controvert Defendants' argument. Because it is clear that Erwin was not a party to the contracts between E&J and ABC and the ABC trusts, the Court GRANTS Defendants' Motion to Dismiss with respect to the breach of contract claim asserted against Erwin.

2. Breach of Fiduciary Duty

Plaintiff claims that E&J as trustee to the investor trusts, owed a fiduciary duty. (Compl. at ¶ 27.) As trustee of each of the investor trusts, E&J clearly had a fiduciary duty owed to ABC and the investor trusts. In addition, the law is clear that an attorney has a fiduciary duty to his client when an attorney-client relationship is created. *See Willis v. Maverick*, 760 S.W.2d 642, 645, 31 Tex. Sup. Ct. J. 569 (Tex. 1988); *Thompson v. Vinson & Elkins*, 859 S.W.2d 617, 623 (Tex. App.--Houston [1st Dist.] 1993, writ denied). An attorney-client relationship arises when an attorney agrees to render professional services to a client. *Mellon Serv. Co. v. Touche Ross & Co.*, 17 S.W.3d 432, 437 (Tex. App.--Houston [1st Dist.] 2000, no pet.). This relationship may be expressly created by contract, or impliedly created through the parties' actions. *Id.* Since E&J conducted its services through Erwin, as stated earlier, an attorney-client relationship existed between Erwin and ABC. Therefore, Erwin had a fiduciary duty owed to ABC and the investor trusts. Any breach of that duty is properly actionable by ABC and the investor trusts. Thus, the Court finds that Plaintiff has standing to assert a claim for breach of fiduciary duty against E&J and Erwin. Accordingly, the Court DENIES Defendants' Motion to Dismiss for Lack of Standing with respect to Plaintiff's breach of fiduciary duty claim.

Defendants also argue that because Erwin is not a party to the contracts at issue, he cannot be held individually liable for fraudulent transfer, breach of fiduciary duty, or professional malpractice or negligence. Though the pleadings may be imprecise, they do not warrant dismissal of the actions against Erwin. In the Complaint, Plaintiff alleges that E&J conducted its services through Erwin. (Compl. at ¶ 9.) Throughout the Complaint, E&J attributes the alleged

actions to the “defendants” collectively. *See, e.g., id.* ¶ 50. No limited liability partnership law in any state extends so far as to shield a partner from his own wrongful conduct. When applying the proper Rule 12(b)(6) standard, the claims against Erwin, as pleaded, are sufficient to survive a motion to dismiss for failure to state a claim because there are facts under which Plaintiff could conceivably prevail. By alleging that E&J conducted its services for ABC and the ABC trusts through Erwin, the Plaintiff can recover against Erwin under the theory that he was directly involved in the wrongful conduct of E&J or that he had knowledge of the wrongful conduct but failed to take reasonable steps to prevent it. The Defendants do not direct the Court to a single federal or Texas case supporting the proposition that suit cannot be maintained against a partner who, according to the Complaint, provided all the services offered by E&J. Accordingly, the Court DENIES Defendants’ Motion to Dismiss with respect to claims against Erwin in his individual capacity.

3. Aiding and abetting breach of fiduciary duty

Plaintiff claims that Defendants aided and abetted ABC in breaching ABC’s fiduciary duty owed to its investors. 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, thus, GRANTS Defendants’ Motion to Dismiss for Lack of Standing with respect to Plaintiff’s claim for aiding and abetting breach of fiduciary duty.

4. Aiding and abetting corporate waste

Plaintiff claims that Defendants gave substantial assistance to ABC in accomplishing corporate waste with the knowledge that ABC's conduct constituted corporate waste.

Defendants argue that this claim should be dismissed for lack of standing and failure to state a claim because only corporate shareholders have standing to bring claims for corporate waste.

(Mot. at 16.) Defendants misstate the law. In California, a corporation itself must bring an action for an injury to the corporation and only in the case of inaction by the corporation, do shareholders have standing to bring a derivative lawsuit. *In re Sagent Tech., Inc., Derivative Litig.*, 278 F. Supp. 2d 1079, 1086 (N.D. Cal. 2003). Because this claim is ABC's to assert, the Court finds that Plaintiff has standing to assert this claim. Therefore, the Court DENIES Defendants' Motion to Dismiss for Lack of Standing and DENIES Defendants' 12(b)(6) Motion to Dismiss with respect to Plaintiff's claim for aiding and abetting corporate waste.

5. Professional malpractice/negligence and Gross negligence

Plaintiff claims that Defendants as attorneys and in their role as trustee for each of the investor trusts, owed a duty of care to each of the trusts. Plaintiff alleges that Defendants breached those duties by negligently performing their obligations as trustee. Defendants argue that Plaintiff lacks standing because Plaintiff's claims are exclusively on behalf of the investor trusts and ABC's investors. There is no dispute that an attorney-client relationship existed between ABC and E&J. In addition, Plaintiff claims that trust agreements exist between the investor trusts and E&J. Accepting Plaintiff's pleadings as true, as the Court must do, the Court finds that ABC and the investor trusts can claim professional malpractice or negligence against

E&J and hence Plaintiff has standing to assert those claims. In addition, the Court disagrees with Defendants' assertion that the claims for professional malpractice and negligence are not properly brought against Erwin. As discussed earlier, by alleging that E&J conducted its services for ABC and the ABC trusts through Erwin, the Plaintiff can recover against Erwin under the theory that he was directly involved in the wrongful conduct of E&J or that he had knowledge of the wrongful conduct but failed to take reasonable steps to prevent it. Therefore, the Court DENIES Defendants' Motion to Dismiss for Lack of Standing and DENIES Defendants' 12(b)(6) Motion to Dismiss with respect to Plaintiff's claim against Defendants for professional malpractice/negligence and gross negligence.

6. Fraudulent Transfer

Pursuant to the authority granted to him by the Court, Plaintiff alleges that all transfers from ABC to the Defendants were fraudulent transfers. (Compl. ¶ 48.) Defendants claim that Plaintiff lacks standing to assert this claim because this claim seeks to enforce the rights of the investors. (Mot. 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 a claim for fraudulent transfers on behalf of the investors of ABC against E&J and Erwin. Accordingly, the Court DENIES both of Defendants' Motions to Dismiss with respect to Plaintiff's claim for fraudulent transfer.

IV. Leave to Amend

In this Order, the Court has found that Plaintiff's breach of contract claim should be dismissed as to Erwin and that Plaintiff's aiding and abetting breach of fiduciary duty claim should be dismissed as to both Defendants. In its Response, Plaintiff requests that if the Court finds its Complaint insufficient, the Court grant Plaintiff leave to amend its Complaint. (Resp. at 17-18.) The Court now turns to Plaintiff's request for leave to amend.

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 do not indicate to the Court that Plaintiff will be able to sufficiently cure the lacking elements of its claims if given the opportunity to amend the Complaint. Hence, the Court DENIES Plaintiff’s request for leave to amend.

V. Conclusion


Therefore, for the reasons stated herein, the court hereby GRANTS in PART and DENIES in PART Defendant’s Motion to Dismiss for Lack of Standing. The Court also GRANTS in PART and DENIES in PART Defendants’ 12(b)(6) and 9(B) Motion to Dismiss. Specifically, the Court DISMISSES Plaintiff’s following claims:

- (1) Plaintiff’s breach of contract claim against Defendant Erwin; and
- (2) Plaintiff’s aiding and abetting breach of fiduciary duty claim against both Defendants.

Further, the Court DENIES Plaintiff’s request for leave to amend.

IT IS SO ORDERED.

Signed this 25th day of February 2008.



JORGE A. SOLIS
UNITED STATES DISTRICT JUDGE