

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

GIAN SINGH SAMBHI, et al.

Plaintiff,

v.

No. CV-09-1053 MCA/RLP

HARPREET SINGH, et al.

Defendant.

**BRIEF IN SUPPORT OF MOTION TO DISMISS
BY DEFENDANTS HARPREET SINGH AND AMAN SHARMA**

Defendants Harpreet Singh and Aman Sharma (collectively “Defendants”) move to dismiss each of plaintiffs’ claims under Fed. R. Civ. P. 12(b)(6) for failure to state a claim.

BACKGROUND

Plaintiffs apparently brought this action under the Court’s diversity jurisdiction pursuant to 28 U.S.C. §1332. [Doc. 1, ¶15, 2] They claim that they are shareholders of four corporations, Bababudhaji, Corp., Gurunanakdevji, Corp., PSJ, Corp., and ADJ, Corp.¹, *id.* at ¶18, 2, each of which operates a motel in central New Mexico. *Id.* at ¶¶11-14, 2. Plaintiffs name each of the corporations as an “involuntary” defendant. *Id.*

Plaintiffs contend that Defendants and others “were responsible for the day-to-day operations and management of the Corporations,” *id.* at ¶16, 2, “failed to provide complete and/or accurate financial records in a timely fashion,” *id.* at ¶19, 2, and that they “have refused to take action and that a demand on them to bring or join in action to prevent fraudulent diversion

¹ A search of the New Mexico Public Regulation Commission’s on-line database reveals that no New Mexico corporation is named PSJ, Corp. or ADJ, Corp. However, New Mexico corporations do exist which are named PSJ, Inc. and ADJ, Inc. See <http://www.nmprc.state.nm.us/cgi-bin/prcdtl.cgi?2822922+ADJ+INC> and <http://www.nmprc.state.nm.us/cgi-bin/prcdtl.cgi?1592369+PSJ+INC>.

of various corporate assets would be futile and useless.” *Id.* at ¶21, 2. Plaintiffs allege that “[t]here is a dispute as to the correct ownership percentages and stock certificates issued for all four of the corporations and properties.” *Id.* at ¶17, 2.

Based on these few general allegations, Plaintiffs advance eight causes of action against Defendants: breach of fiduciary duty, conversion, unjust enrichment, declaratory relief, accounting, constructive fraud, fraud, and appointment of a receiver.²

DISCUSSION

Plaintiffs’ complaint must contain a “short and plain statement” of their claims which demonstrates that they are entitled to relief. *See* Fed. R. Civ. P. 8(a)(2). This pleading standard demands “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009) (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). As *Iqbal* made clear through its discussion of *Twombly*:

To survive a motion to dismiss under Fed. R. Civ. P. 12(b)(6), a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.

Iqbal, 129 S. Ct. at 1949 (citations and internal quotations omitted).

In applying these standards, a court considering a Rule 12(b)(6) motion to dismiss need not accept the truth of legal conclusions – only well-pleaded, nonclusory facts. *Id.*, at 1949-50. Rule 12(b)(6) requires that a complaint set forth the grounds of the pleader’s entitlement to relief

² An accounting and request for a receiver are remedies - not causes of action. See discussion at Section IV, *infra* at p.8.

through more than labels, conclusions and a formulaic recitation of the elements of a cause of action. *Id.*, at 1949 (citing *Twombly*, at 555). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* "Nor does a complaint suffice if it tenders 'naked assertions' devoid of 'further factual enhancement.'" *Iqbal*, at 1949 (quoting *Twombly*, at 555).

Furthermore, "only a complaint that states a plausible claim for relief survives a motion to dismiss." *Id.* at 1950. If the "well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged -- but it has not 'show[n]' -- 'that the pleader is entitled to relief.'" *Iqbal*, at 1950 (quoting Fed. R. Civ. P. 8(a)(2)). "A plaintiff armed with nothing more than conclusions" is not entitled to subject defendants to the costs and burdens of litigation. *Iqbal*, at 1950.

Plaintiffs' complaint cannot survive scrutiny under these standards. Plaintiffs often fail to allege even the proper elements of causes of action. When they do, they make no more than conclusory assertions. Accordingly, their claims for relief are not plausible and the Court must dismiss their complaint.

I. Breach of Fiduciary Duty

In their claim for breach of fiduciary duty, plaintiffs fail to adequately allege a duty or breach. Plaintiffs assert in only conclusory fashion that Defendants were fiduciaries of plaintiffs and the corporations. [Doc. 1, ¶24, 3] Plaintiffs state that Defendants breached that "duty to Plaintiffs by not informing them in regard to financial information in regard to the businesses or informing the Defendants of the day-to-day operation of the businesses." *Id.* at ¶25, 3. Plaintiffs appear to contend that Defendants also breached a fiduciary duty because they "embarked the Corporations upon a course of conduct detrimental and injurious to plaintiffs." Plaintiffs claim

they were injured, *id.* at ¶27, 2, but fail to specify in any way the nature of their injury. They contend only that Defendant's supposed breach of fiduciary duty was "a cause" of their damages. *Id.* at ¶27, 4. *Id.* at ¶28, 3.

Plaintiffs have not alleged any basis for the existence of a fiduciary duty. The existence of a fiduciary duty is a legal conclusion and this Court is not required to accept as true legal conclusions asserted in a complaint. *See Iqbal*, at 1949. Plaintiffs state only that Defendants were responsible for the day-to-day operations and management of the corporations. [Doc. 1 at ¶16, 2]. A bare allegation of such control without identification of the source of that power is simply insufficient to establish the plausibility vis-à-vis the possibility of the existence of a fiduciary duty. Managers, for example, do not owe a fiduciary duty to shareholders. *See Gonzales v. DHI Mortgage Co.*, No. C 09-1798 PJH, 2009 U.S. Dist. LEXIS 113178, at *10 (N.D. Cal. Dec. 4, 2009) (dismissing breach of duty claims where plaintiffs failed to allege nature of duty or specific facts as to the manner in which defendant's conduct allegedly breached this duty because it did not give defendant fair notice of the claim and the grounds upon which it rest).

Plaintiffs also have not stated sufficient facts to establish Defendants' breach of a fiduciary duty, assuming such a duty existed here. No general duty exists to apprise shareholders of the day-to-day operations and management of the corporations. Moreover, it is difficult to speculate how embarking the corporations "upon a course of conduct detrimental and injurious to plaintiffs" may be a breach of fiduciary duty. Plaintiffs' pleading provides no insight into their claimed damages to know, for example, whether Defendants legitimately satisfied a creditor over the interests of the shareholders or whether they may have simply acted for the benefit of all shareholders instead of preferring some specific aspect of Plaintiff's ownership interests. But, the point of *Twombly* and *Iqbal* is that neither Defendants nor the Court need ponder what may be

possible; it is incumbent on Plaintiffs to plead sufficiently so that their claim to relief is plausible. *See Iqbal*, at 1950; *Gonzales v. DHI Mortgage Co.*, at *10.

Finally, damage is an element of a claim for breach of fiduciary duty and Plaintiffs have failed to specify any damage caused by an alleged breach. *See Turpin v. Smedinghoff*, 117 N.M. 598, 601, 874 P.2d 1262, 1265 (1994). Moreover, Plaintiffs lack standing to bring a direct action against third persons like Defendants for damages resulting from an injury to a corporation. *See Marchman v. NCNB Texas National Bank*, 120 N.M. 74, 81-82, 898 P.2d 709, 716-17 (1995).

II. Conversion and Unjust Enrichment

Plaintiffs' claims for conversion and unjust enrichment must fail because they are based on Defendants' alleged conversion of property of the corporations. For their conversion claim, Plaintiffs allege that "Defendants exercised unauthorized assumption and ownership of Plaintiff's property including but not limited to money withdrawn from the Corporations bank accounts without their knowledge, misappropriation of corporate funds, fraudulent real estate transactions, and Corporate funds for Defendant's personal gain." *Id.* at ¶33, 4. Plaintiffs' unjust enrichment claim is similar: "Defendants were unjustly enriched by using corporate funds for their personal gain and not to further the best interests of the corporate entities." *Id.* at ¶40, 5.

Plaintiffs are complaining about damages resulting from injuries to the corporations and even if Plaintiffs were somehow indirectly injured, they lack standing to bring a direct action against third persons like Defendants for damages resulting from an injury to a corporation. *See Marchman*, 120 N.M. at 81-82, 898 P.2d at 716-17. In order for Plaintiffs' complaint to survive a motion to dismiss, it must "state a claim to relief that is plausible on its face." *Iqbal*, at 1950. In order to do so, Plaintiffs' must plead the factual content necessary for this Court to draw the reasonable inference that Plaintiffs suffered direct harm as a result of Defendants' actions. *See*

Lubin v. Cincinnati Ins. Co., No. 1:09-CV-1156-RWS, 2009 U.S. Dist. LEXIS 112019, at *18 (N.D. Ga. Nov. 30, 2009) (dismissing complaint that did adequately allege plaintiff suffered direct rather than derivative harm). Plaintiffs' claims for conversion and unjust enrichment fail to do so.

III. Declaratory Relief

Plaintiffs do not allege sufficient facts for the Court to determine the existence of an actual controversy of a justiciable nature or that the Court has jurisdiction over this claim. Proceedings under the Declaratory Judgment Act are governed by the same pleading standards as other civil actions. 5 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 1238, at p. 407 (3d ed. 2004). Consequently, Plaintiffs' claim must meet the plausibility requirement of *Twombly/Iqbal*.

Plaintiffs' state that their quest for a declaratory judgment is centered on stock certificates issued by the corporations. *Id.* at ¶48, 5. Plaintiffs allege that they seek "declaratory relief in order to ascertain the correct stock ownership and reissue stock certificates in accordance with the correct ownership of the shareholders in the four corporations." *Id.* at ¶53, 6. However, Plaintiffs plead only that Defendants had unnamed persons cancel and reissue unspecified stock certificates of unknown ownership without Plaintiffs' knowledge or approval. *Id.* at ¶49, 6. Plaintiffs add that "[t]here is incomplete documentation and history of the stock certificates issued for the corporations." *Id.* at ¶51, 6. Moreover, Plaintiffs state that Defendants failed to pay Plaintiffs for stock certificates that Defendants allege Plaintiffs transferred to them. *Id.* at ¶50, 6.

Plaintiffs' factual allegations fail to allege an actual controversy of a justiciable nature. In order to state a claim for declaratory relief, Plaintiffs must allege a "justiciable controversy"

by disclosing “some legal right, relation, status, or interest claimed by the [P]laintiff[s] over which an actual controversy or dispute with the [D]efendant[s] has arisen.” *Federal Practice and Procedure* § 1238, at pp. 409-10. A finding that no controversy exists would justify granting a motion to dismiss under Fed. R. Civ. P. 12(b)(6). *See Robin Prod. Co. v. Tomecek*, 465 F.2d 1193, 1196 (6th Cir. 1972). Here, Plaintiffs do not allege any legitimate interest they may have that they are able to dispute with Defendants. Neither the corporations’ alleged cancellation and reissue of shares or the supposedly incomplete documentation and history of issued shares have any plausible implications for Plaintiffs. Defendants’ asserted failure to pay Plaintiffs for certain stock certificates that Defendants allege Plaintiffs transferred to them is meaningless.

Further, because Plaintiff’s other claims must be dismissed, plaintiff fails to plead sufficient facts for the Court to determine that it has jurisdiction over this claim under the Declaratory Judgment Act, 28 U.S.C. § 2201. The Declaratory Judgment Act does not provide an independent basis for subject matter jurisdiction. *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950); *see Household Bank v. JFS Group*, 320 F. 3d 1249, 1253 (11th Cir. 2003) (“the operation of the Declaratory Judgment Act is procedural only”). It does not appear that the Court has diversity jurisdiction over this claim because the amount in controversy does not exceed \$75,000. *See* 28 U.S.C. §1332(a).

Finally, Plaintiffs seek relief that is not available under claims for conversion and unjust enrichment. Plaintiffs claim entitlement to actual and punitive damages, [Doc. 1, at ¶55, 6], and mandatory injunctive relief to cause the corporations reissue stock certificates. *Id.* at ¶53, 6. The Court cannot grant such relief under the Declaratory Judgment Act.

IV. Accounting and Request for a Receiver

Plaintiffs' "claims" for an accounting and receiver are actually requests for remedies rather than independent substantive claims. *See Gordon v. Washington*, 295 U.S. 30, 38 (1935) ("A receivership is only a means to reach some legitimate end sought through the exercise of the power of a court of equity. It is not an end in itself."); *Daly v. Pearl Spirits, Inc.*, No. C 08-4398 PJH, 2009 U.S. Dist. LEXIS 108188, at *14 (N.D. Cal. Nov. 19, 2009) (citing *Glue-Fold Inc. v. Slautterback Corp.*, 82 Cal.App.4th 1018, 1023, n. 3, 98 Cal. Rptr. 2d 661 (2000) ("constructive trust and an accounting . . . [are] equitable forms of remedies . . . dependent upon a substantive basis for liability"); *Canada Life Assur. Co. v. LaPeter*, 563 F.3d 837, 843 (9th Cir. 2009) ("[A]ppointment of a receiver in equity is not a substantive right; rather, it is an ancillary remedy which does not affect the ultimate outcome of the action.")). Therefore, they have no separate viability if Plaintiffs' substantive claims are dismissed. *See Daly v. Pearl Spirits, Inc.*, at *14.

V. Constructive fraud

Plaintiffs' attempt to state a cause of action for constructive fraud is deficient because Plaintiffs fail to identify the correct elements of the claim, much less allege sufficient facts to establish the plausibility of the claim. "Constructive fraud is a breach of a legal or equitable duty which, irrespective of the moral guilt of the fraud feisor, the law declares fraudulent because of its tendency to deceive others, to violate public or private confidence, or to injure public interests." *Velasquez v. Mascarenas*, 71 N.M. 133, 140, 376 P.2d 311, 316 (1962) (citations and internal quotations omitted). In order to establish a cause of action based on a claim of constructive fraud, Plaintiffs must allege "a breach of a legal or equitable duty which the law declares fraudulent because of its tendency to deceive others." *See Parker v. E.I. DuPont de Nemours, Inc.*, 121 N.M. 120, 132, 909 P. 2d 1, 13 (Ct. App. 1995) (quoting *Barber's Super*

Markets, Inc. v. Stryker, 84 N.M. 181, 186, 500 P. 2d 1304, 1309 (Ct. App. 1972)). An action for constructive fraud is maintainable where there is a nondisclosure of material facts and the person charged with the constructive fraud had a duty to speak under existing circumstances. *Everett v. Gilliland*, 47 N.M. 269, 141 P.2d 326 (1943).

Plaintiffs allege that the “parties” (presumably the Defendants, “involuntarily” and otherwise, and the Plaintiffs) “had a special confidential or fiduciary relationship” without providing any basis for that allegation. [Doc. 1, ¶64, 7]³ They contend that the Defendants made false representations, converted corporate funds and “gained an advantage at the expense of the Plaintiffs.” *Id.* at ¶66, 67. However, Plaintiffs fail to identify any “legal or equitable duty” of Defendants or that Defendants breached such a duty. In fact, the words “duty” and “breach” do not even appear in Count VI.

The existence of a special confidential or fiduciary relationship is a legal conclusion and this Court is not required to accept as true legal conclusions asserted in a complaint. *Iqbal*, 129 S. Ct. at 1949. But more importantly, Plaintiffs haven’t just failed to set forth enough facts to state a plausible claim, they haven’t even alleged the elements of a viable cause of action for constructive fraud. Accordingly, the unarticulated claim for constructive fraud must be dismissed.

Furthermore, Plaintiffs again are complaining about damages resulting from injuries to the corporations. They lack standing to bring a direct action against third persons like Defendants for damages resulting from an injury to a corporation. *See Marchman*, 120 N.M. at 81-82, 898 P.2d at 716-17.

³ Similarly, Plaintiffs did not provide any basis for their allegation of the existence of a fiduciary duty. *See* Section I, *infra* at pp. 3-5.

VI. Fraud

Plaintiffs' fraud claim does not satisfy the general pleading requirements of *Twombly/Iqbal* or the particularized pleading requirements of Federal Rule of Civil Procedure 9(b) which provides: "In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." "At a minimum, Rule 9(b) requires that a plaintiff set forth the 'who, what, when, where and how' of the alleged fraud, and must set forth the time, place, and contents of the false representation, the identity of the party making the false statements and the consequences thereof." *United States ex rel. Sikkenga v. Regence Bluecross Blueshield of Utah*, 472 F.3d 702, 726-27 (10th Cir. 2006) (quotations omitted). Moreover, when there are allegations of a fraudulent scheme with multiple defendants, the complaint must inform each defendant of the specific fraudulent acts which constitute the basis of action against each particular defendant. ("Rule 9(b) does not allow a complaint to merely lump multiple defendants together but require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud." *Gonzales v. DHI Mortgage Co.*, at *10 (quoting *Swartz v. KPMG LLP*, 476 F.3d 756, 764-65 (9th Cir. 2007)); see also *Pegasus Holdings v. Veterinary Centers of America, Inc.*, 38 F.Supp.2d 1158, 1163 (C.D. Cal. 1998) (Where an action involves multiple defendants, a plaintiff "must provide each and every defendant with enough information to enable them 'to know what misrepresentations are attributable to them and what fraudulent conduct they are charged with.'").

In their claims for fraud, Plaintiffs allege that Defendants: 1) used corporate funds for personal expenses; 2) made unidentified false statements to a lawyer in regard to issuing stock; 3) made unidentified false representations to Plaintiff Satnam Singh regarding the cancellation of

stock certificates; 4) made unidentified false representations to shareholders in the course of four real estate contracts; 5) paid family members with corporate funds for work they never performed; 6) made false representations to some unknown person that Gian Sambhi stole a company vehicle; 7) made false representations to Defendants' own attorney; 8) paid unknown attorney fees from corporate funds; and 9) made unidentified false representations to accountants from Sage Accounting. Each of these allegations will be addressed in turn. Generally, however, Plaintiffs once again complain about damages resulting from injuries to the corporations. They lack standing to bring a direct action against third persons like Defendants for damages resulting from an injury to a corporation. *See Marchman*, 120 N.M. at 81-82, 898 P.2d at 716-17.

Using corporate funds for personal expenses

In support of Plaintiffs' claim that Defendants used corporate funds for their personal expenses they offer no details of the underlying transaction(s) other than to state that the use "is evidenced by the corporate credit card statements" [Doc. 1, ¶73, 8] and that "Defendants used their position to misappropriate corporate funds for their own personal gain" *Id.* at ¶82, 9. Plaintiffs do not allege *any* misrepresentation of fact, known by the maker to be untrue, made with the intent to deceive and to induce any of the Plaintiffs to act upon them, and upon which any of the Plaintiffs relied to his detriment. Plainly, the Plaintiffs allege no cause of action for fraud with this claim.

Moreover, a general claim against all defendants for fraud is improper when it fails to inform each defendant of their specific part in the fraud. *Gonzales v. DHI Mortgage Co.*, at *10; *Pegasus Holdings v. Veterinary Centers of America, Inc.*, 38 F.Supp.2d at 1163. Plaintiffs don't even identify which corporation's funds were used, when, or for what expenses. Rule 9(b) does not allow such a vague claim of fraud to proceed.

Unidentified false statements to a lawyer in regard to issuing stock

Plaintiffs claim that “Defendants made false representations to the lawyer issuing the stock certificates” [Doc. 1, ¶74, 8]. They do not identify to whom the statements were allegedly made or when. There is no identification of which Defendants made the allegedly false statements. The particularity requirement of Rule 9(b) is not satisfied with this vague claim.

Additionally, the Plaintiffs again fail to even allege the *elements* fraud. The general claim that there was a false representation to some unknown lawyer is insufficient. There are no allegations that the representation was made to the any of the Plaintiffs, nor that any of the Plaintiffs in any manner relied on the false representation. The Plaintiffs have failed to state a cause of action for fraud with this deficient allegation.

Unidentified false representations to Plaintiff Satnam Singh

Plaintiffs come closer to fulfilling the mandates of Rule 9(b) with their claim that “Defendant Aman Sharma and Defendant Parmjit Singh made false representations to Plaintiff Satnam Singh regarding cancellation of stock certificates”. *Id.* at ¶76, 8. Plaintiffs identify who made the allegedly false statements and to whom they were allegedly made. However, Plaintiffs still fall short of fulfilling their Rule 9(b) obligations because they utterly neglect to identify the content of the allegedly false representations (other than that they had something to do with “cancelation of stock certificates”) or when they were allegedly made. The bare allegation that there was some false statement made at some time is insufficient. *See Lawrence Nat'l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991); *Lancaster Cmty. Hosp. v. Antelope Valley Dist.*, 940 F.2d 397, 405 (9th Cir. 1991).

This claim is also insufficient to provide adequate details showing all of the elements for fraud. Specifically, the Plaintiffs fail to identify that the unidentified false statements were

known by the maker to be untrue, that they were made with the intent to deceive and to induce the Plaintiff to act upon it and, possibly most noteworthy, that the Plaintiff in some manner relied to his detriment upon the falsity. The lack of *any* detail to place the Defendants on notice of the allegations against which they are to defend is fatal to this claim.

Unidentified false representations to shareholders in the course of real estate contracts

In Paragraph 77 of their Complaint, the Plaintiffs allege that the following circumstances constitute fraud:

“Defendant Parmjit Singh, as real estate agent for the corporations, used Corporate funds to purchase real estate for the corporations, but only put his son Defendant Harpreet Singh’s name on the real estate contract and title to the ADJ property in Gallup, which had the largest down payment and the most equity of the four properties, even though he had falsely represented to the other shareholders that the appropriate shareholders name would be on all four real estate contracts.”

Even a close examination of this paragraph fails to reveal exactly what Plaintiffs are pleading that was falsely represented and to whom. Evidently, Plaintiffs allege that Defendant Parmjit Singh was a real estate agent for some, or all, of the corporations identified in the complaint and that he assisted in the corporation(s)’ acquiring real estate. He also was allegedly involved in causing particular shareholders’ names being placed on real estate contracts in some way. And, in the course of doing this, he falsely represented to “shareholders” of some or all of the corporations “that the appropriate shareholders name would be on all four real estate contracts”.

Plaintiffs’ allegations that the false representation involved the “appropriate shareholders name” being placed on “all four real estate contracts” do very little to provide the required illumination of the contents of the false representation. *See Lawrence Nat’l Bank*, 924 F.2d at 180. Further, this allegation is missing any of the required indications of the time and place of the false representation(s), or the consequences thereof. *Id.* In sum, there is not significant detail

to the allegation to inform Defendants of the specific fraudulent acts which constitute the basis of this claim. Failure to do so requires dismissal under Rule 9(b).

Paying family members with corporate funds for work they never performed

Plaintiffs claim that “Defendants had control over the corporate funds and used corporate funds to pay family members ... who never actually worked for the hotels or even lived in the United States during the time they were paid.” [Doc. 1, ¶78, 8]. Plaintiffs provide no other details of their claim. Plaintiffs only use an “example”. This type of “shotgun” approach to a claim for fraud is inadequate for the purpose of Rule 9(b). *See Goldman v. Belden*, 98 F.R.D. 733, 739-40 (W.D.N.Y. 1983). (“At a minimum, [Rule 9(b) requires that] the complaint must include the following: (1) the nature of each individual defendant's participation in the fraud, including the facts constituting scienter and an explanation of the defendant's duty toward the plaintiff; (2) whether the defendant is being sued as a primary defendant or as an aider and abetter; and (3) as to allegations on information and belief, a statement of the source of the information and the reasons upon which the belief is founded.” –citation omitted)

Plaintiffs also do not allege any misrepresentations by anyone, or to anyone. At best, the allegation seems to *imply* that some Defendant falsely represented to someone that family members were doing work for some corporation when they really weren't. But, even if that were explicitly stated, the allegations would still fall far short of the requirements placed upon Plaintiffs by Rule 9(b) because they would fail to identify the individual Defendant that made the misrepresentation, to whom, and when.

In addition to failing to meet the mandates of Rule 9(b), this claim fails to lay out facts to show that the elements of fraud are met. Notably, the Plaintiffs fail to identify that the unidentified false statements were known by the maker to be untrue, that they were made with

the intent to deceive and to induce Plaintiffs to act upon them and, that any Plaintiff relied to his detriment upon the falsity. Without further explanation of the essential elements of fraud, the claim is deficient and must be dismissed.

Alleged false representations that Gian Sambhi stole a company vehicle

Plaintiffs claim as fraudulent that “Defendant Harpreet Singh knowingly made false misrepresentations that Plaintiff Gian Sambhi stole a company vehicle when in fact Defendant Parmjit Singh had asked Gian Sambhi to use the vehicle to get materials in California that were needed for repairs on the properties” [Doc. 1, ¶¶79, 8-9]. This claim of fraud fails to meet the mandates of Rule 9(b) because, while it identifies a Defendant that allegedly made a false statement and the general content of that false statement, it fails to identify the person who received the statement and any time-frame during which the statement was allegedly made. As explained above, Rule 9(b) requires that the pleadings give notice to the defendants of the fraudulent statements for which they are alleged to be responsible. Without some indication of when the allegedly fraudulent statement was made, and to whom, Defendants cannot possibly be said to have been given adequate notice of the statements for which he is allegedly responsible.

Furthermore, this claim of fraud does not in any manner identify how Plaintiffs were allegedly harmed by the misrepresentation. Plaintiffs are required by Rule 9(b) to show some consequence of the allegedly fraudulent statement. *See Lawrence Nat'l Bank v. Edmonds (In re Edmonds)*, 924 F.2d 176, 180 (10th Cir. 1991). Given the lack of information regarding the circumstances of the alleged statement, it is impossible for, Defendants, or the Court, to even speculate on the possible consequences of such a statement.

Plaintiffs continue the theme of this claim with their assertion that “Defendant Harpreet Singh made false representations *to his lawyer* in order to threaten filing a complaint alleging

that Gian Sambhi stole the corporate vehicle when in fact Gian Sambhi had been directed by Parmjit Singh to use the corporate vehicle to obtain supplies for the hotels” [Doc. 1, ¶80, 9] (*emphasis added*). Even if this were true (which is denied), there is no conceivable set of facts that would show that the Plaintiffs relied to their detriment on statements made by one of the Defendants *to that defendant’s own lawyer*.

Payment of unknown attorney fees from corporate funds

Plaintiffs claim as another source of fraud that “Defendant Harpreet Singh has paid and continues to pay his attorney fees from the corporate funds”. *Id.* at ¶81, 9. The Plaintiffs fail to identify what “attorney fees” were paid, why (which is extremely important since it may be entirely appropriate for attorney fees to be paid by a corporation), when, and to whom. The only possible identification of the fees is the reference to “his” fees.

Defendant Harpreet Singh can only speculate can only speculate about the specifics of the fraud Plaintiffs claim her perpetrated and cannot possibly form a response to such an allegation. Moreover, Plaintiffs again fail to identify *any* misrepresentation of fact in conjunction with the alleged wrongful payment of attorney fees. Similarly, Plaintiffs do not allege that any such misrepresentation (if such even exists) was known by the maker to be untrue, made with the intent to deceive and to induce any of the Plaintiffs to act upon them, and upon which any of the Plaintiffs relied to their detriment.

Unidentified false representations to accountants from Sage Accounting

Finally, Plaintiffs claim that “Defendants knowingly made false representations to the corporate accountants, Sage Accounting” *Id.* at ¶83, 9. Plaintiffs do not identify any of the alleged “false statements” with anywhere near particularity required by Rule 9(b). They do not identify to whom the statements were allegedly made or when. They fail to identify which

Defendants made the allegedly false statements. Most notably, they do not even identify the general subject matter of the allegedly false statements, much less the actual content of the statements as necessary.

Additionally, Plaintiffs again fail to even allege the elements of fraud. The general claim that there was a false representation to some unknown account about some unknown subject is insufficient. There are no allegations that any representation was made to the any of the Plaintiffs. To the contrary, Plaintiffs state that the falsehoods were related to an accountant, or accountants. There is no indication that any of the Plaintiffs in any manner relied on the false representation, or that they ever even received the content of the alleged falsities. Plaintiffs have failed to state a cause of action for fraud with this deficient allegation.

CONCLUSION

Plaintiffs' complaint fails to meet the general pleading requirements of Federal Rule of Civil Procedure 8(a) as determined by the Supreme Court in *Twombly* and *Iqbal*. Plaintiffs also fail to allege fraud with particularity as required by Federal Rule of Civil Procedure 9(b). To the extent Defendants are able to discern what Plaintiffs are alleging, Plaintiffs seek damages resulting from injuries to the corporations. They lack standing to bring a direct action against Defendants for damages resulting from an injury to a corporation. Moreover, Plaintiffs fail to allege any basis for the Court to conclude that the requisite amount is in controversy or that the Court has diversity jurisdiction over Plaintiffs' claims. For all these reasons, the Court must dismiss Plaintiff's complaint.

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Certificate of Service

I HEREBY CERTIFY that on the 14th day of December, 2009, I filed the foregoing electronically through the CM/ECF system, which caused all counsel to be served by electronic means, as more fully reflected on the Notice of Electronic Filing:

Electronically Filed

David A. Streubel
Attorney for Plaintiff