

**IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF KANSAS**

**ORCHESTRATE HR, INC, et al.,**

**Plaintiffs,**

**v.**

**BLUE CROSS BLUE SHIELD KANSAS,**

**Defendant.**

**Case No. 5:19-cv-4007-HLT-TJJ**

**MEMORANDUM AND ORDER**

Plaintiffs Orchestrate HR, Inc. and Vivature, Inc. (collectively “Vivature”) filed this diversity action against Defendant Blue Cross Blue Shield Kansas and assert various tort claims. Currently before the Court is Blue Cross’s motion to dismiss Vivature’s second amended complaint. Doc. 217. Blue Cross seeks to dismiss claims Vivature added in its second amended complaint. As discussed below, the Court grants in part and denies in part Blue Cross’s motion. Vivature’s claims for fraud, defamation, and tortious interference with contract remain as they did following the Court’s prior ruling on the earlier motion to dismiss. *See* Doc. 69. Vivature’s claim of fraud by nondisclosure, which was added in the second amended complaint, is dismissed without prejudice.

**I. BACKGROUND**

Generally stated, the allegations in this case involve Vivature’s work with universities to help them bill insurers for medical services performed by the universities’ licensed athletic trainers. Vivature contracts with schools and helps them file the insurance claims and receives a share of the billings collected. This dispute arose when Blue Cross denied many of the claims submitted by Vivature for the universities and began labeling the insurance claims as fraudulent or improper. Vivature contends that Blue Cross fraudulently induced them to change their claims-

filing practices on a promise that claims would be paid, fraudulently failed to disclose certain information, defamed Vivature to Washburn University and other schools, and tortuously interfered with Vivature's contracts with Washburn University and other schools. Vivature asserts four claims in the second amended complaint: fraud, fraud by non-disclosure, defamation, and tortious interference with contract. Doc. 194 at 25-31.

The current motion to dismiss is not the first filed in this case. The Court previously granted in part and denied in part a prior motion to dismiss the first amended complaint.<sup>1</sup> That order stated that Vivature's fraud claim is limited to alleged fraudulent representations made in an October 17, 2017 call between Vivature and Blue Cross; that Vivature's defamation claim is limited to the March 7, 2018 letter sent by Blue Cross Blue Shield of North Dakota to Washburn, and which repeated statements made by a Blue Cross representative named Becky; and that Vivature's claim for tortious interference with contract is limited to its contract with Washburn University. *See* Doc. 69 at 1-2, 19. All other claims, including one for tortious interference with prospective business relations, were dismissed. The Court also found that Texas law governs Vivature's claims. *Id.* at 8-9. Vivature subsequently sought and was granted leave to file a second amended complaint, which is now the operative complaint. *See* Doc. 194.

Blue Cross now moves to dismiss the second amended complaint. In its reply brief, Blue Cross clarifies that it is only seeking dismissal of newly asserted claims beyond those that were defined by the Court in its prior order. It does not seek dismissal of any surviving claims carried forward from the first amended complaint into the second amended complaint. Doc. 243 at 2-3.

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<sup>1</sup> In addition, the Court has denied as moot a motion to dismiss the original complaint, denied a Rule 12(b)(1) motion to dismiss the first amended complaint, and denied two motion to dismiss under the Texas Citizens Participation Act. These motions are in addition to many, many others filed in this contentious case. Although the parties have been warned about the scorched-earth litigation tactics employed here, without much apparent effect, the Court will again remind the parties about their obligations under Rule 1 of the Federal Rules of Civil Procedure.

## II. STANDARD

To survive a motion to dismiss under Rule 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.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is plausible if it is accompanied by sufficient factual content to allow a court “to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The plausibility standard requires “more than a sheer possibility that a defendant has acted unlawfully,” but it “is not akin to a ‘probability requirement.’” *Id.* “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.” *Id.* (quoting *Twombly*, 550 U.S. at 557) (internal quotations omitted). In undertaking this analysis, a court accepts as true all well-pleaded allegations in the complaint, though it need not accept legal conclusions. *Id.* Likewise, conclusory statements are not entitled to the presumption of truth. *Id.* at 678-79.

## III. ANALYSIS

### A. Fraud

The Court previously ruled that Vivature had properly alleged a fraud claim based on the October 17, 2017 call between various Vivature and Blue Cross representatives where someone from Blue Cross represented—fraudulently, according to Vivature—that Blue Cross would process and pay claims if Vivature made changes to its claims-filing process. Doc. 69 at 10. Blue Cross now moves to dismiss what it suggests is an expanded fraud claim in the second amended complaint. But Vivature clarifies that it has not added any new allegations of fraud. Doc. 227 at 8. Because Vivature represents that its fraud claim is unchanged, the Court reiterates its holding that Vivature has adequately stated a fraud claim based on the October 17, 2017 call. Doc. 69 at 10.

The parties also debate the proper measure of damages for Vivature’s fraud claim. But the issue before the Court is whether Vivature has adequately pleaded a fraud claim, not what the proper measure of damages are. The Court has previously addressed the potential damages. *See id.* at 5-7. The Court sees no need to revisit that issue at this stage. Accordingly, Blue Cross’s motion as to Vivature’s fraud claim is denied.

### **B. Fraud by Nondisclosure**

Blue Cross argues that Vivature fails to allege with sufficient particularity a claim for fraud by nondisclosure.<sup>2</sup> The elements of fraud by nondisclosure are: (1) concealment or nondisclosure of material fact within a party’s knowledge; (2) knowledge that the other party was unaware of the fact and could not discover the truth; (3) intent to act by concealment or nondisclosure of the fact; and (4) injury caused by the nondisclosure. *NuVasive, Inc. v. Renaissance Surgical Ctr. N., L.P.*, 853 F. Supp. 2d 654, 663 (S.D. Tex. 2012). “In order to be actionable, a claim for fraud by nondisclosure requires there to have been a duty to disclose.” *Id.* at 661. Thus, to plead fraud by nondisclosure, a plaintiff must show a failure to disclose facts, a duty to disclose those facts, and that the facts were material. *EC & SM Guerra, LLC v. Philadelphia Indem. Ins. Co.*, 2020 WL 6205855, \*3 (W.D. Tex. 2020).

The heightened pleading standard in Rule 9(b) applies to claims of fraud by nondisclosure. *Id.* This requires a party alleging fraud to “state with particularity the circumstances constituting fraud.” Fed. R. Civ. P. 9(b). This “requires plaintiff to set forth the ‘who, what, where, and when’ of the alleged fraud.” *Arena v. Wal-Mart Stores, Inc.*, 221 F.R.D. 569, 571 (D. Kan. 2004). Intent can be alleged generally. Fed. R. Civ. P. 9(b).

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<sup>2</sup> Fraud by nondisclosure was not asserted in the first amended complaint and therefore Court did not address it in the prior order.

In its claim for fraud by nondisclosure, Vivature alleges that Blue Cross “failed to disclose a multitude of material facts.” *See* Doc. 194 at ¶ 67 (listing facts). Vivature also alleges that Blue Cross had a duty to disclose these facts because discovery of new information made earlier representations misleading or untrue; partial disclosures created false impressions; and voluntary disclosure of some information created a duty to disclose the whole truth. *Id.* at ¶ 68.

The Court finds this fails to plead fraud by nondisclosure with the requisite particularity. At most, Vivature has alleged that Blue Cross did not disclose certain facts. But missing from the second amended complaint is the significance of these facts or why Blue Cross was obligated to disclose them. Although Vivature alleges that Blue Cross had a duty to disclose this information, *see id.*, this allegation is just a rote recitation of the legal standard for when a duty might arise. *Compare Tornado BUS Co. v. BUS & Coach Am. Corp.*, 2015 WL 11120584, at \*5 (N.D. Tex. 2015) (stating “a duty to disclose may arise: (1) when one party voluntarily discloses information, which gives rise to the duty to disclose the whole truth; (2) when one party makes a representation, which gives rise to the duty to disclose new information that the party is aware makes the earlier representation misleading or untrue; or (3) when one party makes a partial disclosure and conveys a false impression, which gives rise to a duty to speak”), *with* Doc. 194 at ¶ 68. Vivature does not explain how or why these duties arose, what discoveries made earlier representations untrue, what partial disclosures needed correcting, or how Blue Cross disclosed some but not all information. This fails to satisfy Rule 9(b). *See Tornado BUS Co.*, 2015 WL 11120584, at \*5 (“Without additional specific factual allegations showing that this statement gave rise to a duty to disclose additional information, the pleadings fail to meet the specificity requirement.”). Vivature also fails to allege how any of these alleged omissions caused it injury.<sup>3</sup>

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<sup>3</sup> It appears many of these omissions also relate to Vivature’s defamation or tortious-interference claims. But the fact that Vivature may have been injured by certain actions or statements for purposes of those claims does not mean

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