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U.S. COURTS
 PLEASANTON, CALIFORNIA
 N
 DISTRICT OF CALIFORNIA
 CENTRAL DISTRICT

Attorneys for Dr. Ernest Sutton.

UNITED STATES DISTRICT COURT

DISTRICT OF IDAHO



POCATELLO DENTAL GROUP, P.C., an)
 Idaho professional corporation,)

Plaintiff,)

vs.)

INTERDENT SERVICE CORPORATION,)
 a Washington corporation,)

Defendant.)

INTERDENT SERVICE CORPORATION,)
 a Washington corporation,)

Counterclaimant,)

vs.)

POCATELLO DENTAL Group, P.C., an)
 Idaho professional corporation; DWIGHT)
 G. ROMRIELL, individually; LARRY R.)
 MISNER, JR., individually; PORTER)

Case No.: CV-03-450-E-LMB

MEMORANDUM IN SUPPORT OF
 ERNEST SUTTON'S RULE 12(b)(6)
 MOTION TO DISMISS INTERDENT
 SERVICE CORPORATION'S
 COUNTERCLAIM

SUTTON, individually; ERNEST)
SUTTON, individually; GREGORY)
ROMRIELL, individually; ERROL)
ORMOND, individually; and ARNOLD)
GOODLIFFE, individually,)
Counterdefendants.)

LARRY R. MISNER, JR, individually,)
Counterclaimant,)

vs.)

INTERDENT SERVICE CORPORATION,)
a Washington corporation,)
Counterdefendant.)

LARRY R. MISNER, JR., individually,)
Crossclaimant,)

vs.)

POCATELLO DENTAL GROUP, P.C., an)
Idaho professional corporation,)
Crossdefendant.)

INTRODUCTION

Defendant and Counterclaimant Interdent Service Corporation ("ISC") pursuant to Rule 13(a) of the Federal Rules of Civil Procedure brought a Counterclaim against Plaintiff and Counterdefendant Pocatello Dental Group, P.C. ("Group") and, in its Sixth and Seventh Claims for Relief, added individuals including Ernest Sutton ("Sutton") as Counterdefendants pursuant to Rule 13(h) of the Federal Rules of Civil Procedure¹. Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Counterdefendant Sutton through his counsel of record seeks dismissal of ISC's Sixth and Seventh Claims for Relief against him on the following grounds: (1) ISC's failure to plead with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure; (2) ISC's allegations neither state a claim for "fraud in the inducement" nor any other claim upon which relief may be granted, and (3) ISC's claims as pled are barred by the applicable statute of limitations .

COUNTERCLAIM AGAINST COUNTERDEFENDANT-SUTTON

Counterdefendant Sutton is named only in the Sixth and Seventh Claims for Relief in ISC's counterclaim. ISC's Sixth Claim for Relief for fraud in the inducement² is against Counterdefendant Group and individual Counterdefendants L.R. Misner, Jr., Porter Sutton, Ernest Sutton, Gregory Romriell, Dwight Romriell, Errol Ormond and Arnold Goodliffe. ISC's Seventh Claim for Relief entitled "Alternative Claim for Rescission and Restitution"³ is against the

¹ ISC has made no change to the allegations contained in either its Sixth or Seventh Claim for Relief contained in its proposed Amended and Supplemental Answer, Counterclaims and Third-Party Complaint now pending before this Court.

² ISC's Sixth Claim for Relief is found in ¶¶ 90-97 of ISC's Answer and Counterclaims.

³ ISC's Seventh Claim for Relief is found in ¶¶ 98-100 of ISC's Answer and Counterclaims.

identical Counterdefendants as its Sixth Claim for Relief.

The individual Counterdefendants, including Counterdefendant Sutton, were shareholders in the Group in October of 1996 when the predecessors of both the Group and ISC allegedly entered into a written management agreement ("Management Agreement"⁴) whereby ISC claims to have acquired certain contractual rights with respect to the Group. Counterdefendant Sutton resigned from the Group prior to suit being filed and therefore was no longer a shareholder in the Group at the time this suit was commenced. He does however continue to provide dental services to patients as an employee of the Group pursuant to an employment agreement ("Employment Agreement"). Counterdefendant Sutton is not a party to the existing Management Agreement allegedly between ISC and the Group and Counterclaimant ISC is not a party to the existing Employment Agreement between the Group and Misner.

A. Sixth Claim for Relief

Counterclaimant ISC claims that it was "fraudulently induced" to enter into the Management Agreement with Group, not only by Counterdefendant Group, but also, by each of the individual Counterdefendants including Sutton. *ISC Answer and Counterclaims*, ¶ 91. ISC further claims that "the Management Agreement was a material part of the consideration for which ISC paid Counterdefendants \$2.8 million". *Id.*

ISC then claims that it "relied upon representations by Group, including representations by [all the individual Counterdefendants including Sutton] regarding their willingness and ability to abide by the terms in the Management Agreement, including Article 5.2". *ISC Answer and*

⁴ The Management Agreement is attached as Exhibit 1 to ISC's Answer, and Counterclaims. See paragraph 15 of ISC's Answer and Counterclaims

Counterclaims, ¶ 92. ISC also claims that it “relied upon Group’s concealment of its intent not to abide by Article 5.2.” *Id.*

ISC then claims that “Article 5.2 is a material term of the Management Agreement” and its absence “would materially and adversely frustrate the parties’ essential objectives as expressed in the Management Agreement.” *ISC Answer and Counterclaims*, ¶ 93.

Then, “[b]ased upon information and belief”, ISC claims all Counterdefendants including Sutton “never intended to honor their agreement in, or abide by the terms of, article 5.2.” *ISC Answer and Counterclaims*, ¶ 94.

ISC claims to have “suffered detriment as a proximate result of its reliance on the representations and concealment of facts” by Counterdefendants including Sutton. *ISC Answer and Counterclaims*, ¶ 95. ISC claims it would not have entered into the Management Agreement “but for the misrepresentations and concealment of material facts” by Counterdefendants including Sutton. *ISC Answer and Counterclaims*, ¶ 96. Finally, Counterclaimant ISC claims to have “been damaged in an amount in excess of \$2.8 million plus prejudgment interests” as a “direct and proximate result” of Counterdefendants’ fraud. *ISC Answer and Counterclaims*, ¶ 97.

B. Seventh Claim for Relief

In its Seventh Claim for Relief subtitled “Alternative Claim for Rescission and Restitution”, Counterclaimant ISC begins by repeating its allegation contained in paragraph 91 above that the “terms of the Management Agreement was a material part of the consideration for which it paid [Counterdefendants] \$2.8 million”. *ISC Answer and Counterclaims*, ¶ 99.

Next, Counterclaimant ISC “expressly denies that any term of the Management Agreement is illegal or unenforceable.” But, ISC then claims that it “is entitled to rescind the

Management Agreement and to restitution of the \$2.8 million it paid [Counterdefendants including Sutton] plus prejudgment interest” “if this Court determines that “[Article] 5.2 or any other material term of the Management Agreement is illegal or unenforceable⁵”. *ISC Answer and Counterclaims*, ¶ 100.

ARGUMENT

“When an entire complaint, or an entire claim within a complaint, is grounded in fraud and its allegations fail to satisfy the heightened pleading requirements of Rule 9(b), a district court may dismiss the complaint or claim”. *Vess v. Ciba-Geigy Corp. USA*, 317 F.3d 1097, 1107 (9th Cir. 2003). “A motion to dismiss a complaint ‘grounded in fraud’ under Rule 9(b) for failure to plead with particularity is the functional equivalent of a motion to dismiss under Rule 12(b)(6) for failure to state a claim.” *Id.*

Rule 9(b) demands that, when averments of fraud are made, the circumstances constituting the alleged fraud “be ‘specific enough to give defendants notice of the particular misconduct . . . so that they can defend against the charge and not just deny that they have done anything wrong.’” Averments of fraud must be accompanied by “who, what, when, where and how” of the misconduct charged. “[A] plaintiff must set forth *more* than the neutral facts necessary to identify the transaction. The plaintiff must set forth what is false or misleading about a statement, and why it is false”.

Vess, 317 F.3d at 1106 (*citations omitted*) (italics in original).

⁵ Presumably, ISC’s “Alternative Claim for Rescission and Restitution” proposes the remedy of rescission and restitution as an alternative relief to tort damages for ISC’s Sixth Claim for Relief alleging fraud in the inducement. While Counterdefendant Sutton recognizes that the remedy of rescission and restitution may also be granted based upon a finding of mutual mistake, ISC’s pleadings make no reference to this legal theory. Therefore, dismissal of ISC’s Sixth Claim for Relief should entail dismissal of ISC’s Seventh Claim for Relief against Sutton.

In deciding a Rule 12(b)(6) motion “[a]ll allegations of material fact made in the complaint are taken as true and construed in the light most favorable to the plaintiff. A complaint should not be dismissed unless it appears beyond doubt that the plaintiff cannot prove any set of facts in support of the claim that would entitle him or her to relief”. *No. 84 Employer-Teamster Joint Council Pension Trust Fund v. American West Holding Corp.*, 320 F.3d 920, 931 (9th. Cir. 2003) (*citations omitted*). However, in deciding Rule 12(b)(6) motions, courts “do not accept any unreasonableness inferences or assume the truth of legal conclusions cast in the form of factual allegations.” *Ileto v. Glock, Inc.*, 349 F.3d 1191, 1200 (9th. Cir. 2003) (*citing Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th. Cir. 1981)).

“Allegations of fraud based upon information and belief usually do not satisfy the degree of particularity required under Rule 9(b).” *Wool v. Tandem Computers Incorporated*, 818 F.2d 1433, (9th. Cir. 1987) (*citations omitted*). Although this rule pertaining to pleading fraud based upon “information and belief” may be relaxed as to matters “peculiarly in the opposing party’s knowledge”, the allegation based upon information and belief should be accompanied by a “statement of the facts upon which the belief is founded”. *Id.*

A. **ISC’s Fraud Claims Against Sutton Fail to Meet the Pleading Requirements of Rule 9(b) of the Federal Rules of Civil Procedure.**

“In all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other conditions of mind of a person may be averred generally.” Rule 9(b), *Federal Rules of Civil Procedure* (“FRCP”). Failure to plead with the particularity required by Rule 9(b) renders the pleading vulnerable to a Rule 12(b)(6) motion to dismiss for failure to state a claim. *Shapiro v. Miami Oil Producers’ Inc.* 84

FRD 234 (D. Mass. 1979). Furthermore, "conclusory allegations or legal conclusions masquerading as factual conclusions will not suffice to prevent dismissal under Rule 12(b)(6)." *ABC Arbitrage Plaintiffs Group v. Tchuruk*, 291 F.3d 336, 348 (5th. Cir. 2002).

Counterclaimant ISC's stated claims against Counterdefendant Sutton, *i.e.*, ISC's Sixth and Seventh Claims for Relief, must be dismissed pursuant to Rule 9(b) due to ISC's failure to "specify such facts as the times, places, benefits received, and other details of the alleged fraudulent activity" in their Counterclaim. *Neubronner v. Milken*, 6 F.3d 666, 672 (9th. Cir. 1993) (*citing Semegen v. Weidner*, 780 F.2d 727, 731 (9th. Cir. 1985)). "[M]ere conclusory allegations of fraud are insufficient". *Moore v. Kayport Package Express, Inc.*, 885 F.2d 531 (9th. Cir. 1989) (*citing Wool v. Tandem Computers, Inc.*, 818 F.2d 1433, 1439 (9th. Cir. 1989)).

ISC has alleged no more particularity concerning the content of the alleged fraudulent representations than that, "[w]hen entering the Management Agreement, ISC relied upon representations by Group, including representations by L.R. Misner, Porter Sutton, Ernest Sutton, Gregory Romriell, Errol Ormond, and Arnold Goodliffe regarding their willingness and ability to abide by the terms in the Management Agreement, including Article 5.2". *ISC Answer and Counterclaims*, ¶ 92. But, where there are multiple defendants, plaintiff must plead fraud with particularity as to each defendant. *Old Republic Ins. Co. V. Hansa World Cargo Serv., Inc.*, 170 FRD 361, 374 (S.D.N.Y. 1997) (*citing Noble v. Great Brand of Europe, Inc.*, 949 F. Supp.183 (S.D.N.Y. 1996)). Not only does ISC fail to make its allegations with particularity as to each Counterdefendant, ISC fails to allege what "representation" any Counterdefendant made "regarding their willingness and ability", whether that "representation" was true or false at the time allegedly made, whether that "representation" concerned a present or future event or when,

where and to whom it was allegedly made.

From ISC's pleadings, it is not even clear whether ISC is alleging that these individual Counterdefendants made any representations in their individual capacity, as opposed to representations made in their corporate capacity, "regarding their willingness and ability to abide by the terms of the Management Agreement". *ISC Answer and Counterclaims*, ¶ 92. ISC does not appear to claim that the individual Counterdefendants are parties to the Management Agreement between ISC and Group. In its Counterclaim, ISC does not attempt to state a claim for breach of contract against any of the individual Counterdefendants. ISC's Counterclaim offers no rationale for why any of the Counterdefendants would be making representations to ISC concerning the Management Agreement *in their individual capacity* or why ISC would be relying on any such alleged representation made by an individual Counterdefendant unless that representation was made by that Counterdefendant as an agent of the Group.

Because a "corporate officer may only be held liable for fraud if s/he participates in it or has actual knowledge of it . . . [ISC] must allege facts, with particularity, which demonstrates [Sutton's] participation in the fraud or actual knowledge of the fraud". *Camper's World International, Inc. v. Perry Ellis International, Inc.*, 2002 U.S. Dist. LEXIS 14909 *11 (S.D.N.Y. 2002) (citing *Cohen v. Koenig*, 25 F.3d 1168, 1173 (2nd. Cir. 1994)). ISC has not even alleged that Sutton was a "corporate officer" in 1996 at the time when he is alleged to have made the fraudulent representation. Because ISC has failed to make such allegations with particularity, Counterdefendant Sutton should be dismissed from ISC's fraud based claims under Rule 9(b) of the FRCP.

The Idaho Supreme Court has held that “a cause of action for fraud [may be pled] using circumstantial evidence to show intent to defraud. . . . Once the plaintiff establishes by circumstantial evidence an inference that the defendant harbored actual intent to defraud, the burden of coming forward with rebuttal evidence shifts to the defendant.” *DBSI/TRI V v. Fred H. Bender, Philip A. McLennan, Bender and Bender*, 130 Idaho 796, 807, 948 P.2d 151, 162 (1997). Although “intent” need not be pled with particularity under Rule 9(b), it must at least be pled generally. The question regarding ISC’s pleading of Counterdefendants’ “intent” may be stated as whether ISC’s Counterclaim against Sutton alleges sufficient facts to support “an inference that [he] harbored actual intent to defraud” so that “the burden of coming forward with rebuttal evidence” should shift to Sutton. ISC’s conclusory allegations contained in Paragraph 94 based solely upon “information and belief” falls far short of the mark.

“A plaintiff will not survive a Rule 9(b) motion to dismiss on the pleadings by simply alleging that a defendant had fraudulent intent. In order to adequately plead scienter, a plaintiff must set forth specific facts to support an inference of fraud.” *Lovelace v. Software Spectrum, Inc.*, 78 F.3d 1015, 1018 (5th. Cir. 1996) (citing *Tuchman v. DSC Communications Corp.*, 14 F.3d 1061, 1068 (5th. Cir. 1994)). The Second Circuit “has stated that ‘we must not take the relaxation of Rule 9(b)’s specificity requirement regarding condition of mind for a ‘license to base fraud claims on speculation and conclusory allegations’ . . . Accordingly we have held that ‘plaintiffs must allege facts that give rise to a strong inference of fraudulent intent’.” *Chill v. GE*, 101 F.3d 263, 267 (2nd. Cir. 1996) (quoting *Acito v. Imcerna Group, Inc.*, 47 F.3d 47, 52 (2nd. Cir. 1995)).

ISC claims “[b]ased upon information and belief” that the Group and individual Counterdefendants including Sutton “never intended to honor their agreement in, or abide by the

terms of Article 5.2" in the Management Agreement. *ISC Answer and Counterclaims*, ¶ 94.

"Even where allegations are based upon information and belief, supporting facts on which the belief is founded must be set forth in the complaint. And this holds true 'even when the fraud relates to matters peculiarly within the knowledge of the opposing party.'" *Hayduk v. Lanna*, 775 F.2d 441 (1st. Cir. 1985) (*citations omitted*). ISC pleads no facts as to Sutton or any other individual Counterdefendant in its Counterclaim giving rise to an inference of fraud.

B. ISC's Allegations Fail to State a Claim for Fraud in the Inducement or Any Other Claim Against Sutton Upon Which Relief Can Be Granted.

The Counterdefendants including Sutton as individuals are not parties to the Management Agreement and therefore would have no agreement with ISC to "honor" or "abide by the terms of Article 5.2". *ISC Answer and Counterclaims*, ¶ 94. ISC claims that (1) the Group breached Article 5.2 of the Management Agreement at Paragraph 65, (2) "concealed its intent not to abide by Article 5.2" from ISC at Paragraph 92 and (3) "never intended to honor [the Group's] agreement in, or abide by the terms of, Article 5.2" in Paragraph 94 of ISC's Counterclaim. Assuming for argument sake that ISC's allegations underlying its claim against the Group state a valid claim against the Group, those allegations against the Group stand in sharp contrast to the allegations against Sutton as an individual. Because Sutton is not alleged to be a party to the Management Agreement, Sutton cannot be alleged to have (1) breached Article 5.2 of the Management Agreement, (2) concealed his intent to breach Article 5.2 or (3) to have never intended to comply with Article 5.2.

Either ISC is attempting to state a "fraud in the inducement" claim against Counterdefendant Sutton as (1) an individual, (2) the Group's agent or (3) both as an individual

and the Group's agent. Regardless of ISC's intended legal theory, Sutton must be dismissed pursuant to Rule 12(b)(6) of the FRCP in that ISC has failed to state any claim against him. If Sutton was acting as an individual in making the alleged fraudulent representations, ISC has not alleged any facts suggesting how it could have been harmed by Sutton's representations not involving the Group. If, on the other hand, ISC contends that Sutton was acting as the Group's agent in 1996 when the alleged fraudulent inducement occurred, ISC has failed to allege any facts supporting their Sutton as agent theory and the Management Agreement attached to their Counterclaim as Exhibit 1 shows it to have been signed by another Counterdefendant as the Group's president.

The Management Agreement between the predecessors of ISC and the Group was executed on October 11, 1996. ISC's Counterclaim against the Group and individual Counterdefendants including Sutton was filed more than seven years later on or about November 6, 2003. *ISC Answer and Counterclaims*, ¶ 14. ISC has attempted to circumvent the rule that promises or statements relating to future events will not support an action for fraud by pleading "[b]ased upon information and belief" that Counterdefendants explicitly including Sutton "never intended to honor their agreement in, or abide by the terms of, Article 5.2." *ISC Answer and Counterclaims*, ¶ 94.

Idaho has adopted the majority rule that a misstatement of *present* intention can form the basis for a fraud claim. "All but a few courts regard a misstatement of a present intention as a misrepresentation of a material fact; and a promise made without the intent to perform it is held to be sufficient basis for an action of deceit, or for restitution or other equitable relief." *Mitchell*, 120 Idaho at 844, 820 P.2d at 713 (*quoting* W. Prosser & W. Keeton, Prosser and Keeton on the

Law of Torts, § 109 pp. 762-65 (5th. Ed. 1984)). But, in its Counterclaim against Sutton, ISC attempts to ground its fraud in the inducement claims on an alleged variance between the Group's promises made in the Management Agreement and the alleged then present intent of the Group's individual shareholders. Assuming solely for the sake of argument that an individual shareholder such as Sutton in October 1996 had secretly concealed his present intent to never comply individually with the terms of the Management Agreement, he could not possibly commit fraud unless his then present intent not to comply conflicted with his individual promise to comply. Because the Management Agreement contains no promises that Group shareholders as individuals like Sutton could possibly intend never to perform, the fraud in the inducement claim against Sutton should be dismissed.

Any possible present intent Sutton **could** have had regarding honoring Article 5.2 of the Management Agreement would necessarily implicate a "promise or a statement of future event [that] will not serve as basis for fraud". *Mitchell v. Barendregt*, 120 Idaho 837, 843, 820 P.2d 707, 713 (Ct App. 1991) (*quoting Sharp v. Idaho Investment Corp.*, 95 Idaho 113, 122, 504 P.2d 386, 395 (1972)). Sutton could not possibly have had the present intent in 1996 to refuse to comply with Article 5.2. Any present intent then existing relative to Article 5.2 must have been conditioned on Sutton being placed in a position by the Group to either comply or refuse to comply with Article 5.2. At most, Sutton could have had a present intention in October 1996 to thwart the Group's compliance with Article 5.2 if, or when, he ever came into a position within the Group to act relative to Article 5.2 on behalf of the Group. While Sutton in 1996 could have had a present intent as an individual shareholder in the Group to not comply with the Management Agreement, he could not have possibly had a then present intent to cause the Group to not comply

with the Management Agreement. Because his intent relative to compliance with Article 5.2 was necessarily conditioned on the occurrence of a future event, Sutton could not have had the present intent for the Group not to comply with Article 5.2 in October 1996.

Sutton – when he allegedly made representations in 1996 regarding “his willingness and ability to abide by the terms of the Management Agreement, including Article 5.2” – was in no position to either “honor” or “abide in” Article 5.2. *ISC Answer and Counterclaims*, ¶ 92. Article 5.2 of the Management Agreement between ISC and Group imposes contractual duties solely on the Group. At the time of the alleged fraudulent representations in 1996, Counterdefendant Porter Sutton – not Counterdefendant Ernest Sutton – was president of the Group. *See* Management Agreement Signature Page attached as Exhibit 1 to *ISC Answer and Counterclaims*. Counterdefendant Sutton’s then present intent in 1996 regarding his future compliance or noncompliance with Article 5.2 as an individual shareholder of the Group cannot possibly serve as the basis of a fraud claim based upon alleged representations or promises concerning the Group’s future compliance or noncompliance with Article 5.2.

C. ISC’s Claims Against Sutton Are Barred by the Applicable Statute of Limitations.

In spite of pleading the date of formation of the Management Agreement as October 11, 1996, ISC’s Counterclaim fails to state when it discovered the facts constituting Counterdefendants’ alleged fraud in the inducement. *ISC Answer and Counterclaims*, ¶ 16. The Idaho statute of limitations for fraud is three years from “the discovery, by the aggrieved party, of the facts constituting the fraud”. Idaho Code § 5-218. “Actual knowledge of the fraud can be inferred if the aggrieved party could have discovered the fraud by reasonable diligence, although the Court will hesitate to infer such knowledge.” *DBSI/TRI V v. Fred H. Bender, Philip A.*

McLennan, Bender and Bender, 130 Idaho 796, 807, 948 P.2d 151, 162 (1997) (citing *McCoy v. Lyons*, 120 Idaho 765, 773, 820 P.2d 360, 368 (1991)). Therefore, Counterdefendant ISC's claims are barred as pled by the applicable Idaho statute of limitations absent at least some allegation that discovery of the fraud did not occur until sometime within the last three years.

Because ISC's fraud in the inducement claim rests on Counterdefendants Group and individuals then present intentions in 1996 allegedly concealed from ISC by the Group, the date when the statute of limitations for ISC's fraud in the inducement claim began to run is the date ISC either acquired -- or reasonably should have acquired -- knowledge of facts supporting their allegations contained in Paragraph 94 that Counterdefendants "never intended to honor their agreement in, or abide by the terms of, Article 5.2". But, ISC at this time apparently still does not have knowledge of sufficient facts to support this critical allegation because ISC pled those allegations contained in paragraph 94 based only upon "information and belief". Absent even an allegation that ISC has made the critical discovery of facts supporting their fraud in the inducement claim for each of the Counterdefendants, ISC's Counterclaim against those Counterdefendants not alleged to have had their alleged fraud in 1996 discovered by ISC within the last 3 years must be dismissed as beyond the three year statute of limitations. On the other hand, if ISC does now have knowledge of facts sufficient to support its allegations concerning any Counterdefendant's then present state of mind in 1996, ISC must be required to amend its Counterclaim to state the facts supporting that knowledge and the date those facts supporting that knowledge was acquired by ISC.

CONCLUSION

For the reasons stated above, this Court should grant Counterdefendant Sutton's Motion to Dismiss pursuant to Rules 9(b) and 12(b)(6) of the Federal Rules of Civil Procedure.

Counterclaimant ISC has (a) failed to plead its Counterclaim against Sutton with the particularity required by Rule 9(b), (b) failed to state a claim upon which relief may be granted and (c) failed to allege facts showing its Counterclaim is not barred by the applicable three year statute of limitations.

DATED this 4th day of March, 2004.

RACINE, OLSON, NYE, BUDGE
& BAILEY, CHARTERED

By _____


Richard A. Hearn

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 4th day of March, 2004, I served a true and correct copy of the above and foregoing document to the following person(s) as follows:

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