

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
(Northern Division)

WW, LLC, *et al.*

*

Plaintiffs

*

v.

*

Civil Action No. 09-524 - AMD

Pear, Sperling, Eggan & Daniels, P.C., *et al.*

*

Defendants

*

* * * * *

MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS

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Pear, Sperling, Eggan & Daniels, P.C. and Paul R. Fransway, Defendants (hereinafter “Defendants”) submit this Memorandum in support of their Motion to Dismiss.

INTRODUCTION

The Plaintiffs (hereinafter “Plaintiffs” when referred to collectively) in the instant case are WW, LLC (hereinafter “WW” when referred to individually), Richard Welshans (hereinafter “Mr. Welshans” when referred to individually) and Deborah Williams (hereinafter “Ms. Williams” when referred to individually.) Plaintiffs claim they suffered damages as a result of alleged deficiencies in a Franchise Offering Circular (hereinafter “FOC”) that was delivered by The Coffee Beanery, Ltd. (hereinafter “Coffee Beanery”) to Mr. Welshans and Ms. Williams in June 2003. (*See*, Complaint attached hereto as Exhibit 1 at ¶¶7-11, 17-22, 24-31.) The Complaint alleges Defendants are an attorney and law firm who provided Coffee Beanery with legal services in connection with the preparation of the FOC. (*See*, Exhibit 1 at ¶¶4, 5.)

Plaintiffs’ Complaint was filed on March 5, 2009. (*See*, this Court’s docket.) Plaintiffs’ Complaint contains two Counts, which seek recovery for “Negligent Misrepresentation” and “Fraudulent Inducement,” respectively, arising from the alleged deficiencies in the FOC. (*See*, Complaint attached hereto as Exhibit 1 at ¶¶7-11, 17-22, 24-31.)

Plaintiffs’ Complaint is barred by the statute of limitations. The statute of limitations applicable to Plaintiff’s claim is § 5-101 of the Courts Article, Maryland Code Annotated:

A civil action at law shall be filed within three years from the date it accrues unless some other provision of the Code provides a different period of time within which an action shall be commenced.

As described below, Plaintiffs retained at least two attorneys to investigate and pursue claims arising from the alleged deficiencies in the FOC in 2005, and through these attorneys Plaintiffs

actually filed at least two claims seeking damages and other relief arising from the alleged deficiencies in the FOC in 2005. Also in 2005, Plaintiffs filed a complaint with the Securities Commissioner of the State of Maryland arising from alleged deficiencies in the FOC. The following is “timeline” of the procedural events, which establish that Plaintiffs’ Complaint is barred by the statute of limitations:

1) January 21, 2005 - - Plaintiffs, represented by Mario L. Herman, Esquire, filed a claim with the American Arbitration Association against Coffee Beanery. This claim sought damages and identified the “Nature of Dispute” as “Fraud, Negligent Misrepresentation, Fraudulent Misrepresentation, Fraudulent Nondisclosure, Negligent Nondisclosure, Breach of Contract, Breach of the Covenant of Good Faith and Fair Dealing, violations of the Maryland Franchise Registration and Disclosure Law Title 14 Sections 201, *et seq.*, Michigan Franchise Investment Law, M.C.L., Section 445.1501, *et seq.*, Michigan’s Consumer Protection Act, and M.C.L., Section 445.901, *et seq.*”

2) In 2005, Plaintiffs filed a complaint asserting deficiencies in the FOC with the Securities Commissioner of State of Maryland, Case No. 2005-0244.

3) November 28, 2005 - - Plaintiffs, now represented by Harry M. Rifkin, Esquire, wrote to the American Arbitration Association taking the position that “the claims of WW, LLC, Deborah Williams and Richard Welshans against The Coffee Beanery, Ltd.” were not subject to arbitration. This letter stated, *inter alia*, “the offering circular was in violation of the Maryland Franchise Act,” and this letter stated that Plaintiffs were considering filing a legal action in Maryland against The Coffee Beanery, Ltd. as well as its officers.

4) December 15, 2005 - - Plaintiffs followed up on their attorney’s letter of November 28, 2005, by filing a multi-count lawsuit in this Court, *WW, LLC, et al. v. The Coffee Beanery, Ltd., et al.*, Civil Action No. 05-03360-AMD, seeking recovery of damages under various theories, including but not limited to “intentional misrepresentation,” which is fraud, and negligent misrepresentation, arising from the alleged deficiencies in the FOC.

Mr. Welshans’ claim should also be dismissed, because this Court lacks subject matter jurisdiction over Mr. Welshans’ claim. Mr. Welshans sought protection under the Bankruptcy Act in a Chapter 7 filing in April 2008. Mr. Welshans did not disclose the claim against the

Defendants on his bankruptcy schedules. Because Mr. Welshans did not disclose the claim against Defendants on his bankruptcy schedules, that claim remains the property of his bankruptcy estate as the claim has never been administered by the Chapter 7 bankruptcy trustee. The Chapter 7 bankruptcy trustee alone has standing to pursue the claim.

Plaintiffs' claim for negligent misrepresentation should also be dismissed because Plaintiffs lack standing under Maryland law as non-clients of Defendants to pursue such a claim arising from legal services provided by Defendants to Coffee Beanery.

Plaintiffs' claim for fraudulent inducement against Defendants should also be dismissed for substantive reasons which exist independent of the statute of limitations.

FACTS ALLEGED IN THE COMPLAINT

AND

ADDITIONAL ADJUDICATIVE FACTS OF WHICH THIS COURT CAN TAKE JUDICIAL NOTICE IN DECIDING DEFENDANTS' MOTION UNDER FED.R.CIV.P. 12(b)(6)

In the Complaint in the instant case, the Plaintiffs claim they suffered damages as a result of alleged deficiencies in the FOC that was delivered by Coffee Beanery to Mr. Welshans and Ms. Williams in June 2003. (*See*, Exhibit 1 at ¶¶7-11, 17-22, 24-31.) The Complaint alleges Defendants are an attorney and law firm who provided Coffee Beanery with legal services in connection with the preparation of the FOC. (*See*, Exhibit 1 at ¶¶4, 5.) The Complaint contain two Counts, which seek recovery for "Negligent Misrepresentation" and "Fraudulent Inducement," respectively, arising from the alleged deficiencies in the FOC. (*See*, Exhibit 1 at ¶¶7-11, 17-22, 24-31.)

The Complaint in the instant case was filed on March 5, 2009. (*See*, Exhibit 1 at p. 1.

See, also, this Court's docket.) Prior to January 21, 2005, however, Plaintiffs had already reached the conclusion, which is established by an adjudicative fact that is a part of this Court's records, that they had been victimized by, *inter alia*, alleged negligent misrepresentations and alleged fraudulent failures to disclose in the FOC. (*See*, Docket in *WW, LLC, et al. v. The Coffee Beanery, et al.*, 05-03360-AMD, Doc. No. 5 [Defendants' Motion to Dismiss, or to Stay Proceedings Pending Arbitration] at Exhibit B-7 thereto, a copy of which is attached hereto as Exhibit 2. *See, also*, additional copy of Defendants' Motion to Dismiss, or to Stay Proceeding Pending Arbitration in *WW, LLC, et al. v. The Coffee Beanery, et al.*, 05-03360-AMD at Exhibit B-7 thereto, which is attached hereto as Exhibit 3.) Plaintiffs had already initiated an inquiry into the alleged deficiencies in the FOC by retaining an attorney to represent them in connection with investigating and pursuing claims arising from the alleged deficiencies in the FOC prior to January 21, 2005. (*Id.*) By January 21, 2005, the attorney retained by the Plaintiffs for this purpose had filed an action against Coffee Beanery seeking declaratory judgment and damages arising from, *inter alia*, alleged fraud and negligent misrepresentation arising from alleged deficiencies in the FOC. (*Id.*) By mid-2005, Plaintiffs had also filed a Complaint with the Securities Commissioner of Maryland arising from the alleged deficiencies in the FOC. (*See*, Exhibit 2 at Doc. No. 8.) Prior to November 28, 2005, Plaintiffs retained a second attorney to represent them in connection with investigating and pursuing claims arising from the alleged deficiencies in the FOC.¹ (*See*, Exhibit 3 at Exhibit B-14 thereto.) On December 15, 2005, Plaintiffs filed a multi-count lawsuit in this Court, *WW, LLC, et al. v. The Coffee Beanery, Ltd.*,

¹ The second attorney retained by Plaintiffs for this purpose is Plaintiffs' counsel in the instant case, Harry M. Rifkin, Esquire.

et al., Civil Action No. 05-03360-AMD, seeking recovery of damages under various theories, including but not limited to “intentional misrepresentation,” which is fraud, and negligent misrepresentation, arising from the alleged deficiencies in the FOC. (*See*, Complaint in *WW, LLC, et al. v. The Coffee Beanery, Ltd., et al.*, Civil Action No. 05-03360-AMD attached hereto as Exhibit 4.)

On April 1, 2008, Mr. Welshans sought protection under the Bankruptcy Act by filing a Voluntary Petition under Chapter 7. (*See*, Docket in *In re. Richard A. Welshans*, U.S. Bankruptcy Court District of Maryland [Baltimore], Case No. 08-14455 attached hereto as Exhibit 5.) Mr. Welshans did not disclose his claim against the Defendants on his bankruptcy schedules. (*See*, Mr. Welshans’ bankruptcy petition with Schedules attached hereto as Exhibit 6, at Schedule B-Personal Property.)²

As the Complaint alleges, Plaintiffs are non-clients of the Defendants. (*See*, Exhibit 1, *passim*.) Plaintiffs’ claims arise from the legal services provided by the Defendants “for the Coffee Beanery, Ltd.” in connection with the preparation of the FOC. (*See*, Complaint at ¶¶4, 5, 9-11.) Count One of the Complaint purports to assert a claim for “negligent misrepresentation” against the Defendants, arising from the legal services provided by the Defendants to Coffee

² Mr. Welshans only disclosed the cause of action against Coffee Beanery, *i.e.*, *WW, LLC, et al. v. The Coffee Beanery, Ltd., et al.*, Civil Action No. 05-03360-AMD, in his bankruptcy schedules. (*See*, Exhibits 5 and 6.) After Plaintiffs moved to reopen *WW, LLC, et al. v. The Coffee Beanery, Ltd., et al.*, Civil Action No. 05-03360-AMD - - which had been dismissed with prejudice by this Court prior to the date on which Mr. Welshans filed for bankruptcy and alerted the Trustee to the existence of that then-moribund claim - - the Chapter 7 Bankruptcy Trustee filed a Motion to Reopen Mr. Welshans’ bankruptcy on April 7, 2009, which Mr. Welshans opposed on April 21, 2009. (*See*, Exhibit 5 at Doc. Nos.42 and 43. *See, also*, Motion to Reopen and Opposition thereto filed in Mr. Welshans’ bankruptcy which are attached hereto as Exhibits 7 and 8, respectively.)

Beanery in connection with the preparation of the FOC. (*See*, Exhibit 1 at ¶¶17-21.) In support of the “negligent misrepresentation” claim, Plaintiffs offer the legal conclusion “Defendants’ failure to disclose material required information in the Maryland Franchise Offering circular was not in accordance with the standard of care required of attorneys preparing and registering Franchise Offering Circulars in the State of Maryland.” (*See*, Exhibit 1 at ¶21.)

Count Two of the Complaint, which purports to assert a claim for “fraudulent inducement,” also arises from the Defendants’ “failure . . . to disclose,” and “failing to disclose” certain information in the FOC when the Defendants provided legal services to Coffee Beanery in connection with “the preparation of the Franchise Offering Circular for The Coffee Beanery, Ltd.” (*See*, Exhibit 1 at ¶¶5, 8, 9, 28, 30.) The Complaint alleges no direct communications between Defendants and Plaintiffs when Plaintiffs were reviewing the FOC and deciding whether they would purchase a Coffee Beanery franchise, much less any communications between Defendants and Plaintiffs during which Defendants made any affirmative misrepresentations of material fact to Plaintiffs. (*See*, Complaint, *passim*.) Like the “negligent misrepresentation” claim, moreover, the “fraudulent inducement” claim is also predicated upon Plaintiffs’ legal conclusion that Defendants “owed a duty of care to the Plaintiffs” in connection with the legal services Defendants provided to Coffee Beanery in preparing the FOC. (*See*, Complaint at ¶¶5, 24.)

ARGUMENT

a. *Standard for Motions to Dismiss*

When ruling on a motion to dismiss under Fed.R.Civ.P. 12(b)(6), a court must accept well pled factual allegations in the complaint as true. *See, e.g., Onawola v. Johns Hopkins*

University, 412 F.Supp.2d 529, 531-32 (D.Md. 2006), *aff'd*, 2007 U.S.App. LEXIS 5806 (4th Cir. 2007). “It is also important to be mindful, however, that the defendants are entitled to have the *legal sufficiency* of the complaint fully examined and that, although the truth of all facts is assumed, consistent with the complaint’s allegations, (citations omitted), the court need not accept the legal conclusions drawn from the facts, *see, Shatz v. Rosenberg*, 943 F.2d. 485, 489 (4th Cir. 1991), or unwarranted inferences, unreasonable conclusions, or arguments. *See generally* 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* §1357 (2d ed. 1990 & 2004 Supp.).” *Onawola*, 412 F.Supp.2d at 531-32. (Italics in original.) *See, also, Miller v. Pacific Shore Funding*, 224 F.Supp.2d 977, 985 (D.Md. 2002). (While a court accepts well pled factual allegations in the complaint as true when ruling on a motion to dismiss under Fed.R.Civ.P. 12(b)(6), the “Court, however, is ‘not bound to accept as true a legal conclusion couched as a factual conclusion.’ (Citation omitted). Otherwise, ‘Rule 12(b)(6) would serve no function, for its purpose is to provide a defendant with a mechanism for testing the legal sufficiency of the complaint.’”)

When deciding motions to dismiss for failure to state a claim under Fed.R.Civ.P. 12(b)(6) that are based upon affirmative defenses supported by facts established in the record in other judicial proceedings, courts may take judicial notice of facts established in the record in other judicial proceedings without converting the motion into one for summary judgment under Fed.R.Civ.P. 12(c). *See, e.g., Whitehead v. Viacom*, 233 F.Supp.2d 715, 719 n. 5, 720-23 (D.Md. 2002); *Andrews v. Daw*, 201 F.3d 521, 524 n. 1 (4th Cir. 2000); *Briggs v. Newberry County Sch. Dist*, 838 F.Supp. 232, 234 (D.S.C. 1992), *aff'd*, 989 F.2d 491 (4th Cir. 1993).

Dismissal for failure to state a claim upon which relief can be granted is appropriate

under Fed.R.Civ.P. 12(b)(6), when it appears from the facts that the court may properly consider without converting the motion into one for summary judgment under Fed.R.Civ.P. 12(c) that the limitation period has run. *See, e.g., Miller*, 224 F.Supp.2d at 985; *Whitehead*, 233 F.Supp.2d at 719 n. 5, 720-23; *Andrews*, 201 F.3d at 524 n. 1; *Briggs*, 838 F.Supp. at 234.³ *See, also, Knickman v. Prince George's County*, 187 F.Supp. 559, 563 (D.Md. 2002). (“A limitations defense may be raised in a pre-answer motion under Fed.R.Civ.P. 12(b)(6).”); and *Interphase Garment Solutions, LLC v. Fox Television Stations, Inc.*, 566 F.Supp.2d 460, 463 (D.Md. 2008)(same). In a diversity case, such as the instant case, this Court applies the Maryland statute of limitations as well as Maryland law construing it. *Miller*, 224 F.Supp.2d at 985.

Pursuant to Fed.R.Civ.P. 9(b), moreover, fraud claims, and claims otherwise denominated which share the gravamen of fraud claims, must be dismissed when facts have not been pled with sufficient particularity to establish each of the elements of the claim. *See, e.g., Kwang Dong Pharmaceutical Co. v. Kan*, 205 F.Supp.2d 489, 495 (D.Md. 2002); *Adams v. NVR Homes, Inc.*, 193 F.R.D. 243, 250-54 (D.Md. 2000). Use of such words as “fraudulent,” of “fraudulently misrepresented,” “falsely, wrongfully, and fraudulently represented,” or “engaged in deception, fraud, false pretense, false premises, misrepresentation” are characterizations of the needed facts rather than allegations of facts and as such are insufficient to withstand a motion to dismiss. *Kwang Dong Pharmaceutical*, 205 F.Supp.2d at 495; *Adams*, 193 F.R.D. at 250-52.

b. Plaintiffs' Claims Are Barred by the Statute of Limitations

³ If a court determines the facts before it warrant conversion of the motion into one for summary judgment under Fed.R.Civ.P. 12(c), the court may rule on the motion in accordance with the summary judgment standard of Fed.R.Civ.P. 56. *See, e.g., Gerber v. Northwest Hospital Center*, 943 F.Supp. 571, 574 n. 1 (D.Md. 1996).

The statute of limitations applicable to Plaintiff's claim is § 5-101 of the Courts Article, Maryland Code Annotated:

A civil action at law shall be filed within three years from the date it accrues unless some other provision of the Code provides a different period of time within which an action shall be commenced.

Dismissal for failure to state a claim upon which relief can be granted because the claim is barred by the statute of limitations is proper where, as in the instant case, the facts which the Court can consider in deciding a motion to dismiss demonstrate that plaintiffs had sufficient knowledge of the facts on which their eventual claims against defendants are based to put them on inquiry notice more than three years before filing suit. *Miller*, 224 F.Supp.2d at 985. *See, also, Doe v. Archdiocese of Washington*, 114 Md.App. 169, 174-75, 689 A.2d 634 (1997); *Moreland v. Aetna U.S. Healthcare, Inc.*, 152 Md.App. 288, 295-299, 831 A.2d 1091 (2003). If matters beyond the scope of Fed.R.Civ.P. 12(b)(6) are considered pursuant to Fed.R.Civ.P. 12(c) and the motion is treated as one for summary judgment and disposed of as provided in Fed.R.Civ.P. 56, "ordinary principals governing summary judgment . . . continue to apply when the issue on summary judgment is limitations." *Bennett v. Baskin & Sears*, 77 Md.App. 56, 68, 599 A.2d 393 (1988); *Murphy v. Merzbacher*, 346 Md. 525, 531, 697 A.2d 861 (1997); *Edwards v. Demedis*, 118 Md.App. 541, 553, 703 A.2d 240 (1997), *cert. den.*, 349 Md. 234, 707 A.2d 1328 (1998); *Lumsden v. Design Tech Builders, Inc.*, 358 Md. 435, 436-53, 749 A.2d 796 (2000). Where there is no dispute of fact material to limitations, and the moving party is entitled to judgment as a matter of law, a motion for summary judgment should be granted. *Bennett*, 77 Md.App. at 67-68; *Edwards*, 118 Md.App. at 553; *Lumsden*, 358 Md. at 436-53; and *Bank of New York v. Sheff*, 382 Md. 235, 854 A.2d 1269 (2004)(If there is no genuine dispute of fact

material to limitations, “and the question of whether the plaintiffs were on inquiry notice more than three years before their suit was filed can be determined as a matter of law, summary judgment on that issue is, indeed, appropriate.”)

Where a plaintiff has knowledge of the facts upon which his or her eventual claims are based more than three years before the operative pleading is filed against the defendant, the plaintiff’s claims are barred by limitations as a matter of law even if the plaintiff was not aware of his legal remedies against the defendant and did not have knowledge of his legal rights to bring the claims at that time. *Moreland*, 152 Md.App. at 297-98; *Lumsden*, 358 Md. at 447; *Doe*, 114 Md.App. at 183; and *Miller*, 224 F.Supp.2d at 986-87. Maryland does not use the “maturation of harm” rule to determine the accrual of a cause of action. *Doe*, 114 Md.App. at 174-75; *Edwards*, 118 Md.App. at 553. “The dispositive issue in determining when limitations begin to run is when the plaintiff was put on notice that he may have been injured.” *Fairfax Savings v. Weinberg & Green*, 112 Md.App. 587, 613, 685 A.2d 1189 (1996). A cause of action accrues when “some injury,” even “trivial injury,” occurs, *i.e.*, “when some evidence of legal harm has been shown,” and limitations is not tolled until all damages come into existence or become known. *Fairfax Savings*, 112 Md.App. at 613; *Doe*, 114 Md.App. at 177; *Edwards*, 118 Md.App. at 553.

Limitations begins to run “from the time that the claimant knows that a wrong, which has caused injury, exists”, and a claimant’s “investigation into the cause of damages [does] not delay the beginning of the running of the statute of limitations until” the “investigation is concluded”. *Lumsden*, 358 Md. at 440, 447, 449. “*The beginning of limitations is not postponed until the end of an additional period deemed reasonable for making the investigation.*” *Lumsden*, 358

Md. at 448, *quoting*, *Lutheran Hospital v. Levy*, 60 Md.App. 227, 238, 482 A.2d 23 (1984), *cert. den.*, 302 Md. 288 (1985). (Italics in original.) *See, also*, *Bennett*, 77 Md.App. at 67; *Lutheran Hospital*, 60 Md.App. at 237. (“The beginning of limitations is not postponed until the end of an additional period of time deemed necessary for making the investigation.”); and *Doe v. American National Red Cross*, 923 F.Supp. 753, 757 (D.Md. 1996) “Claimants gain knowledge sufficient to put them on inquiry notice generally when they know, or should know, that they have been injured by a wrong,” and “[f]rom that date forward, a claimant will be charged with knowledge of facts that would have been disclosed by a reasonably diligent investigation, regardless of whether the investigation has been conducted or was successful.” *Lumsden*, 358 Md. at 452. (Emphasis added.) *See, also*, *Sheff*, 382 Md. at 241; and, *Am. Nat. Red Cross*, 923 F.Supp. at 756-60. A plaintiff has “three years,” “beginning from the date that circumstances have put her” on notice of a potential claim, “within which to investigate further, obtain expert opinion, discuss settlement, and file suit.” *Lumsden*, 358 Md. at 445-46. The ““crucial date is the date the claimant is put on inquiry, not the date” on which a conclusion is reached after an investigation has been completed. *Russo v. Ascher*, 76 Md.App 465, 470, 545 A.2d 714 (1988), *quoting*, *Lutheran Hospital*, 60 Md.App. at 240. Furthermore, “[o]nce on notice of one cause of action, a potential plaintiff is charged with responsibility for investigating, within the limitations period, *all potential claims and all potential defendants* with regard to the injury.” *Lumsden*, 358 Md. at 447, *quoting*, *Doe*, 114 Md.App. at 188. (Emphasis in original.) *See, also*, *Am. Nat. Red Cross*, 923 F.Supp. at 760-61.

In *Lutheran Hospital*, for example, as in the instant case, the plaintiff began an investigation into the origin of the problems which ultimately gave rise to her lawsuit (in

Lutheran Hospital problems with the plaintiff's ankle) more than three years before the lawsuit was filed; and also as in the instant case this investigation included hiring counsel to make inquiries on her behalf. *Lutheran Hospital*, 60 Md.App. at 234. The plaintiff's attorney requested that Lutheran Hospital provide, *inter alia*, the plaintiff's x-ray films on May 2, 1975, and on June 11th he received the Lutheran Hospital medical records and x-ray reports, but not the x-ray films. *Id.* The material received was insufficient to indicate malpractice. *Id.* Lutheran Hospital finally produced the x-ray films on January 14, 1977, after which the plaintiff's then-treating physician reviewed the x-ray films and based on that review opined, on July 25, 1978, that malpractice had occurred. *Id.* The plaintiff filed a lawsuit against Lutheran Hospital approximately 1 year and 4 months after the x-ray films were produced, and less than a year after she obtained the opinion (based upon a review of the x-rays) that she may have a cause of action. *Id.* Her lawsuit, however, was barred as a matter of law by the statute of limitations because limitations had begun to run under the discovery rule more than three years before the lawsuit was filed and it was not tolled until the investigation had been concluded irrespective of the fact that the investigation had been unsuccessful until a date within three years of the date the lawsuit was filed. *Id.*

Bennett, supra, is also instructive. On September 15, 1981, the plaintiffs first articulated a suspicion that they might have been harmed by the other business entities into which the plaintiffs had entered into business transactions in which the defendant law firm had provided legal representation to one of the parties to the transactions. *Bennett*, 77 Md.App. at 58-59, 63-63. 75. Sometime in October 1981, the plaintiffs hired Hogan & Hartson to advise them with regard to claims against other business entities into which the plaintiffs had entered into business

transactions. *Bennett*, 77 Md.App. at 62-63. On October 29, 1981, Hogan & Hartson issued a preliminary report in which it reached no firm conclusions but suggested, *inter alia*, that the plaintiffs pursue various lines of investigation, including further investigation regarding the defendant law firm. *Id.* The plaintiffs' lawsuit in *Bennett* would have been timely filed, if "inquiry notice" began on the date the plaintiffs actually retained Hogan & Hartson, or on the date Hogan & Hartson issued its preliminary report, or thereafter. *Bennett*, 77 Md.App. at 58, 62-63. However, the trial court held as a matter of law, and the Court of Special Appeals affirmed, that limitations on the plaintiffs' claim against the law firm began to run, under the "discovery rule" on September 15, 1981. *Bennett*, 77 Md.App. at 58-59, 75.

As in *Sheff*, Plaintiffs in the instant case were "undisputably on inquiry notice" in 2005, when they engaged "counsel to investigate," and in the instant case also to pursue claims regarding the problems Plaintiffs' perceived with the UFOC. *Sheff*, 382 Md. at 241, 246. (Plaintiff was on inquiry notice as a matter of law, at the latest, when it involved its counsel in review of financial transactions which ultimately gave rise to legal malpractice claim, even though its counsel was not engaged to investigate the defendant attorney's conduct). As in *Sheff*, Plaintiffs "did initiate an inquiry," on their own and through the Consumer Protection Division of the State of Maryland as well as through their attorneys, and they "failed to follow up" by filing his lawsuit within three years of the date on which that inquiry was made. *Sheff*, 382 Md. at 246.⁴

⁴ Unlike the plaintiff in *Sheff*, moreover, Plaintiffs in the instant case got a "clear answer" from both of their attorneys by January 21, 2005, and November 2005, respectively, that they had suffered legally cognizable damages as a result of the alleged deficiencies in the UFOC. Indeed, Plaintiffs in the instant case got a "clear answer" from their two attorneys that they could and should file claims seeking damages arising from the alleged deficiencies in the UFOC prior

Am. Nat. Red Cross is also on point. The plaintiff had “strong suspicions that some wrong had occurred” when she was diagnosed as HIV positive after receiving blood transfusions at St. Agnes Hospital in 1985 and after undergoing operations at Johns Hopkins performed by the now deceased Dr. Rudolph Almaraz. *Am. Nat. Red Cross*, 923 F.Supp. at 754, 760. The plaintiff learned she was HIV positive after undergoing testing offered by Johns Hopkins following the “major media explosion” that occurred upon the public disclosure that Dr. Almaraz operated on patients while he was infected with AIDS. *Am. Nat. Red Cross*, 923 F.Supp. at 754. *See, also, Faya v. Almaraz*, 329 Md. 435, 440-41, 620 A.2d 327 (1993). The plaintiff learned of Dr. Almaraz’ death and its cause, took the testing offered by Johns Hopkins, and was diagnosed as HIV positive in December 1990. *Am. Nat. Red Cross*, 923 F.Supp. at 754-55. Shortly thereafter, in January 1991, the plaintiff retained an attorney to investigate her claims, and this attorney filed a lawsuit on her behalf against Johns Hopkins and the estate of Dr. Almaraz. *Am. Nat. Red Cross*, 923 F.Supp. at 755. In late December 1991, the plaintiff and her attorney learned that Dr. Almaraz was not the source of the plaintiff’s HIV infection. *Am. Nat. Red Cross*, 923 F.Supp. at 755. Within three years of that date, on November 1, 1994, the Plaintiff sued the American National Red Cross, alleging that she became infected with HIV through her blood transfusions at St. Agnes Hospital. *Id.*

This court rejected the plaintiff’s argument that the statute of limitations was tolled until December 1991, when the plaintiff and her attorney became aware that Dr. Almaraz was not the source of her HIV infection and that the probable source was her blood transfusions. *Am. Nat. Red Cross*, 923 F.Supp. at 756. Although the plaintiff and her attorney were “free to pursue

January 21, 2005, and November 2005, respectively.

claims against the earlier defendants,” they were “charged with the knowledge that the applicable statute of limitations would not be tolled while [the attorney] sought to resolve [the plaintiff’s] claims against those parties.” *Am. Nat. Red. Cross*, 923 F.Supp. at 760. As in this case, the plaintiff “hired an attorney and initiated litigation precisely because of her belief” that she had suffered a particular harm caused by someone’s “wrongdoing,” but then “took her time and failed to conduct a reasonably diligent investigation and to initiate a lawsuit [against all potential defendants] within three years of the time she was on inquiry.” *Am. Nat. Red Cross*, 923 F.Supp. at 760-61. As this Court also noted, “the issue here is not whether it was reasonable to delay an investigation of a second (or third or fourth) potential defendant while an investigation . . . goes forward as to the first potential defendant. Maryland law simply does not support such a “*seriatim*” application of the discovery rule where a potential plaintiff is on inquiry notice of her victimization.” *Am. Nat. Red Cross*, 923 F.Supp. at 761.

For the reasons stated above, Plaintiffs’ Complaint is clearly barred by the statute of limitations under Maryland law.

c. *Richard Welshans’ Claim Should Also be Dismissed Because He Lacks Standing to Sue and this Court Lacks Subject Matter Jurisdiction Over his Claim Because the Claim is Property of Richard Welshans’ Bankruptcy Estate*

“[S]tanding undergirds subject-matter jurisdiction . . .” *Miller v. Pacific Shore Funding*, 287 B.R. 47, 49 (D.Md. 2002), *aff’d*, *Miller v. Pac. Shore Funding*, 2004 U.S. App. LEXIS 1270 (4th Cir. 2004). Claims such as those asserted by Richard Welshans in the instant case constitute property of the Richard Welshans’ bankruptcy estate, as to which only the bankruptcy trustee has standing to sue. *Miller*, 287 B.R. at 50-51. *See, also*, *National American Ins. Co. v. Ruppert Landscaping Co., Inc.*, 187 F.3d 439, 441-42 (4th Cir. 1999). When a plaintiff lacks standing to

sue because the claim is the property of its bankruptcy estate, and only the trustee has standing to sue, “the Court must dismiss the Complaint for lack of subject matter jurisdiction.” *Miller*, 287 B.R. at 51-52.

d. *The Negligent Misrepresentation Claim Should Be Dismissed As Defendants Owed No Duty to Plaintiffs Arising from Defendants’ Provision of Legal Services to Coffee Beanery and Plaintiffs, as a Consequence, Lack Standing to Sue the Defendants for Negligent Misrepresentation Arising from Defendants’ Provision of Legal Services to Coffee Beanery*

As the Complaint alleges, Plaintiffs are not and never have been clients of the Defendants. (*See*, Exhibit 1, *passim*.) The Plaintiffs’ claims arise from the legal services provided by the Defendants “for the Coffee Beanery, Ltd.,” in connection with the preparation of the FOC. (*See*, Complaint at ¶¶4, 5, 9-11.) Count One of the Complaint purports to assert a claim for “negligent misrepresentation” against the Defendants, arising from the legal services provided by the Defendants to Coffee Beanery in connection with the preparation of the FOC. (*See*, Exhibit 1 at ¶¶17-21.) In support of the “negligent misrepresentation” claim, Plaintiffs offer the legal conclusion “Defendants’ failure to disclose material required information in the Maryland Franchise Offering circular was not in accordance with the standard of care required of attorneys preparing and registering Franchise Offering Circulars in the State of Maryland.” (*See*, Exhibit 1 at ¶21.)

Under Maryland law, negligent misrepresentation is a form of negligence. *See, e.g., Lopata v. Miller*, 122 Md.App. 76, 84, 712 A.2d 24 (1998). “[I]n order to state a cause of action for negligence . . . against an attorney, a plaintiff must allege three elements: (1) the attorney’s employment, (2) his neglect of a reasonable duty, and (3) that such negligence resulted in and was the proximate cause of harm.” *Ferguson v. Cramer*, 116 Md.App. 99, 104, 695 A.2d 603

(1997), *aff'd*, *Ferguson v. Cramer*, 339 Md. 760, 765-66, 709 A.2d 1279 (1998); *Noble v. Bruce*, 349 Md. 730, 739, 709 A.2d 1264 (1998). “Maryland as a general rule adheres to the strict privity rule in” negligence cases against attorneys. *Ferguson*, 349 Md. at 765; *Noble*, 349 Md. at 738. Thus, ordinarily, “[i]n order to state a cause of action for [negligence] against an attorney, the first element that a plaintiff must allege and prove is the existence of a duty between the plaintiff and the defendant; specifically, the plaintiff must allege and prove the attorney’s employment.” *Ferguson*, 349 Md. at 765-66.

The “sole exception in Maryland to the strict privity rule” is the “limited exception” known as the “third-party beneficiary exception,” which is “narrow in scope.” *Ferguson*, 116 Md.App. at 105; *Ferguson*, 349 Md. at 766; *Noble*, 349 Md. at 746-47. Maryland courts determine “as a matter of law” whether defendant attorneys owe a duty to plaintiffs within the narrowly circumscribed parameters of Maryland’s “third-party beneficiary” exception to the “strict privity rule.” *Ferguson*, 116 Md.App. at 108-112; *Ferguson*, 349 Md. at 765-75; *Noble*, 349 Md. at 735-59.⁵ Dismissal is appropriate when the “third-party beneficiary” exception to the “strict privity rule” is inapplicable. *Noble*, 349 Md. at 735, 759; *Ferguson*, 116 Md.App. at 112-13; *Ferguson*, 349 Md. at 765, 774-76. *See, also*, *Layman v. Layman*, 84 Md.App. 183, 578 A.2d 314 (1990); *Goerlich v. Courtney Industries, Inc.*, 84 Md.App. 660, 581 A.2d 825 (1990); and *Clagett v. Dacy*, 47 Md.App. 23, 420 A.2d 1285 (1980).

⁵ The appellate cases dealing with this issue, within the context of purported “third-party beneficiary” lawsuits against attorneys, are consistent with “negligence” cases in general, as “[t]he existence of all the elements including a legally recognized duty owed by this defendant to this plaintiff or to a class of persons of which this plaintiff is a member is vital to sustaining a cause of action in negligence.” *Valentine v. On Target*, 353 Md. 544, 549, 727 A.2d 947. “[T]he existence of a legal duty is a question of law to be decided by the court.” *Valentine*, 353 Md. at 549.

Maryland's appellate courts have uniformly held that the "third-party beneficiary" exception to the "strict privity rule" is inapplicable when the attorney provides representation to the client in the context of either "adversarial proceedings" or "transactions" in which a "potential conflict of interest . . . may arise" between the client and the purported "third-party beneficiary." *Ferguson*, 116 Md.App. at 109-112; *Ferguson*, 349 Md. at 769-74; *Noble*, 349 Md. at t 756; *Goerlich*, 84 Md.App. at 664-65; *Clagett*, 47 Md.App. at 29-30. Allegations in a complaint that the plaintiffs were the "intended beneficiaries of the contract" between the attorney and the client, or were "specifically intended to be the beneficiaries" of the legal services provided by the attorney are insufficient to establish standing to sue under the "third-party beneficiary" exception to the "strict privity rule". *Noble*, 349 Md. at 748-49; *Ferguson*, 349 Md. at 770. Likewise, allegations in a complaint that the plaintiffs were the intended beneficiaries of documents that the attorneys drafted or administered in connection with providing legal services to the plaintiffs' parents are insufficient as a matter of law to confer standing under the "third-party beneficiary" exception to the "strict privity" rule. *Ferguson*, 349 Md. at 770; *Noble*, 349 Md. at 754. *See, also, Goerlich*, 84 Md.App. at 664-65. (A non-client could not rely on status as corporate shareholder, director and employee who received a benefit as a result of a Shareholder Agreement drafted by the corporation's attorney to establish "third party beneficiary" status necessary for negligent misrepresentation claim against the corporation's attorney.) Instead, Maryland courts review the context or "circumstances" under which the attorney represents the client and determine, as a matter of law, whether the "third-party beneficiary" exception to the "strict privity" rule is applicable. *Ferguson*, 349 Md. at 770. As held in *Ferguson* and *Noble*, the "third-party beneficiary" exception to the "strict privity" rule is

inapplicable as a matter of law where there is a “potential for conflict” between the attorney’s client and individuals in the position of the purported “third-party beneficiary” plaintiff.

Ferguson, 116 Md.App. at 109-111; *Ferguson*, 349 Md. at 773-74; *Noble*, 349 Md. at 756.

“[T]he fact that the interests of the [client] and the [plaintiff] may be aligned in a particular case does not render the suit acceptable.” *Ferguson*, 116 Md.App. at 111; *Ferguson*, 349 Md. at 773-74. Certainly when, as in the instant case, the interests of the non-client and the client are not identical, the “third-party beneficiary” exception to the strict privity rule, as a matter of law, is inapplicable. *See, e.g., Goerlich*, 84 Md.App. at 664-665; *Layman*, 84 Md.App. at 189; and *Claggett*, 47 Md.App. at 29-30.

This is a scenario in which Maryland’s appellate Courts have repeatedly held that “there are compelling policy reasons for the application of the strict privity rule,” and, thus, for holding that the “third-party beneficiary” exception to the “strict privity” rule is inapplicable as a matter of law. *Ferguson*, 349 Md. at 772-74; *Ferguson*, 116 Md.App. at 108-12; *Noble*, 349 Md. at 753-58. The “strict privity rule” “protects the attorney-client relationship” by prohibiting causes of action by purported “third-party beneficiaries” when, to allow such a cause of action, “could interfere with the attorney’s ability to fulfill his or her duty of loyalty to the client and compromise the attorney’s ability to represent the client zealously.” *Ferguson*, 349 Md. at 773-74. Allowing a “third-party beneficiary” lawsuit under circumstances where there is a “potential for conflict,” subjects the attorney “to an impermissible conflict of interest.” *Ferguson*, 116 Md.App. at 111; *Ferguson*, 349 Md. at 773-74. This “would place an undue burden on [the] attorney-client relationship and possibly the legal profession as a whole.” *Ferguson*, 349 Md. at 774. In such cases, “the attorney owes a duty solely to his or her client,” and “the third-party

beneficiary exception does not apply.” *Ferguson*, 349 Md. at 770, 774. *See, also, Noble*, 349 Md. at 741-42, 756-58. (The “strict privity” rule applies and the “third-party beneficiary” exception is inapplicable in situations where “there exists the danger of placing conflicting duties on an attorney,” because the rule “protects the attorney’s duty of loyalty to and effective advocacy for his or her client.” An attorney should not be subjected to potential negligence claims by third parties whose interests are not necessarily identical with the interests of the client, as allowing such claims might diminish the effectiveness of the attorney as an advocate for his client.)

In *Ferguson*, moreover, both Maryland’s appellate courts held that dismissal of claims by non-clients against attorneys under Maryland’s strict privity rule is particularly situations analogous to that in the instant case. *Ferguson*, 116 Md.App. at 110-11; *Ferguson*, 349 Md. at 772-73. In the instant case, as in *Ferguson*, Maryland’s General Assembly has enacted a statutory scheme whereby the legislature has determined that the attorney defendants’ clients are responsible for the conduct which gave rise to the non-clients’ claims against the attorneys. *Id.* In *Ferguson*, the statutes involved were those that allow beneficiaries under a will to sue personal representatives for damage or loss to the estate arising from personal representatives’ violation of their statutory duty. *Id.* In the instant case, the statutes involved are those that impose a duty on franchisors, but not upon attorneys and law firms retained by franchisors, with regard to the disclosure of information to potential franchisees. *See*, Maryland Code Annotated, Business Regulation Article, §§14-223, 14-227.⁶ As in *Ferguson*, non-client plaintiffs, such as Plaintiff in

⁶ The General Assembly of Maryland has also determined that “3 years after the grant of the franchise” is the appropriate period of limitations for actions arising from conduct under §14-227, *i.e.*, offering to sell or selling a franchise “by means of an untrue statement of a material fact

the instant case, are not deprived of a remedy by the dismissal of their claims against attorneys who did not represent them, because “[a]ny cause of action the [plaintiffs] may have had in the instant case should have been brought against [the attorney defendants’ client.]” *Ferguson*, 349 Md. at 772.⁷

For the reasons stated above, Plaintiffs lack standing under Maryland law to pursue their negligent misrepresentation claims, and those claims should be dismissed.

e. *Plaintiffs’ Fraudulent Inducement Claim Should be Dismissed Because Defendants Owed Plaintiffs No Duty Upon Which to Base a Fraud Claim and Because Plaintiffs’ Complaint Fails to Satisfy Fed.R.Civ.P. 9(b)’s Pleading Standard with Regard to a Fraudulent Inducement Claim*

The only alleged “facts” offered in support of the Plaintiffs’ “fraudulent inducement” claim are that the Defendants, when providing legal representation to Coffee Beanery in connection with the preparation of the FOC, “failed to disclose” information which should have been included in the FOC. (*See*, Complaint at ¶¶5, 8-9.) The Complaint alleges no direct communications between the Defendants and the Plaintiffs when the Plaintiffs were reviewing the FOC and deciding whether they would purchase a Coffee Beanery franchise, much less any communications between the Defendants and the Plaintiffs during which the Defendants made any affirmative misrepresentations of material fact to the Plaintiffs. (*See*, Complaint, *passim*.)

or any omission to state a material fact necessary in order to make the statements made, in light of the circumstances under which they are made, not misleading, if the person who buys or is granted a franchise does not know of the untruth or omission.” *See*, Maryland Code Annotated, Business Regulation Article, §§14-227(a)(1)(ii) and 14-227(e).

⁷ In the instant case, *supra*, unlike *Ferguson*, Plaintiffs have filed and pursued claims against Coffee Beanery and its officers arising from the alleged deficiencies in the FOC. At this time, those claims remain subject to further proceedings in the U.S. Supreme Court and in this Court, respectively.

Plaintiffs' fraudulent inducement claim should be dismissed because the Defendants owed the Plaintiffs no duty to disclose upon which Plaintiffs' claim can be based. First, even if the Defendants and Plaintiffs had been parties to the same business or contractual transactions, which they were not,⁸ "Maryland recognizes no general duty upon a party to a transaction to disclose facts to the other party." *Maryland Environmental Trust v. Gaynor*, 370 Md. 89, 97, 803 A.2d 512 (2002). "There was no fiduciary or confidential relationship between [Defendants and Plaintiffs] that would have required such a disclosure in order to avoid any breach of trust." *Md. Environmental Trust*, 370 Md. at 99.

It is also well settled under Maryland law that non-clients, such as Plaintiffs in the instant case, cannot predicate a fraud claim against attorneys for "failure to disclose" under a "concealment" theory, as attorneys owe no duty of disclosure to non-clients. *Maryland National Bank v. Resolution Trust Corp.*, 895 F.Supp. 762, 770-771 (D.Md. 1995). (Under Maryland law, non-clients could not proceed under a fraud theory on the basis that the attorney failed to disclose certain facts, either to the court or to the non-clients.); *Shatz v. Rosenberg*, 943 F.2d 485, 493 (4th Cir. 1991). (Maryland law does not impose a duty of disclosure to non-clients on attorneys, even when the attorneys knowingly fail to disclose that their clients are acting fraudulently and are aware that the non-clients might be affected by the clients' fraudulent behavior.); *Deckelbaum v. Cooter, Mangold, Tompert & Chapman, PLLC*, 292 B.R. 536, 540 (D.Md. 2003). (Non-client plaintiff's fraudulent concealment claim failed as a matter of law, because, *inter alia*, the attorney defendants did not owe a duty of disclosure to the plaintiff.)

⁸ The Defendants' client, Coffee Beanery, and Plaintiffs were parties to contractual agreements within the context of a business transaction, but an attorney's representation of a client does make the attorney a party to the client's contracts.

Plaintiff's fraudulent inducement claim also fails to meet the demanding pleading requirements of Fed.R.Civ.P. 9(b). In *Adams, supra*, for example, "[a]ccording to the Amended Complaint, fraudulent acts, omissions, concealment and misrepresentations were made to the plaintiffs," which plaintiffs alleged induced them to enter into real estate transactions to their detriment. *Adams*, 193 F.R.D. at 248. The plaintiffs alleged that the defendants acted "fraudulently" and "engaged in deception, fraud, false pretense, false premise, misrepresentation, or knowing concealment, suppression, or omission of material facts with the intent that [plaintiffs] rely on the same in connection with the promotion and sale" of certain properties. *Adams*, 193 F.R.D. at 251-52. As in the instant case, another count of the complaint further alleged that the same acts constituted "negligent misrepresentation." *Adams*, 193 F.R.D. at 248, 252.

As noted in *Adams*, "Rule 9(b) provides in pertinent part that: 'in all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity.'" *Adams*, 193 F.R.D. at 249. "In interpreting this Rule, this Court and other courts have held that a plaintiff alleging fraud must make particular allegations of the time, place, speaker, and contents of the allegedly false acts or statements." *Adams*, 193 F.R.D. at 249-50, quoting, *Windsor Assocs., Inc. v. Greenfield*, 564 F.Supp. 273, 280 (D.Md. 1983). "The requirements of Rule 9(b) apply to all cases where the gravamen of the claim is fraud, even though the theory supporting the claim is not technically termed fraud. (Internal citation omitted.)⁹ The requirements of the Rule also apply to the manner in which the statements are false and the specific facts raising an inference of fraud." (Internal citation omitted.) *Adams*, 193 F.R.D. at 250. "A complaint fails to

⁹ Thus, the "negligent misrepresentation" claim was dismissed along with the "fraud", "concealment", "conspiracy", and "aiding and abetting" claims in *Adams*, 193 F.R.D. at 252.

meet the particularity requirements of Rule 9(b) when a plaintiff asserts merely conclusory allegations of fraud,” and a complaint which fails to meet the particularity requirements of Rule 9(b) is subject to dismissal under Rule 12(b)(6). *Adams*, 193 F.R.D. at 250.

As in *Adams*, the conclusory allegations of the Complaint in the instant case fail to allege sufficient facts with particularity to support a fraud claim against the Defendants. Count Two of the Complaint, at a minimum, should be dismissed on this ground. Since the gravamen of Count One is based upon the same conduct which is alleged in support of Count Two, Count One should also be dismissed.

CONCLUSION

For the reasons set forth above, the Defendants respectfully request that this Court dismiss the Plaintiffs’ Complaint against Pear, Sperling, Eggan & Daniels and Paul R. Fransway, with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of May, 2009, copies of the foregoing Memorandum in Support of Motion to Dismiss were electronically filed and the following person was served by electronic means through the Court's electronic notice and distribution system pursuant to Fed.R.Civ.P. 5(b)(2)(D) and Local Rule 102(1(c):

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