UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In Re:

Chapter 11
No.: 09-24277 (RDD)

AARON and KARIN TZAMAROT,

Debtors.

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AARON TZAMAROT,
KARIN TZAMAROT,
IT'S A MISHMASH-CREAMERY, INC. and
SIMPLY MOVING SYSTEMS, INC.,

Adv.Pro.No.: 11-08362

Plaintiffs,

v.

COLD STONE CREAMERY, INC.,
COLD STONE CREAMERY LEASING COMPANY, INC.,
KAHALA CORP.,
AXIS CAPITAL FUNDING, INC.,
CRAIG GRUBER,
SALAMON, GRUBER, NEWMAN & BLAYMORE, P.C.,

Defendants.

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS MOTION TO DISMISS THE COMPLAINT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

INTRODUCTION

This Memorandum of Law is submitted in support of the motion by Defendants, Craig Gruber ("Attorney Gruber") and Salamon, Gruber, Blaymore & Strenger, P.C. s/h/a Salamon, Gruber, Newman & Blaymore, P.C. ("SGNB"), pursuant to Fed. R. Civ. P. 12(b)(6), seeking an Order of dismissal of the Complaint of Plaintiffs, Aaron and Karin Tzamarot (hereinafter the "Tzamarot Plaintiffs"), It's a Mishmash-Creamery, Inc. (hereinafter "Mishmash") and Simply Moving Systems, Inc. (hereinafter "Simply Moving") (collectively "Plaintiffs"), with prejudice and as a matter of law.

The instant action is a misguided effort by the Plaintiffs to blame Defendants, including Attorney Gruber and SGNB, for their own poor business decision and failed venture. Rather than simply concede that their own failure to conduct necessary due diligence to justify their independent business decisions, they seek to lay blame on the Defendants, including Attorney Gruber and SGNB. However, for the reasons more fully enumerated herein, the instant action must be dismissed with prejudice and as a matter of law.

PRELIMINARY STATEMENT

In the instant action, Plaintiffs allege that they were victims of a scheme by the Defendants to induce them into entering a franchise agreement with Defendant Cold Stone Creamery, Inc. (hereinafter "Cold Stone") and ultimately to enter a lease and sublease for commercial property located at 1481 Weaver Street, Scarsdale, New York ("Weaver Street property" or "Weaver Street premises"), despite Defendants' alleged collective awareness of the "high failure rates of Cold Stone franchises," that the franchise was "highly unlikely to generate sufficient revenues and/or profits to support the lease payments," and that "Cold Stone and its affiliates had been alleged to have paid kickbacks..." See Complaint, pp. 6-10. Plaintiffs set

forth purported causes of action for fraud, fraudulent misrepresentation, negligent misrepresentation, breach of contract, breach of implied covenant of good faith and fair dealing, and tortuous interference with prospective economic advantage against the various Defendants. Id., ¶ 1.

Specifically, as against Attorney Gruber and SGNB, Plaintiffs allege that Attorney Gruber and SGNB failed to properly advise Plaintiffs in connection with a sublease for the Weaver Street property. Plaintiffs further allege that Attorney Gruber and SGNB failed to inform Plaintiffs of a potential unspecified conflict of interest and that their misrepresentations somehow induced Plaintiffs to enter into the original lease for the Weaver Street premises. Id. The Complaint contains two purported claims against Attorney Gruber and SGNB for: (1) fraud and/or fraud in the inducement; and (2) breach of fiduciary duty (conflict of interest). Plaintiffs merely allege that they have been "damaged in an amount to be determined at trial," but do not set forth or detail specific pecuniary damages. See Complaint, ¶¶ 182, 197.

Preliminarily, Mishmash and Simply Moving are not proper Plaintiffs herein, as only the Tzamarot Plaintiffs are the named Debtors in the original bankruptcy proceeding. Additionally, Mishmash has previously filed for and has been discharged in a separate bankruptcy action.[1] Despite being the named debtor in that proceeding, Mishmash failed to list any pre-petition cause of action as against Attorney Gruber or SGNB on its schedule. Therefore, if Mishmash had sought to commence an action against Attorney Gruber or SGNB, any hypothetical lawsuit should have been brought as an adversary proceeding by the Trustee of its estate under its own Chapter 11 proceeding. Since any pre-petition possible cause of action not properly scheduled remains property of the bankrupt estate, Mishmash is judicially estopped from attempting to prosecute a claim now, following its emergence from bankruptcy.

[1] See Docket No. 09-24278 (RDD).

Moreover, the purported claims set forth by Mishmash and Simply Moving must fail because they are not in privity with Attorney Gruber or SGNB, as required to bring any action herein. New York law requires that a plaintiff plead facts demonstrating that an attorney-client relationship existed to assert both a breach of fiduciary duty and fraud claim. Neither Mishmash nor Simply Moving were parties to the underlying Weaver Street lease which was the sole subject of Attorney Gruber's and SGNB's representation of the Tzamarot Plaintiffs. Rather, these two named Plaintiffs were parties only to the sublease for the Weaver Street property for which Attorney Gruber and SGNB had absolutely no involvement. See Idahosa Aff., Exhibits "C" and "J." At no time did either Attorney Gruber or SGNB represent Mishmash's or Simply Moving's interests. See Affidavit of Craig Gruber, Esq. ("Gruber Aff."), dated January 26, 2012, annexed hereto. As there was no fiduciary relationship between the parties, and therefore no requisite duty owed by Attorney Gruber or SGNB, Mishmash and Simply Moving have no standing to assert any claim herein, and their Complaint as against Attorney Gruber and SGNB must be dismissed, as a matter of law and with prejudice as against Attorney Gruber and SGNB herein.

Furthermore, the Tzamarot Plaintiffs do not have standing to assert any claims, as they failed to list any pre-petition cause of action against Attorney Gruber or SGNB on their bankruptcy schedule upon their filing for bankruptcy protection on December 6, 2009. Accordingly, the Tzamarot Plaintiffs do not have the legal capacity to sue in this action. Further, they lack standing since claims may only be brought by a bankruptcy Trustee on behalf of the bankruptcy estate. By operation of the Bankruptcy Code, any causes of action belonging to the Tzamarot Plaintiffs became the property of the bankruptcy estate when they sought protection under the bankruptcy laws. Thus, only the bankruptcy Trustee has the power to bring a suit on

behalf of a Debtor. As the Tzamarot Plaintiffs commenced suit as against Attorney Gruber and SGNB through the actions of their private counsel – *and not through the Trustee* – the instant action is subject to dismissal.

In addition, none of the Plaintiffs herein have sufficiently pled (nor will they be able to prove) their purported causes of action for breach of fiduciary duty and fraud/fraudulent inducement. Moreover, Plaintiffs' breach of fiduciary duty claim is time-barred by the controlling statute of limitations period. The purported breach of fiduciary duty claim seeks purely pecuniary damages and is, thus, covered under the three (3) year statute of limitations for claims against a former attorney. Thus, that claim is time-barred by the statute of limitations and should be dismissed, since the Tzamarot Plaintiffs filed for bankruptcy protection on December 6, 2009, more than three (3) years after Attorney Gruber's and SGNB's alleged malpractice occurred on or about June 6, 2006.

Additionally, even assuming *arguendo* that Plaintiffs' breach of fiduciary duty claim was not time-barred (which it is), the claim remains subject to dismissal, as Plaintiffs have failed to plead the necessary elements state a valid cause of action. While Plaintiffs assert that their purported claim is based upon Attorney Gruber's and/or SGNB's alleged failure to disclose a potential "conflict of interest," nowhere in the Complaint is the alleged "conflict" identified or outlined as the sole "but for" proximate cause of Plaintiffs' alleged damages. Further, the dual representation of Cold Stone, Cold Stone Creamery Leasing Inc. (hereinafter "CS Leasing")[2] and Plaintiffs by Attorney Gruber and SGNB, as alleged by Plaintiffs, did not and cannot constitute a "conflict of interest," as Plaintiffs' and Cold Stone's/CS Leasing's interests were aligned. Clearly it cannot be disputed that those parties' interests were united in their efforts to

[2] Upon information and belief, Cold Stone is the successor-in-interest to CS Leasing, which was dissolved on October 27, 2010. See Complaint, ¶¶ 21-35.

obtain the most beneficial lease possible for the Weaver Street property. Accordingly, there was no conflict of interest in the joint representation. As Plaintiffs have wholly failed to state a cognizable cause of action for breach of fiduciary duty premised upon any alleged "conflict of interest," their claim against Attorney Gruber and SGNB must be dismissed, with prejudice and as a matter of law.

Lastly, Plaintiffs have wholly failed to plead a cognizable cause of action for fraud and/or fraudulent inducement/misrepresentation. Plaintiffs have wholly failed to set forth any detailed allegations supporting a claim against Attorney Gruber or SGNB and have failed to plead any claim with the requisite particularity and specificity. Plaintiffs allege, in the most vague and conclusory manner, that Attorney Gruber and SGNB somehow "induced" Plaintiffs into entering the lease for the Weaver Street premises through unspecified "misrepresentations." To the extent that this Court may construe such vague assertions as a claim for fraud, any such claim is deficiently pled and subject to dismissal pursuant to Fed. R. Civ. P. 9(b). The Complaint does not allege, nor is there any evidence to establish, that Attorney Gruber or SGNB made any fraudulent misrepresentations to Plaintiffs, which were justifiably relied upon to their detriment. Accordingly, Plaintiffs' purported cause of action for fraud/fraud in the inducement must be dismissed, with prejudice and as a matter of law.

For the reasons more fully set forth below, it is respectfully requested that this Court grant the instant motion to dismiss and issue an Order dismissing the Complaint in its entirety, with prejudice and as a matter of law, as against Attorney Gruber and SGNB.[3]

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[3] In assessing the legal sufficiency of a complaint, the Court is ordinarily limited to the facts alleged in the complaint and any document attached as an exhibit. See Chambers v. Time Warner, Inc., 282 F.3d 147, 152-53 (2d Cir. 2002). However, the Court may also rely on documents which the plaintiff had notice and which were integral to their claim even though those documents were not incorporated into the complaint by reference. See Pani, M.D. v. Empire Blue Cross Blue Shield, 152 F.3d 67, 75 (2d Cir. 1998) *citing* Marshall County Health Care Auth. v. Shalala, 988 F.2d 1221 (D.C. Cir. 1993); see also Bender v. Astrue, Slip Copy, 2010 WL

FACTUAL BACKGROUND

The Tzamarot Plaintiffs allege that in or about April 2004, they contacted Cold Stone and CS Leasing regarding the possibility of opening a franchise store with Cold Stone, the self-acclaimed "fastest-growing super-premium ice cream concept in the country."[4] See Complaint ¶¶ 76-79. On or about November 5, 2004, the Tzamarot Plaintiffs executed a "Franchise Agreement" with Cold Stone, and also entered into an agreement with co-Defendant, Axis Capital NY, LLC (hereinafter "Axis"), for the leasing of certain equipment for future use in the franchise. Id., ¶¶ 79-80.

Attorney Gruber and SGNB were orally retained by the Tzamarot Plaintiffs sometime in or about November/December 2005 solely in connection with securing a lease at a location chosen by the Tzamarot Plaintiffs to open their Cold Stone franchise. See Gruber Aff., ¶ 3. The Tzamarot Plaintiffs independently chose Attorney Gruber and SGNB as their counsel for the negotiations and finalization of the lease for the location for their franchise, after being able to choose between a number of potential counsel listed on what Plaintiffs incorrectly claim was a "preferred list." Id., ¶ 4; see also Copies of Various Emails Regarding 245 Park Ave. Property are collectively annexed hereto as Exhibit "E."[5] Cold Stone allegedly provided franchisees with a "preferred list" of attorneys because the attorneys listed had prior experience and familiarity

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3394264 (E.D.N.Y. 2010). The Court may also rely on public records including documents filed before other courts in deciding a motion to dismiss. See Blue Tree Hotels Investment, Ltd. v. Starwood Hotels & Resorts Worldwide, Inc., 369 F.3d 212 (2d Cir. 2004); see also, Taylor v. Vt. Dep't of Educ., 313 F.3d 768 (2d Cir. 2002). Further, even if not attached or incorporated by reference, a document upon which the complaint solely relies and which is integral to the complaint may be considered by the court in ruling on a motion to dismiss for failure to state a claim on which relief can be granted. See Roth v. Jennings, 489 F.3d 499 (2d Cir. 2007).

[4] As indicated on Cold Stone's website detailing franchise information located at: http://www.coldstonecreamery.com/franchises/become_a_franchisee.html.

[5] Documents which the Tzamarot Plaintiffs had notice, as they were either the authors or recipients of emails attached. Please specifically refer to the November 30, 2005 email correspondence from the Tzamarot Plaintiffs.

with the ins-and-outs for negotiating the terms to be included in leases entered into by hundreds, if not thousands, of Cold Stone franchises located across the country. Id. Upon information and belief, the Tzamarot Plaintiffs were not required to use an attorney from the "preferred list" provided by Cold Stone. Id.

Initially, nearly a year following their execution of their franchise agreement with Cold Stone, the Tzamarot Plaintiffs sought to secure a lease for commercial property located at 245 Park Avenue, New York, New York ("Park Ave. property"). Upon information and belief, the Park Ave. property was located and introduced to the Tzamarot Plaintiffs by their brokers, Schuckman Realty, Inc. and Goldschmidt & Associates. See Copy of Proposed Lease for 245 Park Ave. Property is annexed hereto as Exhibit "D."[6] Attorney Gruber's limited role at this time was to attempt to negotiate a lease on behalf of Cold Stone/CS Leasing and the Tzamarot Plaintiffs for the Park Ave. property. See Exhibit "E." However, upon information and belief, lease negotiations for the Park Ave. property stalled when considerable difficulties surrounding the construction of the store were discovered by Cold Stone's construction department.[7] Id. The Tzamarot Plaintiffs then sought to terminate all negotiations surrounding the Park Ave. property and later opted instead to pursue securing a lease at the Weaver Street premises in Scarsdale, New York. This decision was expressly stated in a February 12, 2006 email from the Tzamarot Plaintiffs to the Franchise Development Manager at Cold Stone, Jay Goldstein. Attorney Gruber was carbon copied on the correspondence. Id.

Following the failed negotiations to secure the Park Ave. property for the Tzamarot Plaintiffs' Cold Stone franchise store, the Tzamarot Plaintiffs focused their attention on the

[6] Document is incorporated by reference. See Complaint.

[7] It is important to note that the Tzamarot Plaintiffs were integrally involved in all communications and negotiations concerning the lease of the Park Ave. property and were in frequent communications with Cold Stone representatives as to the same. Id.; see also Gruber Aff., ¶ 7.

Weaver Street premises in Scarsdale, New York. Upon information and belief, Schuckman Realty, Inc. and Goldschmidt & Associates also introduced the Tzamarot Plaintiffs to the Weaver Street property. See Copy of Lease for Weaver Street Property is annexed hereto as Exhibit "B."[8] Neither Attorney Gruber nor SGNB played any part in introducing the Tzamarot Plaintiffs to potential locations to secure a lease for their Cold Stone franchise. See Gruber Aff., ¶¶ 5, 8.

Although Cold Stone was the party to be listed as tenant/lease on the lease (pursuant to the terms of the Tzamarot Plaintiffs' franchise agreement), the terms of the lease were negotiated by the Tzamarot Plaintiffs since their franchise store was to operate from the locations. Id., ¶ 9. As such, Attorney Gruber and SGNB acted on the Tzamarot Plaintiffs' behalf – as the franchisee of Cold Stone – in their efforts to negotiate and to secure the most advantageous lease terms for the Weaver Street premises. After a number of drafts, communications with the Tzamarot Plaintiffs discussing the terms therein and their proposed edits, Attorney Gruber and SGNB were able to finalize negotiations for a lease at the Weaver Street premises. Id.; see also Copies of Various Emails Regarding the Weaver Street Property are collectively annexed hereto as Exhibit "H."[9] On or about June 6, 2006, a ten (10) year lease was finalized between the landlord and Cold Stone. See Exhibit "B." On July 13, 2006, following the execution of the lease, Attorney Gruber performed the ministerial act of circulated the same to all parties.

Thereafter, on June 27, 2006, in accordance with the express terms of the lease and franchise agreement entered into with the Tzamarot Plaintiffs, Cold Stone executed a sublease of the Weaver Street premises with the Tzamarot Plaintiffs' company, and Plaintiff herein,

[8] Document is incorporated by reference. See Complaint.

[9] Documents which the Tzamarot Plaintiffs had notice, as they were either the authors or recipients of emails attached.

Mishmash. See Copy of Sublease for Weaver Street Property is annexed hereto as Exhibit "C."[10] Neither Attorney Gruber nor SGNB had any role, whatsoever, in negotiating or drafting the sublease executed between Cold Stone and the Tzamarot Plaintiffs on behalf of Mishmash. See Gruber Aff., ¶ 12; see also[11] Exhibit "H."

In light of the forgoing, it cannot be disputed that the attorney-client relationship between Attorney Gruber and SGNB and the Tzamarot Plaintiffs was limited to the negotiation of the Park Ave. property lease, and the negotiation and eventual execution of the lease for the Weaver Street premises. Id. Attorney Gruber and SGNB have not represented the Tzamarot Plaintiffs in any other capacity other than their involvement with the failed lease negotiations for the Park Ave. property (which is not the subject of the instant action), and the negotiations surrounding and execution of the lease for the Weaver Street premises. Id., ¶ 13. At no time has Attorney Gruber or SGNB represented Mishmash or Simply Moving in any capacity. Id., ¶ 14.

Based on the Complaint's allegations, it appears that in or about January 2007, the Weaver Street franchise store opened. Thereafter, on or about December 3-4 and 10, 2007, because of an alleged non-payment of rent, the Tzamarot Plaintiffs were sent a notice of default by the landlord (referred to as the "overlord" in the Complaint) and directed to vacate the Weaver Street premises. See Complaint, p. 10.

On December 6, 2009, nearly three and a half (3 ½) years following the end of the attorney-client relationship with Attorney Gruber and SGNB, the Tzamarot Plaintiffs filed for Chapter 13 bankruptcy in the United States Bankruptcy Court, Southern District of New York.

[10] Document is incorporated by reference. See Complaint.

[11] Please specifically refer to May 19, 2006 email correspondence from Jay Goldstein to the Tzamarot Plaintiffs and Attorney Gruber.

See Copy of the Tzamarot Plaintiffs' Bankruptcy Petition is annexed hereto as Exhibit "F."[12] The bankruptcy petition notes that the nature of the debts was "primarily consumer debts," as opposed to business debts. Id. The Tzamarot Plaintiffs filed their bankruptcy schedules on December 31, 2009. See Copy of the Tzamarot Plaintiffs' Bankruptcy Schedule is annexed hereto as Exhibit "G." The "Summary of Schedules" indicates that assets for real and personal property total "$758,000." Id. Neither "Schedule A – Real Property" nor "Schedule B – Personal Property" indicates any potential causes of action against Attorney Gruber or SGNB as a description of property. Id. The Tzamarot Plaintiffs' Chapter 13 filing was converted to a Chapter 11 bankruptcy proceeding on March 15, 2010. See Docket No. 09-24277 (RDD).

Mishmash also filed for bankruptcy in the Southern District of New York on or about December 9, 2009. See Docket No. 09-24278 (RDD). Absent from the filings, including its Schedules, was any listing of possible pre-petition causes of action against Attorney Gruber or SGNB. Mishmash was discharged on or about November 15, 2010, and the case was officially closed on November 23, 2010. Id.

STANDARD OF REVIEW

A motion under Rule 12(b)(6) seeks dismissal on the grounds that the complaint fails to state a claim upon which relief may be granted. Ordinarily, the complaint need simply "contain a short and plain statement of the claim showing that the pleader is entitled to relief." See Fed. R. Civ. P. 8(a)(2). However, conclusory statements and allegations are insufficient to meet this burden. See Ashcroft v. Iqbal, 129 S. Ct. 1937, 1954 (2009); *accord* Bell Atl. Corp. v. Twombly, 127 S. Ct. 1955, 1965 (2007). While Iqbal and Twombly have not ushered in a heightened pleading requirement, the grounds rules for adequate notice pleading under Rule 8 have indeed changed. A plaintiff must set out facts to show he or she is entitled to relief, which

[12] Document is incorporated by reference. See Complaint.

requires more than generic labels, broad conclusions, or formulaic recitations of the elements of a cause of action. See Ashcroft v. Iqbal, 129 S.Ct. at 1954 (finding that "the Federal Rules do not require courts to credit a complaint's conclusory statements without reference to its factual content."); *accord* Bell Atl. Corp. v. Twombly, 127 S. Ct. at 1965 (finding that generic labels and broad conclusions do not set forth facts showing entitlement to relief). Likewise, a legal conclusion couched as a factual allegation is not entitled to the assumption of truth. See Ashcroft v. Iqbal, 129 S. Ct. at 1950.

In order to "survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" Id. at 1949 *quoting* Bell Atl. Corp. v. Twombly, 127 S. Ct. at 1955. "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." Id. Determining whether a complaint states a plausible claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." Id. at 1950.

LEGAL ARGUMENT

POINT I

PLAINTIFFS DO NOT HAVE PROPER STANDING BEFORE THIS COURT

A. Plaintiffs Mishmash and Simply Moving Are Not in Privity, Nor Have a Fiduciary Relationship With Attorney Gruber or SGNB and, Therefore, Do Not Have Standing Before This Court

Plaintiffs Mishmash and Simply Moving have alleged causes of action as against Attorney Gruber and SGNB for breach of fiduciary duty and fraud. To succeed on a claim for breach of fiduciary duty in New York, a plaintiff must demonstrate the existence of a fiduciary duty between the parties and a breach of that duty by the defendant. See Page Mill Asset Mgmt.

v. Credit Suisse First Boston Corp., Not Reported in F.Supp.2d, 2000 WL 335557 (S.D.N.Y. 2000). Similarly, the existence of a legal duty arising out of a fiduciary or similar type relationship is required to state a claim for fraud. See TVT Records v. Island Def Jam Music Grp., 412 F.3d 82, 90–91 (2d Cir. 2005); see also Congress Financial Corp. v. John Morrell & Co., 790 F.Supp. 459 (S.D.N.Y. 1992). A fiduciary relationship may be found "when one [person] is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation." See Flickinger v. Harold C. Brown & Co., 947 F.2d 595, 599 (2d Cir. 1991).

Moreover, in order to maintain the fraud/fraud in the inducement claim against their alleged former attorneys, Mishmash and Simply Moving must sufficient allege that the attorneys were under a duty to them to disclose a material fact. Here, the relationship between Mishmash, Simply Moving and Attorney Gruber and SGNB was far too attenuated to give rise to a fiduciary or any other legal duty. Mishmash and Simply Moving incorrectly contend (contrary to documentary evidence) that Attorney Gruber and SGNB advised them in connection with the sublease to the Weaver Street property executed between Cold Stone and the Tzamarot Plaintiffs, on behalf of Mishmash. See Complaint. However, at no time did Attorney Gruber or SGNB advise any of the named Plaintiffs herein with regard to the sublease. Rather, their limited representation merely involved negotiating and advising the Tzamarot Plaintiffs regarding the Weaver Street lease entered by the landlord of the Weaver Street property and Cold Stone. See Exhibit "B;" see also Gruber Aff., ¶¶ 3, 13. It is indisputable that neither Mishmash nor Simply Moving were parties to the Weaver Street lease. As such, Attorney Gruber and SGNB did not owe any duty, whatsoever, to either Mishmash or Simply Moving.

Mishmash and Simply Moving have not sufficiently alleged nor established that they shared a direct business relationship, let alone a fiduciary relationship with Attorney Gruber or SGNB. In fact, they have failed to sufficiently allege that they maintain the requisite privity with Attorney Gruber and SGNB to afford them standing to assert a cause of action against them. Accordingly, this absence of privity proves fatal to any claim of fraud and/or fraudulent misrepresentation/inducement or breach of fiduciary duty, and requires a dismissal of Mishmash's and Simply Moving's action against Attorney Gruber and SGNB, as a matter of law and with prejudice.

B. The Tzamarot Plaintiffs, as Debtors in the Bankruptcy Proceeding, Failed to Properly Schedule This Purported Action

It is well-settled that the assets of a bankruptcy estate properly include any of a Debtor's causes of action. See Cusano v. Klein, 264 F.3d 936 (9th Cir. 2001) *citing* Sierra Switchboard Co. v. Westinghouse Elec. Corp., 789 F.2d 705 (9th Cir. 1986). Upon commencement of a bankruptcy action, "[t]he debtor shall-(1) file...a schedule of assets and liabilities...and a statement of the debtor's financial affairs." See 11 U.S.C. §521(2). Thus, the Bankruptcy Code places an affirmative duty on a Debtor to schedule any and all assets, including potential causes of action. Id.; see also In re Mohring, 142 B.R. 389 (Bankr.E.D.Cal. 1992).

Here, the Tzamarot Plaintiffs' purported causes of action as against Attorney Gruber and SGNB accrued on or about June 6, 2009 when the lease was finalized (and at the latest July 13, 2009 when the fully executed lease was circulated by Attorney Gruber), well prior to the Tzamarot Plaintiffs' filing for Chapter 13 (converted to Chapter 11 on March 15, 2010). They surely knew or should have known of the facts allegedly giving rise to the causes of action asserted herein against Attorney Gruber and SGNB at the time they filed their bankruptcy petition on December 6, 2009. See Dynamics Corp. of Am. v. Marine Midland Bank–New

York, 69 N.Y.2d 191, 513 N.Y.S.2d 91 (1987). However, despite their knowledge, the Tzamarot Plaintiffs inexcusably failed to schedule their potential causes of action in their bankruptcy filing. See Exhibit "G."

The Tzamarot Plaintiffs' failure to disclose the potential causes of action in their bankruptcy petition/schedule now deprives them of the legal capacity to sue in this action. See Whelan v. Longo, 7 N.Y.3d 821, 822 N.Y.S.2d 751 (2006); see also Voutsas v. Soper, 85 A.D.3d 421, 924 N.Y.S.2d 367 (1st Dept. 2011) (plaintiff's failure to disclose his present fraud claims as an asset in his prior 1999 bankruptcy proceeding deprived him of the legal capacity to bring claims in the related adversary proceeding). Thus, as the Tzamarot Plaintiffs failed to properly schedule the purported causes of action as against Attorney Gruber and SGNB in their bankruptcy petition, they do not have the requisite capacity to assert any cause of action herein. See Becker v. Verizon North, Inc., 2007 WL 1224039 (7th Cir. 2007) (affirming District Court's dismissal of plaintiff's action for lack of standing where the plaintiff failed to disclose a pending employment discrimination cause of action on her bankruptcy schedules); see also Whelan v. Longo, *supra* (plaintiff's failure to disclose cause of action for legal malpractice in her bankruptcy petition deprived her of the legal capacity to sue in the action against the defendant attorney); Voutsas v. Soper, *supra*.

C. The Tzamarot Plaintiffs Cannot Bring an Action on Behalf of the Bankruptcy Estate

Even assuming *arguendo* that the Tzamarot Plaintiffs had listed their potential claims against Attorney Gruber and SGNB as an asset in their bankruptcy proceeding (which they clearly did not), they nonetheless lack standing on all claims concerning their pre-petition assets. The assets scheduled under Section 521(1) of the Bankruptcy Code comprise a bankruptcy estate, and all of the debtor's nonexempt assets become assets of the estate. See 11 U.S.C.

§541(a). The bankruptcy estate encompasses "all legal or equitable interests of the debtor in property as of the commencement of the case, *including all pre-petition causes of action belonging to the debtor*." See Fedotov v. Peter T. Roach and Associates, P.C., 354 F.Supp.2d 471, 475 (S.D.N.Y. 2005) *quoting* Kunica v. St. Jean Financial, Inc., 233 B.R. 46, 52 (S.D.N.Y. 1999); see also Seward v. Devine, 888 F.2d 957, 963 (2d Cir. 1989). Hence, by operation of the Bankruptcy Code, any causes of action belonging to the Tzamarot Plaintiffs (as the Debtors), including the instant action, became property of the bankruptcy estate once they sought protection under the bankruptcy laws. Only a bankruptcy Trustee has the power to bring a suit on behalf of a Debtor. See 11 U.S.C. §323(a); see also Estate of Spirtos v. One San Bernardino County Superior Court, 443 F.3d 1172 (9th Cir. 2006) (Ninth Circuit Court held that creditor could not bring an action on behalf of the bankruptcy estate).

Since this action was improperly commenced by the Tzamarot Plaintiffs' counsel, *and not the bankruptcy Trustee* as required under the Bankruptcy Code, the Tzamarot Plaintiffs lack standing to prosecute this action, and same must be dismissed against Attorney Gruber and SGNB, as a matter of law and with prejudice. See Marshall v. Honeywell Technology Solutions, Inc., 675 F.Supp.2d 22 (D.D.C. 2009).

D. Plaintiff Mishmash is Judicially Estopped From Bringing the Instant Action

As previously mentioned, Section 521 of the Bankruptcy Code requires the debtor to file a schedule of assets and liabilities. See 11 U.S.C. §521(a)(1)(B)(ii). Because "[t]he basic principle of bankruptcy is to obtain a discharge from one's creditors in return for all of one's assets, except those exempt, as a result of which creditors release their own claims and the bankrupt can start fresh," the bankruptcy system cannot function fairly and effectively unless the debtor scrupulously complies with this requirement. See Payless Wholesale Distribs, Inc. v.

Alberto Culver (P.R.) Inc., 989 F.2d 570, 571 (1st Cir. 1993). Accordingly, a debtor cannot omit a cause of action from his schedule of assets, leaving his or her creditors in the dark as to a potential source of payment for their claims, then bring the cause of action on his or own once those claims have been compromised or released in the bankruptcy, keeping any recovery for himself or herself. Id. Once a bankruptcy case closes through administration of the estate, the debtor loses his rights in a cause of action he had at the time he sought bankruptcy protection but nevertheless failed to list on his schedule. See, Jeffrey v. Desmond, 70 F.3d 183, 186 (1st Cir. 1995). In other words, a debtor who fails to schedule a potential claim cannot prosecute the same claim after emerging from bankruptcy. See Vreugdenhill v. Navistar Intern. Transp. Corp., 950 F.2d 524 (8th Dept. 1991).

Here, as Mishmash could have, but failed to schedule a pre-petition potential claim against Attorney Gruber or SGNB prior to its discharge in bankruptcy, it is barred herein from bringing such claims at this time. See In re Costello, 255 B.R. 110, 113 (Bkrtcy. E.D.N.Y. 2000).

POINT II

PLAINTIFFS' PURPORTED CAUSE OF ACTION FOR FRAUD IS SUBJECT TO DISMISSAL

A. Plaintiffs' Claim for Fraud is Not Plead With Requisite Particularity or with the Requisite Elements Needed to State a Valid Claim

Plaintiffs assert a fraud (or fraud-based) claim against all named Defendants, including Attorney Gruber and SGNB. See Complaint, pp. 10-11, 16. Plaintiffs' purported claim as against Attorney Gruber and SGNB is deficiently pled and is otherwise implausible under Iqbal and Twombly cases, as cited above. See Standard of Review, *supra*.

Under New York law, a claim for fraud requires that a plaintiff plead that a defendant "knowingly and with intent to deceive, ma[d]e a false representation upon which [the] plaintiff reasonably relies to his [or her] detriment." See Jones-Soderman v. Mazawey, 2010 WL 54759 (S.D.N.Y. 2010) *citing* Chen v. United States, 854 F.2d 622, 627 (2d Cir. 1988); see also Carvel v. Ross, Slip Copy, 2011 WL 856283 (S.D.N.Y. 2011). With a claim for fraudulent inducement, a plaintiff is required to plead that a defendant "knowingly and recklessly misrepresented a material fact, intending to induce the plaintiff's reliance, and that the plaintiff relied on the misrepresentation and suffered damages as a result." See Merril Lynch & Co. v. Allegheny Energy, Inc., 500 F.3d 171, 181 (2d Cir. 2007).

Rule 9(b) of the Federal Rules of Procedure requires that in connection with allegations of fraud, "the circumstances constituting the fraud must be stated with particularity." See Fed. R. Civ. P. 9(b); see also Granite Partners, L.P. v. Bear, Stearns & Co., Inc., 58 F.Supp.2d 228, 236 (S.D.N.Y. 1999) *citing* Shields v. Citytrust Bancorp, Inc., 25 F.3d 1124, 1127 (2d Cir. 1994). Therefore, the actual fraudulent statements or conduct and the fraud alleged must be stated with particularity. See Chill v. General Electric Co., 101 F.3d 263, 266 (2d Cir. 1996). In order to satisfy Rule 9(b),

> [T]he 'complaint must (1) specify the statements that the plaintiff contends were fraudulent, (2) identify the speaker, (3) state where and when the statements were made, and (4) explain why the statements were fraudulent' -- or, in more simple terms, what, who, where, when, and why. The pleading requirements of Rule 9(b) do not dissipate simply because a party alleges fraud by omission or failure to disclose as opposed to express representation. In other words, a party alleging fraudulent omission must still, to the extent possible, specify what, who, where, when, and why.

See M&I Equip. Finance Co. v. Lewis County Dairy Corp., not reported in F.Supp.2d, 2007 WL 128879 (N.D.N.Y. 2007) *quoting* Mills v. Polar Molecular Corp., 12 F.3d 1170, 1175 (2d Cir. 1993) (internal citations omitted). "Sweeping references to the collective fraudulent actions of

multiple defendants will not satisfy the particularity requirements of Rule 9(b)." See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Young, not reported in F.Supp., 1994 WL 88129, at *7 (S.D.N.Y. 1994).

Additionally, a plaintiff has the burden of pleading circumstances that provide at least a minimal factual basis for the conclusory allegations of scienter. Accordingly, the Courts have held that a plaintiff must allege facts that give rise to a "*strong inference of fraudulent intent.*" See Cohen v. Koenig, 25 F.3d 1168, 1173 (2d Cir. 1994); see also Acito v. Imcera Group, Inc., 47 F.3d 47, 52 (2d Cir. 1995); Wexner v. First Manhattan Co., 902 F.2d 169, 172 (2d Cir. 1990). "An inference that the defendants knew their statements to be false cannot be based on allegations which are themselves speculative." Id. at 173. A plaintiff can establish a strong inference of fraudulent intent (or scienter) in two ways: "'either (a) by alleging facts to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness.[13]'" Id. *quoting* Shields v. Citytrust Bancorp, *Inc.*, 25 F.3d 1124, 1128 (2d Cir. 1994). In order to allege motive, a plaintiff must make some showing of "concrete benefits that could be realized by one or more of the false statements and wrongful nondisclosures alleged." Id. Likewise, a plaintiff can plead circumstantial evidence of reckless conduct by alleging "'conduct which is highly unreasonable and which represents an extreme departure from the standards of ordinary care . . . to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it.'" Id. *at* 268-69.

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[13] Conscious recklessness is a "state of mind approximating actual intent, and not merely a heightened form of negligence." See Saltz v. First Frontier, LP, 782 F.Supp.2d 61 (S.D.N.Y. 2010) *quoting* Novak v. Kasaks, 216 F.3d 300, 312 (2d Cir.2000). Recklessness is "at the least, ... an extreme departure from the standards of ordinary care ... to the extent that the danger was either known to the defendant or so obvious that the defendant must have been aware of it." Id. at 308.

Courts will routinely grant a motion to dismiss where a plaintiff, as in the instant matter, fails to adequately plead reasonable reliance and where a plaintiff failed to examine readily available information, relied on oral representations of information when it could easily have asked for additional information, or failed to properly investigate a transaction. See Glidepath Holding B.V. v. Spherion Corp., 590 F.Supp.2d 435 (S.D.N.Y. 2007); see also Universe Antiques, Inc. v. Vareika, --- F.Supp.2d ----, 2011 WL 5597430 (S.D.N.Y. 2011); Amusement Industry, Inc. v. Stern, 786 F.Supp.2d 758 (S.D.N.Y. 2011). "In assessing the reasonableness of plaintiff's alleged reliance, [the Court] consider[s] the entire context of the transaction, including factors such as its complexity and magnitude, the sophistication of the parties, and the content of any agreements between them." See Abu Dhabi Commercial Bank v. Morgan Stanley & Co. Inc., 651 F.Supp.2d 155 (S.D.N.Y. 2009) (internal quotation marks omitted). In other words, the inquiry is "fact-specific." Id.

In the present case, Plaintiffs have wholly failed to allege that Attorney Gruber or SGNB made any statement or representation of a known material fact upon which Plaintiffs justifiably relied to their detriment. Additionally, conveniently absent from the Complaint is any allegation as to what fraudulent statements were allegedly made to induce Plaintiffs to enter into the Weaver Street lease. In connection with this very important detail, namely what exactly was fraudulent about the unspecified statements allegedly made by Attorney Gruber and/or SGNB, Plaintiffs' own Complaint belies their claim of fraud. Moreover, there is no allegation that Attorney Gruber or SGNB were even aware of or concealed knowledge of any material fact, let alone Cold Stone store's failure rates, "kickbacks to franchisor-mandated vendors," or the cross revenue and profitability of a Cold Stone franchise. See Complaint.

Further, the Complaint is devoid of any allegations regarding a duty that Attorney Gruber or SGNB had to Plaintiffs to provide the aforementioned information, or to provide any information regarding the general financial viability of the lease for the Weaver Street premises. Id. Under New York law, a duty to disclose material facts arises: (1) where there is a fiduciary relationship between the parties, or (2) where one party possesses superior knowledge, not readily available to the other, and knows that the other party is acting on the basis of mistaken knowledge. See Congress Financial Corp. v. John Morrell & Co., 790 F.Supp. at 472 *citing* Aaron Ferer & Sons, 731 F.2d 112 at 123 (2d Cir. 1982).

Plaintiffs cannot assert such allegations, since Attorney Gruber and SGNB were merely retained to handle the negotiations and preparation of the lease of the Weaver Street property on behalf of the Tzamarot Plaintiffs (as franchisee) and Cold Stone (as franchisor). In light of Attorney Gruber's and SGNB's limited representation, there is absolutely no reason to believe that they would be privy to information involving Cold Stone financials. See Complaint. In fact, Attorney Gruber or SGNB were never privy to such information. See Gruber Aff., ¶ 15.

The Complaint glaringly offers insufficient details to satisfy Fed.R.Civ.P. 9(b). It does not specify the "time, place, speaker, and content of the alleged misrepresentations." See American Tissue, Inc. v. Donaldson, Lufkin & Jenrette Securities Corp., 351 F.Supp.2d 79 (S.D.N.Y. 2004). Plaintiffs' claim further fails under New York law, as they have not sufficiently pled that the alleged fraud related to any material term of the lease or that they suffered any damages as a result of Attorney Gruber's or SGNB's alleged conduct. For this and the other reasons enumerated herein, Plaintiffs' second cause of action for fraud must be dismissed with prejudice, and as a matter of law.

POINT III

PLAINTIFFS' PURPORTED CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY IS SUBJECT TO A DISMISSAL

A. Plaintiffs' Cause of Action for Breach of Fiduciary Duty is Time-Barred

In New York, a three (3) year statute of limitations applies to actions seeking money damages for breach of fiduciary duty. See Bouley v. Bouley, 19 A.D.3d 1049, 797 N.Y.S.2d 221, 223 (4th Dept. 2005) (where only money damages are sought, the three-year period set forth in CPLR §214 applies to a breach of fiduciary duty claim); see also Kaufman v. Cohen, 307 A.D.2d 113, 118, 760 N.Y.S.2d 157 (1st Dept. 2003) (the court held that the breach of fiduciary duty claims were barred by the three-year statute of limitations for injury to property in CPLR 214 §(4)); Ciccone v. Hersh, 530 F.Supp.2d 574 (S.D.N.Y. 2008), *affirmed* 320 Fed.Appx. 48, 2009 WL 928088 (under New York law, where plaintiff alleging breach of fiduciary duty seeks only money damages, courts have viewed such actions as alleging injury to property, to which three year statute of limitations applies).

Accordingly, Plaintiffs' purported claim against Attorney Gruber and SGNB is time-barred since Plaintiffs failed to commence the instant action within three (3) years of the accrual of their breach of fiduciary duty claim. See CPLR §214. A claim for breach of fiduciary duty accrues, and the statute begins to run, upon the date of the alleged breach. See Bastys v. Rothschild, not reported in F.Supp.2d, 2000 WL 1810107 at *34 (S.D.N.Y. 2000) (with respect to accrual of a breach of fiduciary duty claim in New York, the statute of limitation begins to run upon the breach, and not when the plaintiff discovers the breach). As a matter of law, claims that are made outside the limitations period provided by the CPLR are subject to dismissal on the pleadings. When an alleged breach is related to a transactional occurrence (i.e., lease, contract, etc.), a cause of action will accrue at the time the underlying transaction took place – upon its

drafting and execution. See Offshore Express v. Milbank, Tweed, Hadley & McCloy, LLP, 291 Fed.Appx. 358, 2008 WL 3992323 (2d Cir. 2008) see also Scantek Medical, Inc. v. Sabella, 583 F.Supp.2d 477 (S.D.N.Y. 2008).

Here, Plaintiffs' cause of action for breach of fiduciary duty is premised upon Attorney Gruber's and SGNB's representation of Plaintiffs in connection with a lease at the subject Weaver Street premises, a transactional occurrence. See Complaint, ¶¶ 108-113. Plaintiffs incorrectly allege that Attorney Gruber and SGNB represented Plaintiffs with regard to the sublease of the premises. At no time did Attorney Gruber and/or SGNB negotiate, prepare or represent Plaintiffs in connection with the sublease. See Gruber Aff., ¶¶ 12-13. Their representation was limited to the negotiation of the lease of the Weaver Street premises. Id., ¶ 3. What is undisputed is that the attorney-client relationship concluded at the completion of the negotiation and the finalization of the lease on or about June 6, 2006. Id.; see also Exhibit "B." Plaintiffs' breach of fiduciary duty claim, therefore, accrued on June 6, 2006. See Offshore Express v. Milbank, Tweed, Hadley & McCloy, LLP, *supra*. Even if one were to consider the attorney-client relationship continuing through Attorney Gruber's ministerial task of obtaining and circulating the fully executed copy of the lease, the attorney-client relationship would have ceased, at the latest, on or about July 13, 2006. Thus, Plaintiffs were required to bring a claim on or before June 6, 2009 (or at the latest on July 13, 2009) to be timely. However, Plaintiffs filed their instant bankruptcy action on or about December 5, 2009, more well after the statute of limitations had expired. Therefore, Plaintiffs' purported cause of action for breach of fiduciary duty as against Attorney Gruber and SGNB is time-barred and must be dismissed, as a matter of law.

B. Plaintiffs Have Failed to Plead a Cognizable Cause of Action for Breach of Fiduciary Duty

(1) Plaintiffs Have Failed to Plead a Cause of Action for Breach of Fiduciary Duty Based Upon any Alleged Conflict of Interest

Where "damages are sought for breach of fiduciary duty under New York law, the plaintiff must demonstrate that defendant's conduct proximately caused injury in order to establish liability." In re Refco Inc. Securities Litigation, --- F.Supp.2d ----, 2011 WL 1219265 (S.D.N.Y. 2011) *quoting* LNC Inves. v. First Bank, N.A., 173 F.3d 454, 465 (2d Cir. 1999). Further, where a claim is based upon an alleged conflict of interest, in order to "prevail on a claim of breach of fiduciary duty, plaintiffs must demonstrate a conflict of interest which amounted merely to a 'substantial factor' in their loss..." See Ciocca v. Neff, not reported in F.Supp.2d, 2005 WL 1473819 (S.D.N.Y. 2005) *quoting* Estate of Re v. Kornstein Veisz & Wexler, 958 F.Supp. 907, 924 (S.D.N.Y.1997).

Moreover, the fact that a fiduciary has a conflict of interest does not by itself constitute a breach of fiduciary duty; instead, a plaintiff must show that the improper relationship or conflict caused the fiduciary to act disloyally. See Severstal Wheeling Inc. v. WPN Corp., --- F.Supp.2d ----, 2011 WL 3849482 (S.D.N.Y. 2011) *citing* Herrara v. Wyeth, not reported in F.Supp.2d, 2010 WL 1028163, at *7 (S.D.N.Y. 2010) ("In the absence of a valid claim for a breach of the duty of loyalty, allegations that Defendants placed themselves into a conflict situation are not independently actionable.").

Here, the Complaint is devoid of any allegation that Attorney Gruber or SGNB failed to disclose any alleged conflict of interest concerning how their relationship with Cold Stone, in and of itself, caused harm to Plaintiffs. Further, Plaintiffs have wholly failed to allege (nor is there any evidence of) that Attorney Gruber's or SGNB's representation of Plaintiffs – in a

limited capacity in connection with the lease of the Weaver Street premises – was adversely affected by their attorney-client relationship with Cold Stone. It defies logic that any conflict of interest could have even existed since Plaintiffs and Cold Stone as tenants/lessees had identical interests in negotiating and entering into the best lease agreement possible for the Weaver Street premises.

Furthermore, it is without dispute that there was never any active concealment on the part of defendants to 'hide' the joint representation, as the joint representation was provided for the convenience of Plaintiffs and Cold Stone, who had a united interest with regard to the lease. The Tzamarot Plaintiffs, at all times, were aware of the dual representation, as evidenced in the Tzamarot Plaintiffs being copied on all correspondences between Attorney Gruber and/or SGNB and Cold Stone, including billing invoices. See Exhibits "E" and "H;" see also Gruber Aff., ¶ 7. To this end, the record is clear that there were no conflicting interests between Plaintiffs and Cold Stone for the purposes of any joint representation surrounding the underlying transaction. As Plaintiffs' interests were sufficiently aligned with those of Cold Stone to ensure that Plaintiffs' interests were protected, Plaintiffs cannot plead nor can they demonstrate an actionable cause of action for breach of fiduciary duty based upon an alleged "conflict of interest." See Gilliam v. Addicts Rehabilitation Center Fund, Not Reported in F.Supp.2d, 2008 WL 782596 (S.D.N.Y. 2008).

In addition, while Attorney Gruber and SGNB vehemently deny any claim of an alleged "conflict" and maintain that the evidence demonstrates otherwise, even if this Court were to accept Plaintiffs' allegation as true for purposes of this motion, Plaintiffs still have not plead (nor can they demonstrate) that "but for" this alleged "conflict" that they would have achieved a more favorable result in the underlying transaction. See Coleman, *supra*. It cannot be inferred from

the Complaint that Plaintiffs would have had a more favorable result in connection with entering the lease for the Weaver Street property, or saved any expense, absent the existence of the alleged "conflict." As such, Plaintiffs' purported breach of fiduciary duty claim must be dismissed, as a matter of law and with prejudice.

(2) Attorney Gruber and SGNB Were Not Guarantors of the Feasibility of Plaintiffs' Financial Investment

An attorney does not have "an omnipresent responsibility to ferret out all possible problems as 'trustee' of the client's interests. Nor does a lawyer have an ombudsmen responsibility to protect the client from his or her own limited business expertise." See R. Mallen & J. Smith, *Legal Malpractice* § 8.2, at 560 (4th ed.1996). In other words, a lawyer has no affirmative duty to offer business advice to a client who has not expressly asked for it. See In re BCI Pancake House, Inc., 270 B.R. 15 (Bankr.D.Del. 2001) (Chapter 11 debtors brought adversary proceeding against their attorneys, and party who assisted debtors pre-petition in attempting to find loan for their failing business, for their alleged negligence in connection with prospective loan from non-traditional foreign lender that failed to close. Court held that lawyer had no duty to investigate foreign lender and was not liable on a legal malpractice theory when the loan failed to close.); see also Yusefzadeh v. Ross, 932 F.2d 1 262 (8th Cir. 1991) (lawyer had no duty to advise client to look for alternative financing options); Lamb v. Barbour, 188 N.J.Super. 6, 455 A.2d 1122 (N.J.Super.A.D. 1982) (lawyer had no duty to tell clients that they were getting in over their heads by purchasing a bakery).

Moreover, New York law does not affirmatively require an attorney who is retained for the purpose of reviewing transactional documents (i.e., a lease as in the instant matter) to advise his/her client regarding the feasibility of the financial investment. See Quintel Corp., N.V. v. Citibank, N.A., 606 F.Supp. 898 (D.C.N.Y. 1985) *citing* Vitale v. Coyne Realty, Inc., 66 A.D.2d

562, 414 N.Y.S.2d 388 (4th Dept. 1979) (an attorney has no duty to advise client as to feasibility of financial investment where client has agreed to terms of deal); see also Campbell v. Rogers & Wells, 218 A.D.2d 576, 631 N.Y.S.2d 6 (1st Dept. 1995).

Here, well prior to Attorney Gruber's and SGNB's limited legal representation in connection with the negotiation of the lease for the Weaver Street premises, the Tzamarot Plaintiffs independently negotiated and executed a franchise agreement with Cold Stone on November 5, 2004 and had already allegedly paid $100,000 to Cold Stone, as a franchisee. See Complaint. Accordingly, Attorney Gruber and SGNB did not owe and could not have owed a duty to Plaintiffs to determine whether their investment as a Cold Stone franchisee was prudent. Furthermore, during the course of any lease negotiations, neither Attorney Gruber or SGNB were privy to any of Cold Stone's financials, gross revenue information or had knowledge of any alleged "high failure rate" of leased Cold Stone stores. See Gruber Aff., ¶ 15. Therefore, Attorney Gruber and SGNB cannot be held liable for what may now, in hindsight, be considered to be an improvident business decision by Plaintiffs. Thus, Plaintiffs' purported claim for breach of fiduciary duty must be dismissed, with prejudice, as matter of law.

CONCLUSION

For the foregoing reasons, Attorney Gruber's and SGNB's pre-Answer Motion to Dismiss should be granted in its entirety, and the Complaint dismissed, with prejudice and as a matter of law.

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Respectfully submitted,

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