SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

STEVE PAPPAS,

Plaintiff,

- against -

LARRY H. SCHATZ and GRUBMAN, INDURSKY, SHIRE & MEISELAS, P.C.,

Defendants.

Index No. 650157/2013

Assigned to the Hon. Melvin L. Schweitzer

Motion Sequence 002

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

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Preliminary Statement

This Court should dismiss this action based on *res judicata,* collateral estoppel, failure to state a cause of action, lack of the requisite particularity in pleading, the statute of limitations, and lack of standing.

This is an action for breach of fiduciary duty and fraudulent and negligent misrepresentation. The action has a history. In April 2009, plaintiff Pappas sued his former business partner, Steve Tzolis, for fraud and breach of fiduciary duty. In that complaint, plaintiff alleged that defendants here – Tzolis's attorney and law firm – participated in Tzolis's alleged fraud and fiduciary misconduct, but plaintiff did not name them as defendants. In *Pappas* v. *Tzolis,* 20 N.Y.3d 228 (2012), the Court of Appeals unanimously dismissed plaintiff Pappas's complaint against Tzolis, as a matter of law, based on exactly the same transaction underlying this action. Now plaintiff wants to bring the same claims against the lawyers. This Court should not permit him to do so.

No factual or legal distinction exists between this action and the *Tzolis* Action. To try to elude the holding of the Court of Appeals, plaintiff inadequately alleges that defendants somehow had an attorney-client relationship with plaintiff, yet the documentary evidence, including plaintiff's own prior sworn statements and the *Tzolis* ruling itself, show otherwise, and in any event the skimpy allegations cannot survive the doctrines of claim and issue preclusion, or the legal principles the Court of Appeals established in the *Tzolis* Action that govern plaintiff's complaint. That the allegations do not satisfy CPLR 3016's heightened pleading standards for causes of action for breach of fiduciary duty or fraud only confirms as much. Plaintiff's breach of fiduciary duty claim is a thinly disguised legal malpractice action barred by the statute of limitations, which equally precludes his alleged misrepresentation claims. Nor does plaintiff – who alleges

injury only to the entity of which he was once a member – have standing to bring them. This is, in short, a complaint with stale claims that the law does not permit, and that plaintiff has already litigated and lost. This Court should so recognize, and dismiss them.

Statement of the Case

The facts may be found in the Court of Appeals's decision in the *Tzolis* Action, the accompanying affirmation with exhibits, and the documents to which either the complaint refers or were part of the Record on Appeal in the *Tzolis* Action. Solely for purpose of this motion, we assume the well-pleaded factual allegations of the complaint to be true, except to the extent the allegations conflict with documents to which the complaint refers and thereby incorporates, or with plaintiff's prior sworn statements in the Record on Appeal in the *Tzolis* Action.

The Parties

Plaintiff Steve Pappas, together with Constantine Ifantopoulos, was one of three Members of Vrahos LLC, an entity formed in or about 2006 to enter into a lease for property at 68-74 Charlton Street. (*Tzolis*, 20 N.Y.3d at 231; Compl. ¶¶ 4-6.) The third Member of Vrahos was Steve Tzolis. (*Tzolis*, 20 N.Y.3d at 231; Compl. ¶ 4.)

Defendant Larry H. Schatz, Esq., a New York attorney for over 40 years, is today and at all times relevant here was affiliated with the law firm now known as defendant Grubman, Indursky, Shire & Meiselas, P.C. (Compl. ¶ 3; Aff. ¶ 3.)

The Buy-Out Transaction

The Operating Agreement governing Vrahos LLC said that each of the Members could "engage in business ventures and investments of any nature whatsoever, whether or not in competition with the [Vrahos] LLC, without obligation of any kind to the LLC or to the other Members" – effectively relieving each Member of customary

fiduciary duties. (*Tzolis*, 20 N.Y.3d at 231; Aff. ¶ 4, Ex. A at 2 (opinion of Gammerman, J.H.O.).) In June 2006, with the agreement of the two other Members, Vrahos sublet the Charlton Street building to a company that Tzolis owned. (Compl. ¶ 7; *Tzolis,* 20 N.Y.3d at 231.) There ensued numerous disputes among the Members about the property. To stop the fighting, Tzolis offered to buy out the other two Members, who agreed. This resulted in the Buy-Out Transaction, in which Tzolis paid Pappas and Ifantopoulos 20 times the amount the two had invested just a year before. *Id.* at 233.

At the closing, in addition to an Agreement of Assignment and Assumption, Pappas and Ifantopoulos signed a Certificate that said (Aff. ¶5, Ex. B) (emphasis added):

> Each of the undersigned Sellers (Steve Pappas and Constantine Ifantopoulos) agrees with & represents to STEVE TZOLIS that each of the undersigned, Sellers, in connection with their respective assignments to Steve Tzolis of their membership interests in Vrahos LLC ***has performed their own due diligence in connection with such assignments***. ***Each of the undersigned Sellers has engaged its own legal counsel***, ***and is not relying on any representation by Steve Tzolis or any of his agents or representatives***, except as set forth in this assignment & other documents delivered to the undersigned Sellers today. Further, each of the undersigned Sellers agrees that Steve Tzolis has no fiduciary duty to the undersigned Sellers in connection with such assignments.

Otherwise put, plaintiff represented in the Certificate (1) that plaintiff had performed his own due diligence in connection with the transfers, (2) that each side had its own legal counsel, and, of importance, (3) that plaintiff specifically disclaimed any reliance, in entering into the Buy-Out Transaction, on any representation of Tzolis "or any of his agents or representatives," by definition including his lawyers.

Plaintiff's Independent Counsel in the Buy-Out Transaction

No more than the Certificate and the Court of Appeals's decision are needed to show that each side in the Buy-Out Transaction had separate counsel; as the *Tzolis* Court said, "plaintiffs [including plaintiff Pappas here] were sophisticated businessmen represented by counsel," *Tzolis*, 20 N.Y. at 233. But more evidence exists: In an affidavit he submitted to the IAS Court in the *Tzolis* Action, plaintiff Pappas swore to the court that, in the Buy-Out Transaction, defendant Schatz was "the attorney for Tzolis," making no reference to any conflicts or any suggestion that Schatz was also plaintiff's lawyer. (Aff. ¶ 6, Ex. C at ¶ 22.) In another document executed in connection with the Buy-Out Transaction, which like the affidavit was in the Record on Appeal in the *Tzolis* Action, Schatz and the Grubman firm are named solely as counsel for Tzolis, while Brook Boyd, Esq., then of Windel Marx Lane & Mittendorf, LLP, is identified as counsel for plaintiff Pappas. (Aff. ¶ 7, Ex. D.) And, curiously, when Vrahos had earlier entered into its long-term lease of the Charlton Street premises (Compl. ¶ 4), Pappas's counsel Boyd represented Vrahos; the Grubman firm nowhere appears on the papers (Aff. ¶ 8, Ex. E). Boyd, now at Meisier Seelig & Fein, LLP, is a lawyer with over 30 years of experience in commercial and real estate transactions. (Aff. ¶ 3, Ex. O.) Neither in the *Tzolis* Action nor in any submission here has plaintiff ever alleged that he was not represented by counsel, and specifically Boyd, in connection with the Buy-Out Transactions and associated documents.

The *Tzolis* Action

On April 7, 2009, Pappas and Ifantopoulos brought an action against Tzolis personally and, supposedly as derivative plaintiffs, on behalf of Vrahos. (Aff ¶ 9,

Ex. F.) The 26-page, 91-plus paragraph complaint, while containing eleven causes of action, condensed to an allegation that Tzolis had defrauded them and breached his fiduciary duties. (*Id.*) This was so, the two asserted on unidentified "information and belief," because Tzolis supposedly knew at the time of the Buy-Out Transaction that another company was prepared to pay a more substantial sum for the Vrahos lease. (*Id.* at ¶¶ 29-30.) This conjecture arose from the fact that, eight months *after* the Buy-Out Transaction, Vrahos, now wholly owned by Tzolis, assigned the lease to a subsidiary of Extell Development Corporation – for $17.5 million. *Tzolis,* 20 N.Y. 3d at 232.

In paragraphs 14 through 30 of their *Tzolis* complaint, in the same opaque and summary fashion as plaintiff does in this complaint here, Pappas and Ifantopoulos identified defendants Schatz and the Grubman firm by name and alleged that they, too, had participated in Tzolis's supposed fraud and fiduciary misconduct. (Aff ¶ 9, Ex. F at 7-11.) For unexplained reasons, the *Tzolis* complaint did not name Schatz or the Grubman firm as defendants. (*Id.* ¶ 9, Ex. F at 1.)

The Lower Court Rulings in the *Tzolis* Action

By Decision and Order dated March 3, 2010, J.H.O. Ira Gammerman dismissed the *Tzolis* complaint based primarily on the disavowal of customary fiduciary duties in the Operating Agreement – that is, that Tzolis did not owe the usual fiduciary duties of disclosure to plaintiff Pappas. (Aff. ¶ 4, Ex. A at 2-6.) Some history is needed at this point, for at the time of this ruling, the law in the First Department, by reason of *Blue Chip Emerald LLC v. Allied Partners Inc.*, 299 A.D.2d 278 (1st Dep't 2002), on which Pappas heavily relied, cast doubt on whether a fiduciary could be released from fiduciary duties in a transaction in which one fiduciary buys out others. While in dismissing the complaint J.H.O. Gammerman distinguished the decision, the IAS Court

did not rely on the Certificate's disclaimer of reliance in doing so. (Aff. ¶ 4, Ex. A at 2-4.)

Noteworthy, however, are two other elements of the ruling: One is that the IAS Court doubted Pappas's standing to sue on Vrahos's behalf since Pappas no longer held an interest in that company. (Aff. ¶ 4, Ex. A at 4, 11.) The other is that, in discussing the claims for fraud and misrepresentations there, the IAS Court noted that Pappas's vague allegations of some "special" relationship giving rise to a duty of disclose were wholly inadequate, and that the complaint was bereft of any allegations that Pappas or his co-plaintiff had made any inquiry concerning prospects for the premises, let alone performed the due diligence each had represented in the Certificate. (Aff. ¶ 4, Ex. A at 5-6.)

On appeal, a divided Appellate Division reinstated the action. 87 A.D.3d 889 (1st Dep't 2011). The First Department panel disagreed over the continuing efficacy of *Blue Chip Emerald*: Three justices considered the case still good law, while the dissenters believed that the Court of Appeals's decision in *Centro Empresarial Cempresa S.A.* v. *América Móvil, S.A.B. de C.V.,* 17 N.Y.3d 269 (2011), had discredited *Blue Chip Emerald*. In *Centro Empresarial*, the Court of Appeals unanimously ruled that when a "principal and fiduciary are sophisticated parties engaged in negotiations to terminate their relationship. . . the principal cannot blindly trust the fiduciary's assertions," *id.* at 279, noting that "[t]o the extent that Appellate Division decisions such as . . . *Blue Chip Emerald* . . . suggest otherwise, they misapprehend the Court of Appeals case law*," id.* at 278.

The Court of Appeals's Decision in *Tzolis*

On appeal from the Appellate Division ruling, the Court of Appeals unanimously agreed with the dissenters and ruled that *Centro Empresarial* was controlling. 20 N.Y.3d at 232-33. So ruling, the Court did not confine its reasoning to the language in the Operating Agreement discharging Tzolis of customary fiduciary duties. The Court of Appeals held, too, that the language of the Certificate negated reasonable reliance on Tzolis's alleged misrepresentations and omissions. *Id.* at 233-34. And the Court went further: Observing that Pappas and his fellow seller "were sophisticated businessmen represented by counsel," the Court said that "the test, in essence, is whether, given the nature of the parties' relationship at the time of the release, the principal is aware of information about the fiduciary that would make the reliance on the fiduciary unreasonable." *Id. at* 233 (citing *Centro Empresarial,* 17 N.Y.3d at 278-79). In other words, the very existence of the disputes among the Members leading up to the Buy-Out Transaction, which the complaint in the *Tzolis* Action stressed, triggered "'a heightened degree of diligence'" whereby "'the principal cannot blindly trust the fiduciary's assertions.'" *Id.* (quoting *Centro Empresarial*, 17 N.Y.3d at 279). Thus, in addition to the Operating Agreement and the Certificate, the very fact of the contentious relationship made it unreasonable for Pappas and Ifantopoulos to rely on alleged representations or omissions of Tzolis.[1]

Prior Proceedings in This Action

On January 17, 2013, one day shy of the sixth anniversary of the Buy-Out Transaction, the two *Tzolis* plaintiffs – Pappas and Ifantopoulos – filed but did not serve a

[1] The Court of Appeals unanimously denied a motion for re-argument in the *Tzolis* Action on March 21, 2013. 20 N.Y.3d 1075.

Summons with Notice naming Schatz and the Grubman firm as defendants. (Aff. ¶ 11, Ex. H.) On February 6, 2013, Pappas filed an Amended Summons with Notice substantially identical to its predecessor except now only his name appeared as a plaintiff. (*Id*.) Exactly 120 days following the initial filing – that is, the last possible day under the CPLR – plaintiff Pappas served the Summons on Schatz and the Grubman firm. (Aff. ¶ 12, Ex. I.) On May 23, 2013, in keeping with CPLR 3012(b), defendants demanded a complaint. (*Id.* ¶ 10, Ex. G.) The complaint having been demanded on May 23, 2017, the complaint was due twenty days later, on June 12, 2013. (Aff. ¶ 13.) Instead, on that twentieth day, plaintiff filed a motion for an extension of time to allow him to hire new counsel and prepare a complaint. (*Id.,* Ex. J.) Defendants opposed this application, and also cross-moved for dismissal.

By decision and order dated October 23, 2013, electronically posted on October 29, 2013, this Court denied defendants' motion to dismiss and granted plaintiff an additional twenty days from service of Notice of Entry to file a complaint. (Aff. ¶ 14, Ex. K.) Notice of Entry was filed and served that same day. (Aff. ¶ 15, Ex. L.) This required service of the complaint by Monday, November 18, 2013. (Aff. ¶ 16.) By this time, plaintiff had already had five months since the initial demand for a complaint to serve one. On Thursday, November 21, 2013, defendants received a *pro se* complaint in an envelope postmarked November 19, 2013. (*Id.* Exs. M, N.)

The Complaint in This Action

In the complaint here, after a recital of the parties, paragraphs 4 through 13 do no more than recite the transactions, including the Buy-Out Transaction, at issue in the *Tzolis* Action. In paragraph 15, plaintiff alleges that Schatz and the Grubman firm "aided and abetted" Tzolis's supposed "scheme," supposedly by "misrepresenting Tzolis'

motivations" in purchasing the lease by means of "telephone conversations wherein they convinced and persuaded" plaintiff "to sell their [*sic*] interest in Vrahos ostensibly for Tzolis to fulfill his life-long 'dream' of creating the best catering hall in New York City (to be named 'Talk of the Town'), while knowing of and specifically working on either the brokerage of and/or legal aspects of [the] Extell deal." The complaint says, without saying how, that Schatz and the Grubman firm knew that these alleged "misrepresentations about Tzolis' motivations were untrue." *Id.* Paragraph 16 then alleges:

> In making such misrepresentations, Defendants held themselves out as counsel for Vrahos and provided advice to PLAINTIFF, as they had on other occasions, while actually acting as counsel for Tzolis for the concealed transaction with Extell.

The complaint purports to plead three causes of action – for breach of fiduciary duty, for fraud, and for negligent misrepresentation.

The Breach of Fiduciary Duty Allegations: In plaintiff's first cause of action, for breach of fiduciary duty, he alleges that at "all times relevant herein, an attorney client relationship existed between," on the one hand, plaintiff "and/or Vrahos," and, on the other, Schatz and the Grubman firm. (Compl. ¶ 18.) There follows a litany of the legal and ethical duties that a lawyer owes a client, and then summary allegations that Schatz and the Grubman firm violated each of these duties by the allegedly concurrent but undisclosed representation of both Tzolis and plaintiff "and/or Vrahos," including by failing to disclose the alleged conflict, the consequences of the alleged conflict, and the impact on plaintiff of the same. (Compl. ¶¶ 19-26.) The conflict, in the complaint's eyes, was that the Grubman firm, while allegedly representing plaintiff

"and/or Vrahos," was also adverse to plaintiff "and/or Vrahos" by simultaneously representing Tzolis in alleged but unidentified dealings with Extell.

Nothing in the complaint pleads when plaintiff "and/or Vrahos" formed their putative attorney-client relationship with Schatz and the Grubman firm. Nothing in the complaint describes the circumstances of its formation, or the legal advice that plaintiff "and/or Vrahos" sought from Schatz and the Grubman firm. Nothing in the complaint explains why plaintiff went to Schatz or the Grubman firm when he already had counsel of his own. Nowhere does the complaint allege facts evincing an intention on the part of Schatz or the Grubman firm to accept this supposed attorney-client relationship with plaintiff "and/or Vrahos." There is no allegation that plaintiff "and/or Vrahos" ever paid Schatz or the Grubman firm for any legal services, or entered into an engagement letter. No facts appear that Schatz and the Grubman firm gave *legal advice* to plaintiff, only that they allegedly indicated the reason why Tzolis wished to purchase plaintiff's Vrahos' interests in an effort to persuade plaintiff to sell. The only alleged *legal* service that the complaint says the Grubman firm performed for Vrahos is some unspecified work on an alleged Extel deal. Yet no facts appear from which a reasonable inference may arise that Schatz and the Grubman firm knew *anything* about a possible Extel transaction, when they knew it, how they came to know it, and hence why they allegedly knew *at the time* that the supposed statements to plaintiff about Tzolis's motives were "untrue." And, most important, the complaint ignores that, under the Vrahos Operating Agreement, Tzolis owed no fiduciary obligations to plaintiff and could do as he pleased, including hiring lawyers to do as he asked.

The Fraud Allegations: In plaintiff's second cause of action, for fraud, the full substance of his allegations appear in paragraph 28 as follows:

> Defendants made representations of fact to PLAINTIFF as to the motivation of Tzolis in purchasing the leasehold in order to persuade PLAINTIFF to sell his interest to Tzolis.

This allegation presumably refers to the prior assertion that some unidentified person from the Grubman told plaintiff that Tzolis wished to fulfill his "dream" of building a catering hall. The next allegations, in paragraphs 29 and 30, say that the representation "made in '28', above, were false and known by defendants to be false," and were "intentionally made to induce PLAINTIFF to sell his interest to Tzolis."

Nothing in the complaint identifies who made these alleged statements or when they were made. Elsewhere, the complaint says in general terms that the "misrepresentations" were made "throughout November 2006, December 2006 and up through and including January 18, 2007" (Compl. ¶ 15) but the pleading is without reference to who said what to whom, when, where, or in what circumstances. Missing, too, here as elsewhere, are any allegations of *fact* that Schatz or the Grubman firm had any knowledge that the allegedly expressed "motivation" was "untrue," or any knowledge whatsoever of any dealings between Tzolis (or his lawyers or representatives) and Extell. Nor does the complaint negate – to the contrary, it openly admits – that by this time the relationship between Tzolis and plaintiff was adversarial, and that the two were fighting over Vrahos and the property. (*See* Compl. ¶¶ 7-8.)

The Negligent Misrepresentation Allegations: Finally, plaintiff's third cause of action, for negligent misrepresentation, repeats the same allegations, and lacks the same factual detail, as his first two causes of action. The lone addition to this cause of action is the allegation that an "attorney-client relationship is a "special relationship

and/or based on privity" (Compl. ¶ 36) – an echo of the allegation plaintiff made in the *Tzolis* Action with respect to Tzolis – but again no facts appear to indicate when, between whom, under what circumstances, or why this alleged relationship came to be, nor any attempt to reconcile the summary claim with the undisputed fact that plaintiff was represented by his own counsel at the time when he readily concedes he was in an adversarial situation with Tzolis and Tzolis's lawyers.

In each cause of action, plaintiff alleges exactly the same damages he alleged in the *Tzolis* Action. He wants the same damages from different parties for the same alleged torts involving the same transaction. No court has ever allowed such a do-over. This Court should dismiss the complaint with prejudice.

Argument

We are mindful that, on a motion under Rule 3211, as tempered by Rule 3016's requirement of particularity in certain circumstances, this Court "must accept the well-pleaded facts as true." *Sand Canyon Corp.* v. *Homeward Residential, Inc.*, 36 Misc.3d 1228(A) (Sup. Ct. N.Y. Co. 2012) (Schweitzer, J.) (emphasis added), *modified on other grounds at* 105 A.D.3d (1st Dep't 2013). But to avoid a dismissal, a pleading "must provide more than bare assertions of legal conclusions and a formulaic recitation of the elements of a cause of action." *Icahn* v. *Lions Gate Entm't Corp.*, 31 Misc.3d 1205(A) (Sup. Ct. N.Y. Co. 2011). Well-pleaded allegations means a complaint must allege factual detail, not simply ape the words that track the hornbook elements of a legal claim. "[B]are legal conclusions and factual claims, which are either inherently incredible or flatly contradicted by documentary evidence, as in the case at bar, are not presumed to be true on a motion to dismiss for legal insufficiency, and . . . when the moving party offers matter extrinsic to the pleadings, the court need not assume the

truthfulness of the pleaded allegations, but rather is required to determine whether the opposing party actually has a cause of action or defense, not whether he has properly stated one." *O'Donnell, Fox & Gartner, P.C.* v. *R-2000 Corp.,* 198 A.D.2d 154, 154 (1st Dep't 1993).

Here, the extrinsic evidence, and the paucity of well-pleaded factual allegations, counsel dismissal of the complaint.

I.

THIS COURT SHOULD DISMISS THE COMPLAINT BASED ON *RES JUDICATA* AND COLLATERAL ESTOPPEL

A. *Res Judicata* Bars Plaintiff's Complaint

Claim preclusion – the doctrine of *res judicata* – bars this action.

"The common law doctrine of *res judicata*, designed to bar relitigation of adjudicated issues, is the law's recognition of the fact that it is to the interest of the State that there should be an end to litigation. The doctrine, as generally stated, is that an existing final judgment rendered upon the merits by a court of competent jurisdiction is binding upon the parties *and their privies* in all other actions or suits on points litigated and adjudicated" therein. *Israel* v. *Wood Dolson Co.,* 1 N.Y.2d 116, 118 (1956) (emphasis added) (citations omitted). The Court of Appeals continued: "In cases involving the relationship of *principal and agent*, master and servant, or indemnitor and indemnitee, the liability of more than one party turns on, or is dependent upon, identical issues. In such situations when the complaining party has been given a full opportunity to litigate those issues against one of the parties, and has been defeated on grounds other than personal defense, he is not permitted to re-litigate the same issue in a new action against the other. The unilateral character of the estoppel in such cases is warranted by

the policy of the doctrine of *res judicata* – that there be an end to litigation." *Id.* at 119-20 (emphasis added).

In short, a party may not re-litigate against an agent the issues the party already litigated and lost against the principal. Overwhelming authority so attests.[2]

Marinelli Assoc v. *Helmsley-Noyes Co., Inc.*, 265 A.D.2d 1 (1st Dep't 2000), is an example. In that case, as in this one, three individuals entered into a joint venture agreement to own and operate property in lower Manhattan. *Id.* at 2. There, as here, the co-venturers had a falling out, upon which, there, one of the venturers brought an arbitration against the other two. *Id.* at 3. The two respondent co-venturers then sought and obtained a judicial stay of the arbitration on the ground that the statute of limitations barred the claimant's causes of action. *Id.* The onetime claimant then brought an action against the managing agent for the property based on the same transactions alleged in the arbitration. *Id.* at 3-4. The IAS Court invoked *res judicata* to dismiss the action, and the First Department unanimously affirmed. *Id.* at 4. The Appellate Division did so even though, in contrast to this action, no court ever reached the merits; the defense was purely a time bar. That the managing agent could not have been joined as a party to the arbitration – the agent never signed the arbitration clause – did not matter: "It is well settled that a defendant who was not a party to a prior proceeding may nevertheless assert res judicata 'where [its] liability . . . is altogether dependent upon the culpability of one exonerated in a prior suit.'" *Id.* at 7 (citations omitted) (brackets and ellipsis in original).

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[2] *E.g., Goldstein* v. *Mass. Mut. Life Ins. Co.,* 60 A.D.3d 506 (1st Dep't 2009); *Fifty CPW Tenants Corp.* v. *Epstein*, 16 A.D.3d 292 (1st Dep't 2005); *Nugent* v. *Diocese of Rockville Centre*, 2011 N.Y. Misc. LEXIS 973 (Sup. Ct., N.Y. Co., March 2, 2011); *The Plaza PH2001 LLC* v. *Plaza Residential Owner LP*, No. 600732/10, 2010 WL 5608978 (Sup. Ct., N.Y. Co. Nov. 7, 2010); *2 N.Y. Prac. Com. Litig. in N.Y. State Courts* § 16.16 (3d Ed.).

Marinelli applied the lessons of *Smith* v. *Russell Sage College*, 54 N.Y.2d 185 (1981). In *Smith*, the Court of Appeals held that, for purpose of applying the doctrine of *res judicata*, a litigant cannot switch a few facts or conceive new theories. Rather, "determination of what 'factual grouping' constitutes a 'transaction' or 'series of transactions' 'depends on how the facts are related in time, space, origin or motivation, whether they form a convenient trial unit, and whether . . . their treatment as a unit conforms to the parties' expectations or business understanding or usage." 265 A.D.2d at 5 (quoting *Smith*, 54 N.Y.2d at 192-93). As the *Smith* Court put it (54 N.Y.2d at 192):

> [I]n deciding *res judicata* issues, we have moved to a more pragmatic test, which sees a claim or cause of action as 'coterminus with the transaction regardless of the number of substantive theories or variant forms of relief . . . available to the plaintiff' (Restatement, Judgments 2d [Tent Draft 4, 1978], § 61, Comment *a*) . . . [F]rom the perspective of claim preclusion, '[a] cause of action' may also denote a separately stated claim on the same congeries of facts, but for different legal relief. But even if there are variations in the facts alleged, or different relief is sought, the separately stated 'causes of action' may nevertheless be grounded on the same gravamen of the wrong upon which the action is brought. . . (Restatement, Judgments 2d [Tent Draft 5, 1978], § 61, Comment *c.*)

This "pragmatic test," in which the court inquires into whether the "gravamen of the wrong" is the same, controls this action and requires dismissal of plaintiff's action, because *res judicata* bars an action against the agent based on a prior adjudication involving the agent's principal arising out of the same transaction.

That plaintiff, without facts, asserts that Schatz and the Grubman firm were his "lawyers" does not change this analysis. Plaintiff does not allege that Schatz and the Grubman firm represented him in the Buy-Out Transaction. He could not do so, because among other things he has sworn to the contrary in a submission to a court, and

the deal documents confirm, as does the *Tzolis* decision, that plaintiff had separate counsel there. Rather, his claim is a vague assertion that somehow, at some unknown time, for some unspecified purpose, Schatz and the Grubman firm became his "and/or Vrahos'" lawyer, and thus they had a conflict in also representing Tzolis adverse to plaintiff in the Buy-Out Transaction. Whether this alleged conflict gives rise to a separate cause of action for breach of fiduciary duty (in reality, legal malpractice) – to which we later turn – does diminish that Schatz and the Grubman firm acted as Tzolis's lawyers and agents in the Buy-Out Transaction. Indeed, the very point of the complaint is that they aided and abetted Tzolis's "scheme" acting as his agent – a "scheme" that the Court of Appeals has already adjudged is not actionable as a matter of law. Thus, even if the Court gives plaintiff an undeserved inference that defendants owed plaintiff a lawyer's duty not to engage in conflicting representations – at best, again, a malpractice claim – by plaintiff's own admission defendants acted as Tzolis's "representatives" in the Buy-Out Transaction and as such the rules of *res judicata* apply as much to them to any other agent.

B. Plaintiff Is Collaterally Estopped

Plaintiff is also collaterally estopped from re-litigating these issues. *Bronxville Palmer* v. *New York*, 18 N.Y.2d 560 (1966), illustrates. There, plaintiff sued a contractor for negligence in building a highway. Plaintiff lost: The court found that the contractor had not been negligent. Much like plaintiff here, plaintiff there looked elsewhere for money, and sued the State of New York. The State could be liable only derivatively, that is, based on the contractor's negligence. Upholding dismissal of plaintiff's action on grounds of collateral estoppel, the Court of Appeals reasoned that "the issues found and determined were those pertinent to the controversy as defined by

the pleadings." *Id.* at 563. If the contractor was not negligent, then the State could not be held liable. *See Briarpatch Ltd., L.P. v. Frankfurt Garbus Klein & Selz, P.C.*, 13 A.D.3d 296 (2004) (plaintiff collaterally estopped by prior contempt hearing from re-litigating claim based on allegedly withheld documents); *Melinitzky* v. *HSBC Bank USA,* 33 A.D.3d 482 (1st Dep't 2006) (husband collaterally estopped by prior determinations in a matrimonial action concerning his rights to access to bank); *Baystone Equities, Inc.* v. *Handel-Harbour,* 9 Misc.3d 1105(A) (Sup. Ct. N.Y. Co. 2005) (having litigated and lost issues against a lawyer plaintiff could not re-litigate the same issues against lawyer's firm).

Plaintiff is estopped to litigate his causes of action here.

Fraudulent & Negligent Misrepresentations: Reasonable reliance is an essential element of a misrepresentation claim. *Dannan Realty Corp.* v. *Harris,* 5 N.Y.2d 317, 320-21 (1959). Plaintiff cannot revisit the issue of reasonable reliance on any allegedly fraudulent or negligent misrepresentations because, as a matter of law, under the Court of Appeals's decision in *Tzolis*, the Certificate he signed, which extended not only to Tzolis but his "agents and representatives," negates an essential element of fraud, namely, reasonable reliance. *Tzolis*, 20 N.Y.3d at 233-34. Plaintiff is thus estopped to assert these causes of action.

Breach of Fiduciary Duty: Plaintiff cannot litigate now that defendants owed him a fiduciary duty. He admitted in the complaint in the *Tzolis* Action that defendants were Tzolis's lawyers, and these admissions estop him from saying otherwise now. *Markwica* v. *Davis*, 64 N.Y.2d 38, 41 (1984) (treating pleading statement as binding admission); *Naldi* v. *Grunberg 55 LLC,* 80 A.D.1, 14 (1st Dep't

2010) (treating complaint's allegations as binding). That he also swore to this, and that the deal documents say it, only further confirm that the documentary evidence defeats his vague and conclusory allegations in this action. And because plaintiff does not properly assert that either Schatz or the Grubman firm had an attorney-client relationship with him, an issue to which we turn, the Court may not reasonably infer that a fiduciary relationship existed for defendants allegedly to breach. *Eurycleia Partners LP* v. *Seward & Kissel, LLP*, 12 N.Y.3d 553, 561-62 (2009) (no fiduciary obligation in absence of attorney-client relationship); *Kavner* v. *Geller*, 49 A.D.3d 281, 282 (1st Dep't 2008) (sophisticated client represented by counsel has no right to rely on adverse counsel). Plaintiff is thus estopped to make this claim.

II.

THIS COURT SHOULD DISMISS THE COMPLAINT BASED ON FAILURE TO PLEAD A CAUSE OF ACTION

Even if claim and issue preclusion did not bar plaintiff's causes of action, the controlling authorities of *Tzolis* and *Centro Empresarial* would dispose of his allegations as a matter of law. Each of plaintiff's claims depends on the central element of reasonable reliance – that he reasonably relied on Schatz and the Grubman firm as fiduciaries, or as persons making statements to him, whether fraudulently or negligently, to "persuade" him to enter into the Buy-Out Transaction. Here the Certificate he signed poses an insurmountable obstacle to any claim of reasonable reliance, because he explicitly disclaimed reliance on Tzolis's "representatives," a role that he concedes Schatz and the Grubman firm played in the Buy-Out Transaction.

The Court of Appeals decided *Tzolis* on a motion to dismiss under CPLR 3211. As a legal matter, plaintiff had every legal and factual inference running in his

favor. Despite this, viewing his complaint in the light most favorable to plaintiff, the Court of Appeals stressed that the factual circumstances of the complaint must guide that exercise: As a sophisticated party with his own counsel, dealing with what he knew to be an antagonistic relationship with Tzolis and knowing as he admits that Schatz and the Grubman firm were Tzolis's counsel, plaintiff had enhanced duties of inquiry as a matter of law. 20 N.Y.3d at 233. Yet as J.H.O. Gammerman noted of the much more detailed *Tzolis* complaint, the pleading there was bereft of any allegations of any diligence on plaintiff's part to probe the facts that he later alleged were concealed from him; here, the complaint whispers not a word about any questioning in which plaintiff engaged with lawyers with whom he concocts a "special" relationship. The IAS Court's words there are equally applicable here (Aff. Ex. A at 6):

> Here, the complaint does not allege that either Pappas, or Ifantopoulos posed any question to Tzolis as to why he was suddenly offering them, respectively, $1 million and $500,000 in return for their respective investments, one year earlier, of $50,000 and $25,000. But even if plaintiffs could, in other circumstances, benefit from the special facts doctrine, the central allegation of the complaint, to wit, that Tzolis knew, in January 2007, that he was likely to be able to assign the Lease to CS for a substantial profit, is made solely on information and belief, without any specification of the source of the information, or of the basis for the belief. Such an allegation does not suffice to support a claim of fraud . . . .

That plaintiff here summarily alleges that Schatz and the Grubman were his "and/or Vrahos'" lawyer does not daunt the effect of these words. Even assuming (incorrectly) that plaintiff adequately alleges an attorney-client relationship, the Rules of Professional Conduct, like their predecessor the Code of Professional Responsibility, provide that a client may consent to a lawyer's allegedly conflicting representations. R.P.C. 1.7(b) (2013); N.Y. Lawyer's Code of Prof'l Responsibility DR 5-105(C) (2009).

Here, if plaintiff truly believed at the time that Schatz and the Grubman firm were also his "and/or Vrahos'" lawyers – *regardless of what he now says they were doing for Tzolis behind plaintiff's back* – then as a "sophisticated businessman represented by separate counsel" he was equipped to object to their representation of Tzolis. Instead, he signed a Certificate disclaiming reliance on anything Schatz and the Grubman firm said. That the Vrahos Operating Agreement released each of the Members from any fiduciary duty to the others fortifies this point. Plaintiff's allegation today that Schatz and the Grubman firm were once his counsel is incredible afterthought that common sense and this Court should reject.

III.

THIS COURT SHOULD DISMISS THE COMPLAINT BASED ON THE FAILURE TO PLEAD WITH PARTICULARITY

CPLR 3016(b) requires that allegations of fraud and fiduciary duty face a heightened pleading standard of particularity. An action for "fraud must be pleaded 'with particularity, including specific dates and items, if necessary and insofar as practicable.'" *Excess Line Assn. of N.Y.* v. *Waldorf & Assoc*., 40 Misc. 3d 759, 772 (Sup. Ct. Suffolk Co. 2013) (quoting *Alexander Infusion, LLC* v. *Prof'l Home Care Servs., Inc,* 25 Misc. 3d 1240(A) (Sup. Ct. Nassau Co. 2009). A complaint should be dismissed when a plaintiff "fails to specify the misrepresentation on which [plaintiff] relied to her detriment or the details of the other circumstances constituting the wrongs for which [plaintiff] would recover." *Hernandez* v. *N.Y.C. Law Dep't Corp. Counsel*, 258 A.D.2d 390, 390 (1st Dep't 1999) (upholding dismissal); *see Lax* v. *Design Quest N.Y. Ltd.*, 101 A.D.3d 431, 431 (1st Dep't 2012) (same). This is equally true of allegations of a breach of fiduciary duty. *Berardi* v. *Barardi,* 108 A.D.3d 406, 406-07 (1st Dep't 2013) (upholding

dismissal). When a "complaint alleges in the most conclusory fashion that [defendant] owed a fiduciary duty to the plaintiff," and when no "facts are alleged with any particularity from which it could be concluded that [defendant] had a duty to act for or give advice for the benefit of the plaintiff, or, indeed, that any type of a relationship of trust existed between them which would give rise to a fiduciary obligation on [defendant's] part, the "absence of sufficient factual allegations to indicate the existence of a fiduciary relationship between the plaintiff and [defendant]," then the allegations of the complaint are "insufficient to satisfy the requirements of CPLR 3016(b)." *Faith Assembly* v. *Titledge of N.Y. Abstract, LLC*, 106 A.D.3d 47, 62 (2d Dep't 2013).

Plaintiff's skeletal pleading does not approach the requirements of CPLR 3016(b). The most basic questions – the who, what, when, where, and how – are missing from the complaint. Plaintiff has been litigating this transaction for over four years. The transaction itself took place almost seven years ago. He has had ample time, and a lawyer in the *Tzolis* Action, to back up his vague generalities with facts permitting reasonable inferences in his favor. He has not done so. The indicia of an attorney-client relationship are no mystery, and when a relationship genuinely exists the allegations of one is no burden. *See Parekh* v. *Cain*, 96 A.D.3d 812, 816-17 (2d Dep't 2012); *Conti* v. *Polizzotto*, 243 A.D.2d 672, 673 (2nd Dep't 1997); *cf. U.S.* v. *Weissman,* 195 F.3d 96, 99 (2d Cir. 1999). Nor are proper allegations of fraud and breach of fiduciary duty an idle exercise. They reflect a policy judgment that parties should not be subject to such odious allegations without facts to support them. None appears here. This should prompt dismissal of the complaint.

IV.

THIS COURT SHOULD DISMISS THE COMPLAINT BASED ON THE STATUTE OF LIMITATIONS

At least four separate grounds exist for dismissal based on untimeliness.

First, plaintiff's breach of fiduciary duty claim is a legal malpractice claim in disguise. The limitations period for breach of fiduciary duty claims depends on the character of the claim. *Kaufman* v. *Cohen*, 307 A.D.2d 113, 118 (1st Dep't 2003). Although the complaint peppers the allegations in its first cause of action with summary assertions of fraud, these assertions are incidental to plaintiff's main supposed grievance – namely, that Schatz and Grubman were lawyers for him "and/or Vrahos," that as such defendants owed him duties under the then-applicable Lawyer's Code of Professional Responsibility, and that they violated those ethical duties to him. When a breach of fiduciary duty claim mostly sounds in legal malpractice, the three-year statue of limitations on malpractice claims applies. CPLR 214; *N.Y. Worker's Comp. Bd.* v. *SGRisk, LLC*, 38 Misc. 3d 1229(A) (Sup. Ct. Albany Co. 2013); *Whylie* v. *Pager*, 39 Misc. 3d 1213(A) (Sup. Ct. Kings Co. 2013). When "an allegation of fraud is not essential to the cause of action pleaded except as an answer to an anticipated defense of Statute of Limitations, courts look for the reality, and the essence of the action and not its mere name." *Powers Mercantile Corp.* v. *Feinberg*, 109 A.D.2d 117, 199-20 (1st Dep't 1985).[3]

[3] *See Buller* v. *Giorno*, 57 A.D.3d 216 (1st Dep't 2008) ("[e]ven if fraud had been pleaded, it would be insufficient to defeat the motion [to dismiss for violating statute of limitations], as the allegations of fraud are incidental to those of breach of fiduciary duty"); *Gonik* v. *Israel Discount Bank of N.Y.*, No. 150057109, 2010 WL 9115345 (Sup. Ct. N.Y. Co. Apr. 15, 2010); *Rand Int'l Leisure Prods., Inc.* v. *Bruno*, 22 Misc. 3d 111(A) (Sup. Ct. Nassau Co. 2009).

Second, and related, that plaintiff's fraud claim is nothing but an incident to his theory that he "and/or Vrahos" had an attorney-client relationship with Schatz and the Grubman firm further requires a time bar. That allegation is the only thing separating this action from the *Tzolis* Action. When "fraud, breach of fiduciary duty and breach of contract causes of action all arose from the same facts as the malpractice claim and alleged similar damages," they are "properly dismissed as duplicative of the deficient malpractice claim. *Vautsas* v. *Hochberg,* 103 A.D.2d 445, 446 (1st Dep't 2013); *see Sun Graphics Corp*. v *Levy, Davis & Maher, LLP,* 94 AD3d 669, 669 (1st Dep't 2012); *Bernard* v *Proskauer Rose, LLP*, 87 AD3d 412, 416 (1st Dep't 2011). The same is true of a claim for negligent misrepresentation. *Hoffman* v. *Colleluori*, 85 A.D.3d 1119, 1120-21 (2nd Dep't 2011). Put another way, plaintiff cannot bootstrap his untimely malpractice claim into a longer limitations period simply by saying that his alleged lawyers intentionally or negligently lied to him in violation of their ethical duties to him as his alleged lawyers.

Third, even if CPLR 213's six-year statute of limitations for fraud applies, this means that the complaint must plead with specificity the elements of the fraud that occurred on January 18, 2007 – the last day salvaged by the filing of the Summons with Notice six years later. Plaintiff cannot avail himself of the "discovery rule" that extends the six-year period for two years upon discovery of the alleged fraud, because his 2009 complaint presaged his allegations here, and thus the two-year tolling does not help him. *Delaware Cnty.* v. *Leatherstocking Healthcare , LLC*, 110 A.D.3d 1211, 1214 (3d Dep't 2013). Thus, plaintiff's conclusory references to misrepresentations in late 2006 are time-barred, for the cause of action accrues when the fraud occurs. *Squitteri* v. *Trapani*,

107 A.D.3d 688, 688 (3d Dep't 2013.) To the extent the fraud accrued with the Buy-Out Transaction on January 18, 2007, the complaint does not particularize any alleged misrepresentations on that day, which also happens to be the day when plaintiff explicitly disclaimed reliance on Tzolis's lawyers Schatz and the Grubman firm, thus extinguishing, as we have said, any fraud claim.

Finally, plaintiff served his complaint by mail postmarked the day after this Court's order required service. We are aware of the indulgences that courts give to *pro se* litigants, and ordinarily we would not raise the point. But this plaintiff waited until the last day to do *everything*. Despite this Court's Order, he missed this deadline (ignoring the e-filing requirements). Litigants have a right to know that a matter is over. As we have noted (7/11/13 Reply Mem. at 1, n.1), plaintiff is no stranger to this courthouse. The pleading he served, even in its skimpiness, reflects a lawyer's aid. Surely fairness to defendants has its claim in these circumstances, and plaintiff should not be yet again excused.

V.

THIS COURT SHOULD DISMISS THE COMPLAINT BASED ON PLAINTIFF'S LACK OF STANDING

The injury plaintiff alleges, as he did in the *Tzolis* Action, is the amount that Vrahos should have been paid had plaintiff not assigned his interests to Tzolis in the Buy-Out Transaction. The injury was to Vrahos. As the IAS Court hinted in dismissing the *Tzolis* Action, plaintiffs there had no right to sue for Vrahos because they had sold their interests in the Buy-Out Transaction that the Court of Appeals later upheld. Not being a member of Vrahos, plaintiff has no right to bring a claim on its behalf. *Chien* v.

Chien, 276 A.D.2d 426, 426 (1st Dep't 2000) (current ownership necessary to bring derivative action); *Rubensetin* v. *Catacosinos*, 91 A.D.2d 445, 446-47 (1st Dep't 1983).

Conclusion

For the reasons set forth above and in the accompanying affirmation and exhibits, we ask this Court to dismiss deny plaintiff's complaint with prejudice, and to award such other and further relief as the Court may deem just and proper.

Dated: New York, New York
December 10, 2013

Respectfully submitted,

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