SUPERIOR COURT OF THE DISTRICT OF COLUMBIA
CIVIL DIVISION

THERANOS, INC., *et al.*,	*	
	*	
Plaintiff,	*	
	*	
v.	*	Case No. 2012 CA 009617 M
	*	Judge Craig Iscoe
MCDERMOTT WILL & EMERY LLP	*	
	*	
Defendant.	*	

ORDER

This matter comes before the Court upon Defendant McDermott Will & Emery LLP's ("Defendant" or "McDermott") Motion to Dismiss (the "Motion"), filed April 1, 2013. Plaintiffs Theranos, Inc. ("Theranos") and Elizabeth Holmes ("Holmes") (collectively "Plaintiffs") filed their Opposition to Defendant's Motion to Dismiss (the "Opposition") on April 17, 2013. Defendant then filed its Reply Memorandum in Support of Defendant's Motion to Dismiss on April 19, 2013.

Factual Background

Plaintiffs filed their Complaint on December 29, 2012. Plaintiffs' suit, based on wrongful conduct of their former counsel, alleges legal malpractice, breach of fiduciary duty, negligence, and breach of contract. The complex nature of this litigation requires a detailed discussion of the interactions between the parties. In 2003, Ms. Holmes founded Theranos, Inc. as a healthcare systems company. At some point that same year, Plaintiffs hired Defendant McDermott to provide legal services related to Plaintiffs' patent applications, regulatory filings, and other business-related matters. From 2003 until 2006, McDermott filed four provisional patent applications with the U.S. Patent and Trademark Office ("PTO") on behalf of Plaintiffs (collectively, the "Theranos Provisionals"). The PTO published the Theranos Provisionals on

approximately November 16, 2006. There is no dispute that the Theranos Provisional contained confidential and proprietary information. In 2006, Plaintiffs hired a new law firm, Wilson Sonsini, to take over "the preparation, filing, and prosecution of subsequent patent applications for Plaintiffs." Defendant continued to represent Plaintiffs on unrelated matters. At all relevant times, John Fuisz was employed as a general partner at McDermott.

Additionally in 2006, Richard and Joseph Fuisz filed a patent application of their own, on behalf of their pharmaceutical company Fuisz Pharma LLC. (the "Fuisz Provisional Patent Application"). Richard and Joseph Fuisz are the father and brother, respectively, of John Fuisz. One year later, Richard and Joseph Fuisz filed a non-provisional patent application based on the Fuisz Provisional Patent Application. The Fuisz Provisional Patent Application was published in January of 2008. Finally, on November 2, 2010, the Fuisz Provisional matured into U.S. Patent No. 7,824,612 (the "'612 Patent"). Plaintiffs' Complaint alleges a multitude of similarities between the Theranos Provisional, the Fuisz Provisional Patent Application, and the '612 Patent.

Although the Fuisz Provisional was published in January of 2008, Plaintiffs became aware of the Fuisz Provisional Patent Application in May of 2008. During either May or August 2008, Plaintiffs were informed that John Fuisz was a partner at McDermott. According to Plaintiff's Opposition, in August 2008 Ms. Holmes "attempted to set up a meeting with the MWE's partner whom she knew" about concerns she had related to the confidentiality of the Theranos Provisionals. On September 22, 2008, Ms. Holmes met with Charles Work and Kenneth Cage, partners at McDermott, and "informed them that Richard Fuisz and Joseph Fuisz had filed an application for a patent…which contained concepts substantially similar" to the Theranos Provisionals. Lastly, according to Plaintiffs, on October 28, 2008, the parties met and

Ms. Holmes learned that John Fuisz was the son and brother of Richard and Joseph Fuisz, respectively, and had access to the Theranos Provisionals.

On October 26, 2011, Plaintiffs brought claims against John, Richard, and Joseph Fuisz, as well as Fuisz Pharma, in the United States District Court for the Northern District of California (the "California lawsuit" or "California litigation"). The facts and claims in the California lawsuit are the same underlying facts as the case at hand; that John Fuisz was a partner at McDermott and misappropriated Plaintiffs' confidential information by disclosing it to his father and brother. On June 26, 2012, the District Court dismissed all claims against John Fuisz because California's one-year statute of limitations had expired. Plaintiffs' argued in California, and continue to argue, that the District of Columbia statute of limitations should apply.

On October 25, 2011, the parties entered into a Tolling Agreement which tolled the statute of limitations to any claims against McDermott until April 30, 2012. The Tolling Agreement also provided that "[d]uring the Tolling Period, neither Party shall commence or file any lawsuit, petition, claim, arbitration, proceeding, or adversarial action against the other Party." Upon consent of both parties, the Agreement was extended until December 31, 2012 or sixty days after either party gives notice to the other party. Despite the Tolling Agreement, Plaintiffs filed the instant suit on December 29, 2012. After the matter was removed to federal court, the parties agreed to remand the case to this Court.[1]

Summary of Defendant's Arguments

Defendant, through its Motion to Dismiss, asserts five primary arguments as to why the case must be dismissed. First, Defendant argues that Plaintiffs' claims are barred by the doctrine

[1] The parties agreed to remand the case back to this Court in light of the Supreme Court's recent decision in *Gunn v. Minton*, No. 11-1118, 2013 WL 610193 (Feb. 20, 2013) (holding that federal courts do not have exclusive original subject matter jurisdiction over attorney malpractice claims involving patent law).

of *res judicata*. Defendant states that "Plaintiffs' malpractice and breach of fiduciary duty claims against McDermott (in this case) and against John Fuisz (in the California litigation) beyond question 'arise from the same nucleus of facts'." Def. Mot. at 13. Defendant adds that "Plaintiffs attempt to relitigate the same claims that already have been resolved against them…by adding a handful of conclusory statements about McDermott." *Id.* at 15. In addition, Defendant argues that claims against McDermott are barred under *res judicata* because McDermott is in privity with John Fuisz based upon the nature of the claims and John Fuisz being a general partner of McDermott. Further, Defendant asserts that the California District Court's dismissal on statute of limitations grounds was a final judgment on the merits.

Second, Defendant argues that the principle of vicarious liability prevents these claims against McDermott because the underlying claims against John Fuisz have been dismissed. Defendant states that "[s]ince all related malpractice claims against John Fuisz were dismissed, with prejudice, in the California litigation, McDermott cannot be held liable for his alleged actions…the only connection between the alleged harm and McDermott is that the firm somehow caused (or failed to prevent) John Fuisz's actions." Def. Mot. at 18-19.

Third, Defendant asserts that Plaintiffs' claims are barred by either the California or District of Columbia statute of limitations. Under California's one-year statute of limitations, it is undisputed that the statute has expired. Defendant claims that Plaintiffs had notice and discovered their alleged injury "at least as of early May 2008" when Plaintiffs became aware of the Fuisz Patent Application because of the similarities to the Theranos Provisional. *Id.* at 23. Alternatively, Defendant states that Plaintiffs were on notice in May or August of 2008 when "Plaintiff Holmes learned that John Fuisz, an individual who shared the same name as the inventors of the '612 Patent, was a partner at McDermott." *Id.* Defendant explains that Plaintiff

Holmes' notice is evidenced by the September and October meetings she arranged based on her suspicions of wrongdoing. *Id.* at 24-26.

Fourth, Defendant contends that the case must be dismissed as a result of Plaintiffs' breach of the Parties' Tolling Agreement. "Under the Tolling Agreement, McDermott had a right not to be sued by Plaintiffs before December 31, 2012. This case was initiated against them on December 29, 2012." *Id.* at 28. Defendants believe specific performance, and therefore dismissal with prejudice, is appropriate because "[n]o amount of damages can give McDermott back their contractual right not to be sued during the Tolling Period." *Id.* at 29.

Lastly, Defendant argues that Plaintiffs failed to plead facts which form a plausible basis for malpractice and breach of fiduciary duty. Defendant states that "the Complaint does not provide a single fact explaining how or when John Fuisz — much less McDermott — committed a single wrongful act that could give rise to malpractice or breach of fiduciary duty." *Id.* at 31. Defendant adds "Plaintiffs' case depends on the sheer ***possibility*** that John Fuisz misappropriated confidential client information."

Summary of Plaintiffs' Arguments

Regarding the doctrine of *res judicata*, Plaintiffs argue that McDermott is not in privity. "John Fuisz's status as a former partner of McDermott does not, standing alone, mean he was in privity with McDermott." Pl.s' Opp. At 2. Plaintiffs add that "[f]urthermore, there is no mutuality of interests between John Fuisz and McDermott because the claims against McDermott were not raised — and could not have been raised — against John Fuisz in California, and therefore he had no stake in fully representing McDermott's interests." *Id.* The crux of Plaintiffs' argument is that the present claims are claims of direct liability against McDermott, not claims based on joint liability or vicarious liability.

Similarly, Plaintiffs respond that vicarious liability does not apply. "McDermott's liability does not rely on John Fuisz being found liable because Theranos's claims against McDermott are not based solely on a theory of vicarious liability for John Fuisz's actions." *Id.* Plaintiffs assert that these claims are for direct liability and therefore, it is irrelevant whether John Fuisz was found liable or not.

Third, Plaintiffs argue that the District of Columbia's three year statute of limitations applies and has not yet run. As initially stated in Plaintiffs' Complaint, Plaintiffs' Opposition re-asserts that "Theranos did not suffer injury resulting from McDermott's wrongdoing until the '612 Patent issued in November 2010." *Id.* at 3. Plaintiffs also claim that the October 28, 2008 meeting was when McDermott ceased to represent Plaintiffs and therefore, the legal claim could not have accrued before then.

Fourth, Plaintiffs maintain that they did not breach the Tolling Agreement and if they did, there was no material harm. They assert that specific performance cannot be granted because extinguishing Plaintiffs' claim would be an inequitable result for the minimal harm. Lastly, Plaintiffs argue that their allegations are sufficiently pleaded because "Theranos alleges it suffered injuries and describes how McDermott caused those injuries." *Id.* Plaintiffs state that the District of Columbia applies a plausibility pleading requirement, not a probability requirement.

Discussion

Pursuant to District of Columbia Superior Court Rule of Civil Procedure 12(b)(6), defendants may contest the legal sufficiency of the pleading by filing a motion to dismiss. Upon receipt of a motion to dismiss, the court must determine (1) whether the pleading includes well-pleaded factual allegations, and (2) whether such allegations plausibly give rise to an entitlement

for relief. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-52 (2009); *see also Mazza v. House Craft LLC*, 18 A.3d 786, 790 (D.C. 2011) (adopting *Iqbal*'s heightened pleading standard); *see also Potomac Dev. Corp. v. District of Columbia*, 28 A.3d 531, 543 (D.C. 2011) (adopting the Supreme Court's plausibility standard for a complaint to survive a motion to dismiss).

I. Plaintiff's Claims are Barred by the Doctrine of *Res Judicata*

Under *res judicata*, "a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action." *Allen v. McCurry*, 449 U.S. 90, 94, 101 S.Ct. 411 (1980) (citing *Cromwell v. County of Sac*, 94 U.S. 351, 352, 24 L.Ed. 195). *Res judicata* bars not only claims that actually were litigated in the first action but "all issues arising out of the same cause of action" that could have been litigated. *See Faulkner v. Government Emps. Ins. Co.*, 618 A.2d 181, 183 (D.C. 1992). *Res judicata* bars a subsequent lawsuit if there has been prior litigation: (1) involving the same claims or cause of action, (2) between the same parties or their privies, and (3) there has been a final, valid judgment on the merits, (4) by a court of competent jurisdiction. *See Smalls v. United States*, 471 F.3d 186, 192 (D.C. Cir. 2006).[2]

The doctrine of *res judicata* "plays a central role in advancing the 'purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdiction'." *See Apotex, Inc. v. Food & Drug Administration*, 393 F.3d 210, 217, 364 U.S.App.D.C. 187, 194 (D.C. Cir. 2004) (citing *Montana v. United States*, 440 U.S. 147, 153, 99 S.Ct. 970, 973 (1979)). "To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending

[2] Although Defendant is correct that federal law applies when a federal court decides an issue based on federal subject matter jurisdiction, Plaintiff is correct in that both the District of Columbia and the federal common law apply the same principles of *res judicata*. The elements and requirements are the same under both forms of jurisdiction.

multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *See Montana*, 440 U.S. at 153-54, 99 S.Ct. at 973-74.

A. Plaintiffs' Claims Stem From the Same Claims and/or Causes of Action as the California Litigation.

The actions arise out of the same cause of action if there is a common nucleus of facts. *See Patton v. Klein*, 746 A.2d 866, 870 (D.C. 1999) (citing *Faulkner*, 618A.2d at 183). It is "the facts surrounding the transaction or occurrence which operate to constitute the cause of action, not the legal theory upon which a litigant relies." *See Page v. U.S.*, 729 F.2d 818, 820, 234 U.S.App.D.C. 332, 334 (D.C. Cir. 1984) (citing *Expert Elec., Inc. v. Levine*, 554 F.2d 1227 (2nd Cir. 1977)). Courts "do not require literally identical claims for *res judicata* to apply." *See Capitol Hill Group v. Pillsbury Winthrop Shaw Pittman, LLP*, 575 F.Supp.2d 143, 149 (D.D.C. 2008), *aff'd*, 569 F.3d 485 (D.C. Cir. 2009). "In pursuing this inquiry, the court will consider 'whether 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'." *Id.* (citing *Apotex, Inc., v. FDA*, 393 F.3d 210, 217 (D.C. Cir. 2004) (internal citations omitted)).

There can be little double that this suit arises out of the same nucleus of fact as the California litigation. In fact, Plaintiffs' counsel, Mr. Marcillo conceded during oral argument that "we could have brought claims against McDermott…we could have tried to bring everybody together in the California action. We chose to try to litigate the issues as against the Fuiszes first and see how that [proceeded]."[3] Motions Hearing (July 18, 2013).

[3] Additionally, Plaintiffs never argued in their Opposition that the nucleus of facts were distinct. However, the Court will still undertake an independent and objective analysis.

In Plaintiffs' Amended Complaint in California, they alleged that "John Fuisz provided his father and brother with Theranos Confidential Information." *See, e.g.,* Cal. Am. Compl. ¶ 35. The Amended California Complaint repeatedly refers to the "Law Firm" or "John Fuisz's Law Firm," which is undoubtedly McDermott. *See, e.g.,* ¶¶ 18-24. The foundational argument and underlying fact-pattern was that "John Fuisz breached his fiduciary duties to Plaintiffs, including, without limitation, by furnishing Theranos Confidential Information to his father and brother." *See, e.g., Id.* at ¶¶ 111-141. Similarly, Plaintiffs' present Complaint alleges that "John Fuisz, who was during the relevant time period a partner at MWE, wrongfully obtained Plaintifs' confidential information…and provided that information to his father, Richard C. Fuisz, and his brother, Joseph M. Fuisz." Pl. Compl. ¶1. Additionally, both Complaints are referring to the same time period and the factual allegations asserted are near-identical. *Compare* Pl. Compl. ¶¶ 28-90 and Cal. Am. Compl. ¶¶ 23-81.

During oral arguments, Plaintiffs' counsel argued that *res judicata* does not apply because the claims in the action before this Court are directly against McDermott rather than against John Fuisz, and, therefore, distinct. Although this argument goes primarily to the concept of privity, it is relevant here. For example, counsel argued that in this litigation there are claims for negligent hiring and negligent supervision. Motions Hearing (July 18, 2013). Plaintiffs are correct in stating that these claims were not raised in the California litigation. However, counsel also conceded that the negligent hiring and negligent supervision related solely to the hiring and supervision of John Fuisz. *Id.* The underlying facts of the negligence claims are that John Fuisz allegedly provided confidential information to his family members and breached his duties towards Plaintiffs. As stated above, that is the exact same fact pattern asserted in the California litigation. As explained in *Page*, the relevant inquiry is dependent

upon the facts surrounding the transaction, not the legal theory. Thus, changing the legal theory to negligent hiring/supervision does not change the basic facts alleged. There can be no doubt that the basic facts are the same.

Additionally, the location (Washington, D.C. and California) and the time period in question (2003-2008) are the same. Lastly, Plaintiffs have conceded that the cases could have been brought together as a convenient trial unit. Although the Court will not make conclusions as to Plaintiffs' motivations for bringing the suits separately, it is clear that it was a strategic decision by Plaintiffs, as counsel admitted.[4] Therefore, the two cases share the same nucleus of fact.[5]

In addition, oral arguments were telling. Plaintiffs' counsel cited the California decision by Judge Rodgers on multiple occasions and asked this Court to adopt the findings of Judge Rodgers, who presided over the California litigation. For example, when discussing the statute of limitations counsel stated "Judge Rodgers not only finds that the harm happened at some point before October 28, 2008, she indeed finds…actual injury occurred that same date." Motions Hearing (July 18, 2013). When discussing whether Plaintiff has sufficiently pleaded, Plaintiffs' counsel stated "the California Court, Judge Rodgers, addressed *Iqbal* and *Twombly* in a Motion to Dismiss that was filed there by the Fuiszes and reviewed our allegations at length" in an effort to persuade this Court to adopt Judge Rodgers' findings. *Id.* At one point, Plaintiffs' counsel even stated "part of this actually is going to be tried in the California action…that is subject to a full trial on the merits." *Id.* Given that Plaintiffs are pointing to the California decision as

[4] The Court has been unable to find a valid reason that Plaintiffs did not bring McDermott into the California litigation. It would have been both more cost efficient and time efficient, and prevented the parties from having to bring a case in another jurisdiction. The logical conclusion is that Theranos made a tactical decision to see what happened in the California litigation.

[5] There has been no, nor could there be a, genuine dispute that the decision constituted a final decision on the merits and was decided by a court of competent jurisdiction. Therefore, the Court finds both of those elements of *res judicata* are satisfied.

favorable arguments and stated, without prompting, that some of the issues will be litigated in California, there can be no doubt that these claims stem from the same cause of action as the California litigation.

2. Defendant McDermott is in privity with Former Defendant John Fuisz in the California Litigation.

A privy "is one so identified in interest with a party to the former litigation that he or she represents precisely the same legal right in respect to the subject matter of the case." *See, e.g., Smith v. Jenkins*, 562 A.2d 610, 615 (D.C. 1989). Agents and principals are not ordinarily in privity with each other. *See Major v. Inner City Property Management, Inc.*, 653 A.2d 379, 381 (D.C. 1995) (quoting *Usher v. 1015 N Street. N.W., Cooperative Ass'n*, 120 A.2d 921, 922 (D.C. 1956)). Therefore, "a decision on the merits in an action against the principal is *res judicata* in a later action against the agent only 'if the prior action concerned a matter within the agency'." *Id.* (quoting *Tamari v. Bache & Co. (Lebanon) S.A.L.*, 637 F.Supp. 1333, 1341 (N.D.Ill. 1986)). The orthodox categories of privies are "those who control an action although not parties to it…those whose interests are represented by a party to the action…[and]successors in interest. *See Smith*, 562 A.2d at 615.

In this jurisdiction, courts have articulated that "partnership is a traditional relationship of privity." *See Modiri v. 1342 Restaurant Group, Inc.*, 904 A.2d 391, 399 (D.C. 2006) (citing *A to Z Assoc. v. Cooper*, 161 Misc.2d 283, 613 N.Y.S.2d 512 (N.Y.Sup.Ct. 1993)). Other jurisdictions, applying nearly identical *res judicata* principles, have found attorneys in privity with their law firms. *Beras v. Carvlin*, 313 Fed.Appx. 353, 354-55(2nd Cir. 2008) (applying *res judicata* when Plaintiff sued law firm after suit against former counsel was dismissed).[67]

[6] Plaintiff cites several cases that are inapplicable. First, it was established through oral arguments that John Fuisz was a general partner in McDermott, not a limited partner. Therefore, while it may be true that limited partners have no privity with their partnerships, that issue is irrelevant to the case at hand. Additionally, *Gragg v. Park Ridge*

Limited liability partnerships are a form of general partnership because they fall under the General Partnership provision of the D.C. Code. *See* D.C. Code §§ 29-610.01-03; *see also*, Mark A. Sargent & Walter D. Schwidetzky, *Limited Liability Company Handbook* § 3.19 (2012). In a limited liability partnership, "[a] partner shall not be personally liable, directly or indirectly, by way of contribution or otherwise, for such a debt, obligation, or other liability solely by reason of being or so acting as a partner." *See* D.C. Code § 29-603.06(c).

One of Plaintiffs' primary arguments against privity is that McDermott's interests in this litigation were not fully represented by John Fuisz in the California litigation. When asked by the Court which of McDermott's interests do not line up with John Fuisz's interests, Plaintiffs' counsel proposed a hypothetical in which the California court found an access violation against McDermott without finding John Fuisz liable. Motions Hearing (July 18, 2013). This in turn could lead to direct liability against McDermott.

However, counsel also conceded that this hypothetical was possible only if someone other than John Fuisz provided the information because in the California litigation he pursued the interest that he did not provide the information. *Id.* As Defendant's counsel, Mr. Davidson, pointed out, that hypothetical would open up an unlimited number of possibilities such as Ms. Holmes' email having been hacked or the leak coming from the firm she hired to replace McDermott. *Id.*[8] In addition, Plaintiffs' Complaint states that John Fuisz was the McDermott

---

Mobile Home Court, LLP, No. 10-3313 WL 4459701 (C.D. Ill. Sept. 26, 2011) does not stand for the proposition for which Plaintiff cited it. Rather, the Court in that case failed to find *res judicata* because there was insufficient evidence as to the relationship between the defendants in the various cases. In fact, the *Gragg* court did not even address a single issue relating to partners and partnerships.

[7] The Court is similarly not persuaded by *Carr v. Rose*, 701 A.2d 1065 (D.C. 1997). Although a case from this jurisdiction, the circumstances surrounding the *Carr* case are entirely distinguishable. The *Carr* case involved a merger between two law firms and the effect of a contract entered into by one of the firms before the merger. That case also involved a deceased partner, and his estate, who had joined the firm after the merger. *Carr* is too attenuated factually to be applicable in the case at hand.

[8] Plaintiffs' allegations do not provide a scintilla of proof the information came from McDermott. It is equally possible that one of Theranos' employees sold the information, that a Theranos email was hacked, or an infinite list

employee who leaked Theranos' confidential information. *See, e.g.,* Pl. Compl. at ¶ 57. The Complaint does not refer to any actions by McDermott attorneys or employess other than John Fuisz. Plaintiffs' entire theory against McDermott relies on John Fuisz's alleged misappropriation of confidential information based on the familial relationship with the alleged patent-infringers. It is illogical and purely speculative for Plaintiffs to suggest that somebody else in McDermott supplied the information.[9] The Complaint did not contain any allegations about other McDermott employees besides John Fuisz. Thus, adding new claims of negligent hiring and supervising does not affect this inquiry because those claims are directly contingent upon John Fuisz's liability and wrongdoing.

Additionally, Plaintiffs' counsel conceded in oral argument that "as to the narrow issue whether John Fuisz is providing the information," the interests of John Fuisz and McDermott are identical. *Id.* As the Court has already found that Plaintiff's contention that a McDermott employee other than John Fuisz could have provided the patent information to Richard and Joseph Fuisz is based on nothing but pure speculation, Plaintiffs' statement demonstrates how the interests in both cases are aligned. In addition, the substantive defenses of both John Fuisz and McDermott are the same: "that Theranos 'confidential information' was not misappropriated by John Fuisz" and that the statute of limitations has run on the claims. *See Def. Mot. to Dismiss* at 16. Therefore, the underlying issue is identical and McDermott's interests were entirely represented. Without John Fuisz being guilty of some sort of misconduct, it is inconceivable that McDermott could be liable. [10]

---

of other possibilities. Plaintiffs do not have even a singular email or letter to indicate either John Fuisz or McDermott was involved.

[9] Similarly, the Court does not credit Plaintiffs' argument that there is a dispute over whether John Fuisz was acting within the scope of his employment. Throughout the Complaint Plaintiffs' indicate he was acting within the scope of his employment. *See, e.g.,* Pl. Compl. at ¶¶ 1, 94.

[10] Plaintiffs also argue that John Fuisz did not fully represent McDermott's interest *because* McDermott is a limited liability partnership. As the firm is an LLP, John Fuisz would not face liability even if McDermott were found

This jurisdiction has not conclusively established whether a general partner in a limited liability partnership law firm is in privity with the firm for the purposes of legal malpractice and *res judicata*. However, the *Beras* case articulates that exact principle based on an identical application of *res judicata*. At the very least, this Court is convinced that John Fuisz was in privity with McDermott based on the circumstances. He was a general partner and partnership is a traditional avenue of privity as mentioned in *Modiri*. Furthermore, the interests were identical in both cases because both McDermott and John Fuisz defended on the grounds that John Fuisz did not misappropriate Theranos' confidential information. Plaintiffs' "new claims" such as negligent hiring and representation still stem from the same underlying facts and issues alleged in the California litigation. Both the identical interests and John Fuisz's status as a general partner indicate privity.

Pursuant to the above considerations, the relevant case law, and the pleadings of the parties, Plaintiffs' claims are barred under the doctrine of *res judicata*. This cause of action involves the same nucleus of facts as the California litigation: that Plaintiffs hired McDermott, that John Fuisz worked for McDermott, that John Fuisz took confidential information that belonged to Theranos, that John Fuisz gave the confidential information to his family members, and that the Fuisz family filed a patent thereby damaging Plaintiffs. Additionally, McDermott is in privity with John Fuisz because John Fuisz fully represented McDermott's interest during the California litigation. Lastly, the dismissal in the California litigation was a final, valid judgment on the merits by a court of competent jurisdiction. It would be a waste of judicial resources and

---

liable, unless he was directly liable due to his own actions. Therefore, Plaintiffs argue, John Fuisz had no motivation to protect McDermott's interests because he was protected from liability, assuming that he wasn't directly liable. Of note, even if John Fuisz was working with an accomplice, he would still have direct liability and therefore, McDermott's interests would still overlap. Thus, assuming *arguendo* that John Fuisz had no incentive to defend McDermott's interests, the only way McDermott's interests and John Fuisz's interests do not overlap is if an anonymous person stole the information without John Fuisz's knowledge and gave the information to Richard and Joseph Fuisz behind John Fuisz's back. As the Court has made clear, there is no weight behind this attenuated theory.

unfair to the Defendant if Plaintiffs were entitled to get a second chance based on their strategic decision to not include McDermott in the California litigation. Although this finding conclusively determines the case, the Court will proceed to address the rest of the parties' arguments and make alternative findings.

II. Plaintiffs' Claims Against Defendant Must be Dismissed Because Underlying Claims Against John Fuisz Were Dismissed

When claims against an attorney are dismissed on the merits, a court must dismiss all claims against the attorney's law firm which are premised on the firm's vicarious liability. *See Ficken v. Golden*, 696 F.Supp.2d 21, 30 (D.D.C. 2010). To establish negligence a plaintiff must prove a duty of care owed by the defendant to the plaintiff, a breach of that duty by the defendant, and damage to the interests of the plaintiff, proximately caused by the breach. *See District of Columbia v. Harris*, 770 A.2d 82, 87 (D.C. 2001). "[A] common law claim of negligent supervision may be predicated only on common law causes of action or duties otherwise imposed by the common law." *See Griffin v. Acacia Life Ins. Co.*, 925 A.2d 564, 577 (D.C. 2007). Although this jurisdiction has not ruled conclusively on the matter, it has been strongly suggested that "in an action seeking damages for negligent supervision, the conduct of the servant must be independently tortious." *See Griffin*, at n. 32. (citing *Daka, Inc. v. McCrae*, 839 A.2d 682, 693 (D.C. 2003)("negligent supervision, while an independent tort directed to the conduct of the employer, requires logically antecedent proof of a tort committed by the supervised employee")).

Plaintiffs point to several cases in which the District of Columbia Court of Appeals has upheld a plaintiff bringing separate actions against a law firm directly and an attorney who was a partner with the firm. However, those cases pertained to actions for which the law firm was directly liable. *See Barrett v. Covington & Burling LLP*, 979 A.2d 1239 (D.C. 2009) (plaintiff

sued the firm for hostile work environment). In the case at hand, Plaintiffs' "direct liability" claims still stem immediately from the claims against John Fuisz. Based on *Griffin*, and logic, Plaintiffs are unable to prove a claim of negligent hiring or negligent supervision if there is no determination that any employee/attorney committed any wrongdoing. Plaintiffs' counsel conceded that there can be no finding of wrongdoing against John Fuisz because he was dismissed from the California litigation with prejudice. Motions Hearing (July 18, 2013). Counsel next argued that the direct claims against McDermott could stand because McDermott could be found negligent for making the Theranos confidential information available to an unidentified person, other than John Fuisz, and that unidentified person could have provided the information to the Fuisz family. *Id.* As mentioned previously, this argument lacks credulity, and is based on nothing but pure speculation. First, nowhere in the Complaint is it alleged that anyone that worked for McDermott besides John Fuisz misappropriated confidential information. Secondly, Plaintiffs' entire theory revolves around John Fuisz, therefore, to blame an unspecified other person would discredit the entire case.

In *Ficken*, a law firm assigned an attorney to a six-month *pro bono* rotation in a quasi-prosecutorial role. *Ficken*, 696 F.Supp.2d at 22. In an action against the law firm, the plaintiff alleged improper conduct during a child neglect case; the Court dismissed the initial case against the attorney because of prosecutorial immunity. *Id.* In the latter case against the firm, the Court concluded that the claims against the firm were based solely on the underlying claims against the attorney. *Id.* at 30-31. Dismissal of the underlying claims mandated dismissal against the firm. *Id.* The Plaintiffs in *Ficken* also argued the firm should face liability for its lack of training because that would create direct liability independent from the attorney's liability. *Id.* This argument also failed because without any misconduct on behalf of the attorney, the plaintiffs

could not allege facts that "indicate a causal relationship between Covington's alleged failure to properly train defendant Furse and the injuries suffered by the plaintiffs."[11]

The circumstances of *Ficken* are strikingly similar to the situation at hand. Plaintiffs' claims against John Fuisz are the sole underlying claims against McDermott. Without establishing that John Fuisz did anything wrong, Plaintiffs are unable to prove a breach of duty, and therefore liability, against McDermott for any of the stated claims, "direct" or through vicarious liability.[12] Similarly, Plaintiffs cannot show a causal relationship between McDermott's alleged failure to supervise John Fuisz and any injury if they cannot establish John Fuisz did anything wrong. The case must be dismissed.

III. Plaintiffs' Claims are Barred Under the Statute of Limitations

In determining which jurisdiction's law applies in a tort case, the District of Columbia uses the "governmental interests" analysis, "under which [courts] evaluate the governmental policies underlying the applicable laws and determine which jurisdiction's policy would be more advanced by the application of its law to the facts of the case under review." *See District of Columbia v. Coleman*, 667 A.2d 811, 816 (D.C. 1995) (citing *Hercules & Co. v. Shama Restaurant*, 566 A.2d 31, 40-41 (D.C. 1989)).[13][14]

[11] The *Ficken* Court also noted that this argument was made untimely.
[12] Plaintiffs also argued that they alleged direct liability on the grounds that McDermott did not exercise reasonable care by hiring an employee who previously was accused of misrepresenting client information at a prior law firm. However, Plaintiffs provided far too little information for the Court to consider that allegation as relevant. Plaintiffs did not provide a single detail, did not say if Mr. Fuisz was sanctioned, if he was adjudged, or if McDermott even had, or should have had, knowledge of the incident. Based on Plaintiffs' pleadings, it is an unfounded allegation made years earlier against John Fuisz and bears no weight on McDermott's liability.
[13] The four factors to consider under this analysis are: (1) the place where the injury occurred; (2) the place where the conduct causing the injury occurred; (3) the domicile, residence, nationality, place of incorporation and place of business of the parties; and (4) the place where the relationship is centered. *Id.*
[14] However, because this Court finds that Plaintiffs' claims are barred under the District of Columbia three-year statute of limitations, it is unnecessary to consider whether California's one-year statute should apply instead.

1. Plaintiffs' Claims are not Timely Under the Discovery Rule.

Pursuant to District of Columbia Code § 12-301 (8), actions must be brought within three years "from the time the right to maintain the action accrues." What constitutes the accrual of a cause of action is a question of law. *See Diamond v. Davis*, 680 A.2d 364 (D.C. 1996). "Where the fact of an injury can be readily determined, a claim accrues for purposes of the statute of limitations at the time the injury actually occurs." *See Mullin v. Wash. Free Weekly, Inc.*, 785 A.2d 296, 298 (D.C. 2001). However, "when the relationship between the fact of injury and the alleged tortious conduct [is] obscure," the "discovery rule" applies. *Id*. Under the discovery rule, "a plaintiff's right of action in a legal malpractice case does not accrue until the plaintiff has knowledge of, or by the exercise of reasonable diligence should have knowledge of (1) the existence of the injury; (2) its cause in fact; and (3) some evidence of wrongdoing." *See Ray v. Queen*, 747 A.2d 1137, 1141 (D.C. 2000) (citing *Diamond v. Davis*, 680 A.2d 364, 371 (D.C. 1996)).

"The plaintiff does not have *carte blance* to defer legal action indefinitely if she knows or should know that she *may* have suffered injury and that the defendant *may* have caused her harm." *See Beard v. Edmondson and Gallagher*, 790 A.2d 541 (D.C. 2002) (emphasis added) (discussing and finding inquiry notice). Furthermore, it is not necessary that all or even the greater part of the damages have to occur before the cause of action arises." *See Knight v. Furlow*, 553 A.2d 1232, 1235 (D.C. 1989). A plaintiff is required to exercise reasonable diligence in investigating their potential claim. *See Diamond*, 680 A.2d at 376-81. "That a defendant's actions obscured the relevant facts from a plaintiff is more appropriately taken into account as part of the circumstances to be considered in examining the reasonableness of the plaintiff's diligence." *Id.* at 377.

Plaintiffs argue that "[i]ssuance of the ['612] patent on November 2, 2010 was the first time when Plaintiffs incurred any actual damages." *See Pl. Compl.* ¶ 82. In addition, Plaintiffs maintain that the reason the actual injury occurred at that time was because the '612 patent would prevent them from manufacturing, selling and licensing their technology. Motions Hearing (July 18, 2013). When asked by the Court why there isn't any harm at an earlier date such as the filing of the Fuisz Provisionals, Plaintiffs' counsel stated "the harm [from the Fuisz Provisionals] would arise in terms of the Fuiszes being able to get a priority date from filing a provisional application in 2006." *Id.* Although Plaintiffs are correct that the injury would be greatly exacerbated by the '612 patent, surely there was *some* injury beforehand. When John Fuisz allegedly leaked the confidential information, some sort of injury occurred, albeit slight. Part of what Plaintiffs paid McDermott for was to protect confidential information and therefore, disclosing that confidential information creates an injury. Similarly, the filing of the Fuisz Provisional is an injury because the Fuiszes would then have a priority date for any patents, as counsel conceded. At the very least, the date if injury is definitely prior to the issuance of the '612 patent on November 2, 2010. However, the date of injury is obscure and therefore, the Court will apply the discovery rule.

Plaintiffs state, and the Court takes as true, that they "first became aware of the Fuisz Provisional Patent application, which was similar to and based on Theranos Confidential Information…, in May 2008." *Pl.* Compl. ¶ 73. Plaintiffs continue that "[i]n or about May 2008 and August 2008, Plaintiffs were informed that John Fuisz was a partner at MWE. In or about August 2008, Ms. Holmes attempted to set up a meeting with the MWE's partner." *Id.* at ¶74. That meeting finally took place on September 22, 2008, and Ms. Holmes informed partners at McDermott that Richard and Joseph Fuisz filed the Fuisz Provisionals which "contained

concepts substantially similar to those disclosed in Theranos Confidential Information." *Id.* at ¶ 75. The partners told her they would "look into" the issue. *Id*. at ¶ 76. Yet despite all of those facts, Plaintiffs claim that the October 28, 2008 meeting, during which Ms. Holmes was informed John Fuisz had access to the confidential information and was related to Richard and Joseph Fuisz, was the first time Plaintiffs had inquiry notice, or notice at all. *See Pl. Opposition* at 20-21.[15] Plaintiffs' argument is unconvincing.

As Plaintiffs have made clear, there are many similarities between the Theranos Provisionals and the Fuisz Provisionals. Pl. Compl. ¶¶ 52-69. When Ms. Holmes became aware of the Fuisz Provisionals she contacted McDermott because of those similarities. Therefore, she clearly was aware that there was a potential injury. Plaintiffs' counsel explained that the purpose of the meetings Ms. Holmes attempted to set-up in August, and had in September, was to "rectify" and "look into" the breach of confidentiality which lead to the filing of the Fuisz Provisional, which Ms. Holmes believed infringed upon her inventions. Motions Hearing (July 18, 2013). These facts also establish that Plaintiffs knew, or should have known, the cause of the injury (allegedly McDermott) well before October 25, 2008.[16][17] Although Plaintiffs did not know John Fuisz had access to the confidential information, they should have figured out it was a possibility. It is very difficult to believe that sophisticated parties like Plaintiffs could see that there was an application by the Fuisz family, know someone named John Fuisz worked for the

[15] Additionally, Plaintiffs ask this Court to adopt a footnote in Judge Rodgers' Opinion which states that actual injury occurred on October 28, 2008. Pl's. Opp. at 17 (citing *Theranos, Inc. v. Fuisz Pharma LLC*, 876 F.Supp.2d 1123, 1134 n. 11 (N.D.Cal. 2012)). As Plaintiffs admit, this statement appears to conflict with areas of the opinion that conclude the injury occurred at least before October 28, 2008. *Id.* Judge Rodgers was applying California's one-year statute of limitations period. Therefore, a difference of a few days was immaterial to her conclusion because the dates in question were so far outside of the one-year period. The apparent discrepancies in Judge Rodgers' Opinion were likely unintentional and demonstrate that the footnote was not material to her decision. Thus, it is not binding on this Court.

[16] As explained in Defendant's Motion, the Tolling Agreement was signed on October 25, 2011, therefore, all claims that arose before October 25, 2008 are barred by the three-year statute of limitations. Thus, October 25, 2008 is the relevant date.

[17] Defendant's counsel articulated simply: "if you have to look into or rectify something, you are on inquiry notice that something happened that shouldn't have." Motions Hearing (July 18, 2013).

firm that maintained her confidential information that is contained in the Fuisz Provisional, and not even consider that John Fuisz may have leaked this information. Plaintiffs' attempts to set-up meetings with the firm indicate that Ms. Holmes made the potential connection. As such, there can be no doubt that Plaintiffs, at the least, were on inquiry notice and had discovered the potential wrongdoing. While the cause of action may not have been established with complete certainty, Plaintiffs certainly were on notice that there *may* have been injury, as required under *Beard*.

2. McDermott's Representation of Plaintiffs' Terminated Prior to the October 28, 2008 Meeting.

Under the continuous representation rule, "a client's legal malpractice claim 'does not accrue until the attorney's representation concerning the *particular matter in issue* is terminated.'" *See Bleck v. Power*, 955 A.2d 712, 715 (D.C. 2008) (emphasis added) (citing *R.D.H. Commc'ns, Ltd. V. Winston*, 700 A.2d 766, 768 (D.C. 1997) (adopting the continuous representation rule for legal malpractice claims)). The rule is based on respect for the attorney/client relationship "and the desire, if the client so chooses, to avoid unnecessarily disrupting the representation in which the error occurred." *R.D.H.* at 769.

The *particular matter in issue* is Theranos' patent applications and other patent-related work. Plaintiffs' Complaint clearly articulates that "[i]n or about early 2006, another law firm took over the preparation, filing, and prosecution of subsequent patent applications for Plaintiffs." *Pl. Compl.* ¶ 32. While the Complaint states that from September 22, 2008, until October 28, 2008 Plaintiffs believed McDermott "*might* represent Theranos" in a dispute with the Fuisz family, *Pl. Compl.* ¶ 80 (emphasis added), there is not a single allegation in the Complaint that McDermott actually represented Plaintiffs in patent matters after Plaintiffs hired another firm to replace McDermott in 2006.

During oral argument, Defendant's counsel confirmed that McDermott did not bill Plaintiffs for any of the meetings in 2008.[18] Motions Hearing (July 18, 2013). Furthermore, when the Court asked Plaintiffs' counsel what matters Plaintiffs have paid McDermott to work on since 2006, Plaintiffs' counsel vaguely referred to "regulatory work" and other unrelated matters. *Id.* The Court concludes that Plaintiffs hired a new firm in 2006 to take over the patent application work and replaced McDermott as counsel in those matters specifically. Therefore, McDermott's representation of Plaintiff in the specific matters related to this litigation terminated in 2006. Plaintiffs' Complaint is well outside the three-year statute of limitations.

IV. Plaintiffs' Filing of the Complaint on December 29, 2012 was a Material Breach of the Tolling Agreement

The purpose of the law of contracts is to protect the reasonable expectations of the parties. *See Ben-Zvi v. Edmar Co.*, 40 Cal.App.4th 468, 475 (1995).[19] California courts allow termination "only if [a] breach can be classified as 'material,' 'substantial' or 'total.'" *See Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 195 Cal.App.3d 1032, 1051 (Cal.Ct.App. 1987) (citing *Coughlin v. Blair*, 41 Cal.2d 587 (1953)). A breach is material if "it is so dominant or pervasive as in any real or substantial measure to frustrate the purpose of the undertaking." *See, e.g., Medico-Dental Bldg. Co. v. Horton & Converse*, 132 P.2d 457, 470 (Cal. 1942); *see also Superior Motels, Inc. v. Rinn Motor Hotels, Inc.*, 241 Cal.Rptr. 487, 495 (Cal.Ct.App. 1987). In determining the materiality of contractual breach, the following factors are to be considered:

> (1) The extent to which the injured party will obtain the substantial benefit which he could have reasonably anticipated; (2) the extent to which the injured party may be adequately compensated in damages for lack of complete performance; (3) the extent to which the party failing to perform has already partly performed or made

[18] Defendant's counsel answered because Plaintiffs' counsel was unable to give an answer.

[19] The parties agree that California law unquestionable applies here. The Tolling Agreement states "[t]his Agreement shall be construed in accordance with the laws of the State of California without reference to its conflict of law principals." Mot. at 28; Opposition at 27.

> preparations for performance; (4) the greater or less hardship on the party failing to perform in terminating the contract; (5) the willful, negligent, or innocent behavior of the party failing to perform; and (6) the greater or less uncertainty that the party failing to perform will perform the remainder of the contract.

See Sackett v. Spindler, 56 Cal.Rptr. 435, 441 (Cal.App. 1967).

Some jurisdictions have found early-filing tolling agreement breaches are immaterial. *See Nomura Asset Capital Corp. v. Cadwalader, Wickersham & Taft LLP*, 889 N.Y.S.2d 506 (N.Y.Sup.Ct. 2009) (finding breach immaterial when complaint filed four days before tolling agreement expired). Others have dismissed filings that acted as a breach to a tolling agreement. *See Continental Carbon Co. v. National Union Fire Ins. Co. of Pittsburgh, Pa.*, 2010 WL 4259795 (W.D.Okla. 2010) (dismissing complaint when tolling agreement was breached by one day).

Plaintiffs argue that

> McDermott made a deliberate and strategic decision to reject Theranos' efforts to extend the tolling agreement…McDermott's own actions thus necessitated that Theranos file this action in order to protect its rights. For McDermott to now claim that Theranos's response to McDermott's decision to reuse to extend the Tolling Agreement somehow constitutes a breach is nonsensical.

Opposition at 26.

For Theranos to claim that filing two days early was not a breach because McDermott chose not to extend the agreement is not only inconsistent with the unambiguous terms of the agreement, but completely unsupported under the law. The Tolling Agreement unambiguously stated that "the Tolling Period shall terminate on the earlier of [December 31, 2012] or sixty (60) days after either party gives notice to the other party." *See* Compl. Ex. B ¶3. The Complaint was filed on December 29, 2012. McDermott had every right to not enter any further agreements and not extend the Tolling. Plaintiffs cannot breach agreements simply because they did not get

what they wanted. Plaintiffs' counsel wisely reversed course during oral argument and admitted that the early filing was a breach of the tolling agreement. The dispute is whether the breach was material.

At the outset, the Court notes that the parties are highly sophisticated and represented by reputable counsel. There can be little doubt that the parties carefully considered the Tolling Agreement and negotiated the terms. Plaintiffs agreed to not file suit before December 31, 2012 (after the extensions) and Defendant agreed to toll the statute of limitations starting the date of the Agreement. Thus, it seems apparent that Defendant expected the benefit of not being sued before December 31, 2012. In fact, one of the primary purposes of the entire Tolling Agreement was to place a hold on all suits. Therefore, following *Medico-Dental*, the action blatantly frustrated the purpose of the undertaking.

Based on the first *Sackett* factor, it is impossible for Defendant to now receive the reasonably anticipated benefit. The benefit of not being sued before December 31, 2012 has been lost. In addition, monetary damages cannot adequately compensate McDermott for losing the right to not be sued. The filing of this action is immeasurable from a financial perspective. The fifth factor also sways in favor of Defendant. That Plaintiffs' actions were willful is beyond dispute. As articulated previously, Plaintiffs are sophisticated parties and they made the strategic decision to file two days early and breach the Tolling Agreement. While the Court does not doubt Plaintiffs' counsel's genuineness when he stated "there was no intent to game the system or to gain some sort of tactical advantage", Motions Hearing (July 18, 2013), the fact remains that the filing was willful and intentional.

The third factor supports the Plaintiffs. It cannot be disputed that Plaintiffs partially performed in that the majority of the Tolling Agreement time had expired. However, the date of

the breach is largely irrelevant because the length of the Agreement was negotiated for and given in exchange for consideration. Similarly, Plaintiffs claim that they were merely trying to "protect its rights" appears to be a claim of great hardship. *See* Opposition at 26. During oral argument, Plaintiffs' counsel was unable to articulate what rights were in danger. Motions Hearing (July 18, 2013). If Plaintiffs had concerns about filing on December 31 because it is New Year's Eve, they should not have agreed to that date under the Tolling Agreement they entered. Any potential problems with that specific day are clearly foreseeable, as they would occur annually. Additionally, it is unusual that Plaintiffs chose to file on a Saturday, a non-business day, instead of simply waiting until Monday, December 31, a business day, at which point they would have been in compliance with the Tolling Agreement. Thus, the Court sees little true hardship that required Plaintiffs to breach the Tolling Agreement in a way other than the one provided for in the Agreement.[20]

Defendant has claimed that it was harmed because the equilibrium was unbalanced. McDermott avers it was prevented from taking strategic action such as filing for a declaratory judgment in California or attempting to join the California litigation. Motions Hearing (July 18, 2013); Defendant Reply at 17-18. In response, Plaintiffs argue that "the date Theranos filed its complaint did not have any effect whatsoever on McDermott's position or the arguments it has made in this action" because the California court would not have allowed any of the actions Defendant claimed it could have taken. Opposition at 28-29. This Court is unwilling to speculate as to how the California court would or would not have ruled on a hypothetical action. However, Defendant was prevented from even attempting any action because of the filing of this Complaint. Thus, Defendant was deprived of opportunity that it reasonable anticipated to have

[20] Plaintiffs also pointed out that they provided notice to Defendant of their impending breach. However, that is irrelevant as well. Providing notice did not relieve Plaintiffs of any obligations under the Tolling Agreement, including the clauses related to the proper method of termination.

based on the Tolling Agreement, regardless of whether its efforts would have succeeded. Therefore, Plaintiffs' breach was material. Defendant is entitled to the benefit of their bargain.

However, the Court remains wary of granting specific performance. In the case at hand, dismissing the Complaint would act as an extinguishment of Plaintiffs' claims because the statute of limitations has now expired. That is a harsh remedy for the breach. Because the Court has made findings which result in the dismissal of the Complaint on several other grounds, it is unnecessary to have a lengthy discussion as to whether specific performance is appropriate. Therefore, the Court finds that the breach was material but withholds making a determination of the relevant remedy as moot.

V. Plaintiffs Failed to Plead Facts Upon Which Relief Can be Granted

As with any pleading, a complaint must contain a short and plain statement of the claim for relief, such that it puts the defendant on notice of the claim against him. Super. Ct. Civ. R. 8(a); *see Sarete, Inc. v. 1344 U St. Ltd. P'ship*, 871 A.2d 480, 497 (D.C. 2005). Defendants may contest the legal sufficiency of the pleading by filing a motion to dismiss pursuant to Superior Court Rule 12(b)(6). *See, e.g.*, *Luna v. A.E. Eng'g Servs., LLC*, 938 A.2d 744, 748 (D.C. 2007); *see generally* Super. Ct. Civ. R. 12(b). Upon receipt of a motion to dismiss, the court must determine (1) whether the pleading includes well-pleaded factual allegations, and (2) whether such allegations plausibly give rise to an entitlement for relief. *See Ashcroft v. Iqbal*, 129 S.Ct. 1937, 1949-52 (2009); *see also Mazza v. House Craft LLC*, 18 A.3d 786, 790 (D.C. 2011) (adopting *Iqbal*'s heightened pleading standard). The pleading need not include "detailed factual allegations," but must include "more than an unadorned, the defendant-unlawfully-harmed-me accusation." *Mazza*, 18 A.3d at 790. When considering a motion to dismiss, the court must accept, as true, all of the allegations in the pleading, and construe all facts and inferences in favor

of the non-moving party. *See Murray v. Wells Fargo Home Mort.*, 953 A.2d 308, 316 (D.C. 2008). Allegations must, however, be sufficient "to raise a right to relief above the speculative level," *Clampitt v. Am. Univ.*, 957 A.2d 23, 29 (D.C. 2008); the pleading must provide more than mere labels and conclusions. *Grayson v. AT&T Corp.*, 980 A.2d 1137, 1144 (D.C. 2009). Thus, dismissal is warranted where the complaint "fails to allege the elements of a legally viable claim." *Chamberlain v. American Honda Fin. Corp.*, 931 A.2d 1018, 1023 (D.C. 2007).

To make a legally cognizable claim of breach of fiduciary duty under District of Columbia law, a plaintiff must allege facts sufficient to show (1) the existence of a fiduciary relationship; (2) a breach of the duties associated with the fiduciary relationship; and (3) injuries that were proximately caused by the breach of the fiduciary duties. *See Cordoba Initiative Corp. v. Deak*, 900 F.Supp.2d 42, 48 (2012) (citing *Armenian Genocide Museum & Memorial, Inc. v. Cafesjian Family Found., Inc.*, 607 F.Supp.2d 185) (applying District of Columbia law). Similarly, claims for both negligence and legal malpractice require a showing of (1) the applicable standard of care; (2) a breach of the standard of care; and (3) a causal relationship between the violation and the harm complained of. *See Biomet Inc. v. Finnegan Henderson LLP*, 967 A.2d 662, 64-65 (D.C. 2009) (citing *O'Neil v. Bergan*, 452 A.2d 337, 341 (D.C. 1982) ("[t]he elements of an action for professional negligence are the same as those of an ordinary negligence action.")).

Plaintiffs' pleadings are rife with conclusory statements, as opposed to facts. For instance, Plaintiffs' Opposition argues it pleaded properly because the Complaint alleged that McDermott's actions fell below the requisite standard of care by "failing to maintain the confidentiality of Theranos's proprietary information; and…failing to ensure that its employees continued to meet the standard of care owed to McDermott's clients." Pl. Opposition at 34. The

Complaint consistently makes similar statements such as "[o]n information and belief, John Fuisz was able to wrongfully provide information to his father and brother in violation of…professional duties as a direct result of the failure by MWE to safeguard Plaintiffs' secrets and confidences." Pl. Compl. at ¶ 44. These statements merely allege Plaintiffs' theory, not the facts behind them. Plaintiff does not allege any action taken by John Fuisz or McDermott specifically. Plaintiffs' statements do not state facts as to *how* McDermott failed to maintain the confidentiality of Theranos' information. Simply because attorneys within the firm had access does not mean the firm did not maintain confidentiality. There are no fact-specific allegations plead which support Plaintiffs' conclusory statements.

The Court has already explained why little, if any, weight should be given to Plaintiffs' unsupported allegation that "public records show that John Fuisz had previously been accused of providing a third party's confidential information to his father." *Id.* at ¶ 42. This too proves nothing. There is no claim that John Fuisz was actually guilty of any wrongdoing nor that McDermott should have known of the alleged incidents. Merely because an attorney was previously accused of improper action by a prior client does not mean a law firm is *de facto* negligent in hiring that attorney; the accusations could have been unfounded. It would be a detriment to the profession if a mere allegation, without proof, of wrongdoing permanently tarnished a lawyer's career because no firm would hire him for fear of *de facto* negligence.

Plaintiffs failed to allege facts that support all elements of their claim. In contrast, the complaint in *Deak* alleged that the defendant breached a fiduciary duty by fraudulently misrepresenting the value of a condominium. *Deak*, 900 F.Supp.2d at 48. The complaint specifically alleged a false representation, who made it, when it was made, a knowledge that it was false and the effect of the statements. *Id.* at 47-49. Here, Plaintiffs did not plead any facts

that demonstrate a breach of the duty, a key element to all of their claims. Although Plaintiffs pleaded that "John Fuisz, while a partner at MWE, provided his father and brother with Theranos Confidential Information, which he accessed as a direct consequence of the access that MWE facilitated (and failed to prevent) to Theranos Confidential Information", the pleading is still insufficient. As explained in *Clampitt* and *Grayson*, the Plaintiffs' must allege more than mere allegations and suppositions. While it is true that John Fuisz had access, there are no allegations of how he accessed the information, how he transferred it, when he transferred it, or any similar facts. Put simply, there is simply no factual support that shows John Fuisz did stole the information and provided it to his family beyond the similarities between the patents and access. Plaintiffs have failed to climb above the "sheer possibility" found to be inadequate in *Iqbal*.[21]

The Court sympathizes that Plaintiffs do not know the inner workings of McDermott. However, Plaintiffs failed to plead sufficient facts beyond conclusory statements. Specifically, Plaintiffs did not sufficiently plead a cognizable claim because of the lack of facts regarding any action by McDermott that constituted a breach of duty. Therefore, the case must be dismissed.

Conclusion

For the foregoing reasons, the Court finds that Plaintiffs' claims are barred by the doctrine of *res judicata*. Alternatively, the Court finds that Plaintiffs' claims must be dismissed because the underlying claims against John Fuisz were dismissed, the statute of limitations has expired, and Plaintiffs' failed to sufficiently plead facts upon which relief can be granted. Additionally, the Court finds that Plaintiffs materially breached the Tolling Agreement but does not dismiss the case on that ground.

[21] Further, the Court has already explained why Plaintiffs' statements in oral argument regarding the possibility that some other employee leaked the information are unpersuasive. Their pleadings are solely based on John Fuisz being the wrongdoer and if Plaintiffs' truly claim it was another, anonymous, person then the Complaint would lack the required specificity and still be dismissed for failure to state facts upon which relief can be granted.

Therefore, it is this 2nd day of August 2013, hereby:

ORDERED, that Defendant McDermott's Motion to Dismiss with Prejudice is **GRANTED**; and it is further

ORDERED, that all of Plaintiffs' claims against Defendant are **DISMISSED WITH PREJUDICE.**

SO ORDERED.

CRAIG ISCOE
JUDGE
(Signed in Chambers)

Copies to:
Donald Flexner
Tanya S. Chutkan
Boies, Schiller & Flexner LLP
5301 Wisconsin Ave. N.W.
Washington, D.C. 20015
Counsel for Plaintiffs

Roger E. Warin
Steven K. Davidson
Emily Nestler
Molly Bruder Fox
Steptoe & Johnson LLP
1330 Connecticut Ave, N.W.
Washington, D.C. 20036
Counsel for Defendant