IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

NATALIE E. THOMAS, et al.,	)	
	)	
Plaintiffs,	)	
	)	Case No. 443270-V
v.	)	
	)	
CAMERON MERICLE, P.A., et al.,	)	
	)	
Defendants	)	
	)	

MEMORANDUM OPINION AND ORDER

This matter came before the Court on September 4, 2018 for hearing on Defendant Cameron Mericle, P.A.'s ("Defendant Cameron Mericle") Motion to Dismiss (Docket Entry No. 51) and Defendant Nagle & Zaller, P.C.'s ("Defendant Nagle & Zaller") (collectively, "Law Firms") Motion to Dismiss (Docket Entry No. 49), together with Plaintiffs' combined Opposition (Docket Entry 59) ("Opposition") and Defendants' respective Replies. Plaintiffs appeared through counsel. The Law Firms appeared through counsel. The Court took the Motions under advisement. For the reasons below, the Court will grant the Defendant Law Firms'[1] Motions to Dismiss as to Counts I, IV, V, and VI without prejudice, as to Count II with prejudice, and grant Plaintiffs leave to amend the First Amended Complaint.

Procedural History

Plaintiffs filed their First Amended Complaint and Demand for Jury Trial in this Court on June 1, 2018 (Docket Entry No. 24). The First Amended Complaint alleged six claims: Count I alleged violations of the Maryland Debt Collection Act, Md. Code Ann., Commercial Law §14–

[1] The other two defendants are Pleasant Prospect HOA, Inc. t/ Woodmore and Vineyards Condominium. Their Motions to Dismiss are pending. See Docket Entries 62 and 64.

201 *et seq.* ("MCDCA") against the Law Firms; Count II alleged Negligent Misrepresentation against Law Firms; Count III alleged Breach of Contract against the Law Firms; Count IV alleged Fraud against the Law Firms; Count V alleged Money Had and Received against the Law Firms; and Count VI requested a Declaratory Judgment under the Maryland Declaratory Judgment Act, Md. Code Ann., Cts. & Jud. Proc., § 3-409, against all defendants. Plaintiffs have since abandoned Count III (Breach of Contract).

Plaintiffs Natalie E. Thomas ("Ms. Thomas") and Jahmal E. Delegall ("Mr. Delegall") claim the Law Firms forced them to sign Confessed Judgment Promissory Notes to settle debts for homeowner's association ("HOA") dues. Defendant Law Firms acted on behalf of their clients, Defendant Pleasant Prospect HOA, Inc. t/ Woodmore ("Woodmore") and Defendant Vineyards Condominiums ("Vineyards Condominiums") (collectively, "Creditors"). The Law Firms confessed judgment against Plaintiffs in Maryland District Courts after Plaintiffs allegedly defaulted on the settlement provisions outlined in the Confessed Judgement Promissory Notes. Plaintiffs seek damages for themselves and a putative class of similarly situated plaintiffs. Plaintiffs make these claims against a putative class of similarly situated defendant homeowners' and condominium associations. Certification of both putative classes remains pending.

This Court granted Defendant Law Firms' Motion for Protective Order to Stay Discovery (Docket Entry 38) on June 29, 2018 (Docket Entry 46). Discovery is stayed between Defendant Law Firms and Plaintiffs pending the outcome of the instant motions.

The Allegations in Plaintiffs' First Amended Complaint

Named Plaintiffs are Maryland residents. Am. Compl. ¶¶ 16-17. Ms. Thomas owed HOA dues to Defendant Woodmore and Mr. Delegall owed HOA dues to Defendant Vineyard Condominiums. *See id.* ¶¶ 50, 78. The Law Firms are Maryland law firms, retained by Creditors to collect their debts. *Id.* ¶¶ 10-11.

Natalie E. Thomas

In April 2013, Defendant Cameron Mericle, acting on behalf of Defendant Woodmore, filed suit against Ms. Thomas in the District Court for Prince George's County to recover alleged unpaid HOA dues. *Id.* at ¶ 50. On or about February 22, 2016, Defendant Cameron Mericle threatened to move forward with trial unless Ms. Thomas signed a Confessed Judgment Promissory Note to settle the alleged amount. *Id.* at ¶ 53. Because Ms. Thomas had no other option, she signed the Confessed Judgment Promissory Note on February 22, 2016, and began to make the outlined payments. *Id.* at ¶¶ 56-58. Ms. Thomas made all payments under the Confessed Judgment Promissory Note. *Id.* at ¶ 63. Nonetheless, Defendant Mericle confessed judgment against Ms. Thomas and filed a Complaint for Judgment by Confession, on Defendant Woodmore's behalf, in the District Court of Maryland. *Id.* at ¶ 64.

Jahmal E. Delegall

In June 2015, Defendant Nagle & Zaller, acting on behalf of Vineyard Condominiums, threatened to file a lawsuit against Mr. Delegall to recover alleged unpaid HOA dues unless he signed a Confessed Judgment Promissory Note. *Id.* at ¶ 78. Because he had no other option, Mr. Delegall signed the Confessed Judgment Promissory Note on June 6, 2015, and began to make its outlined payments. *Id.* at ¶ 82-85. On August 12, 2016, Defendant Nagle & Zaller confessed

judgment against Mr. Delegall and filed a Complaint for Judgment by Confession, on Defendant Vineyard Condominiums' behalf, in the District Court of Maryland. *Id.* at ¶ 88.

In both instances, each Confessed Judgment Promissory Note included a clause that: a) appointed an attorney on behalf of the respective Defendant who would have authority; b) without any prior notice to or approval from the consumer; c) to file for entry of a confessed judgment against the consumer; in a way that d) waived the consumer's right to assert a legal defense to any action. *Id.* at ¶ 36. The Law Firms knew or had reason to know that HOA dues arose from a consumer transaction and/or debt. *Id.* at ¶¶ 54, 64.

Standard of Review

The defense of a failure to state a claim upon which relief can be granted may be raised in a motion to dismiss. Md. Rules 2-322(b)(2). In reviewing a motion to dismiss for failure to state a claim upon which relief can be granted, a trial court "must assume the truth of all well pleaded facts and all inferences that can reasonably be drawn from them." *Howard Cty. v. Connolley*, 137 Md. App. 99, 114, 767 A.2d 926, 934 (2001). In order to withstand a motion to dismiss, the plaintiff "must allege facts with specificity; bald assertions and conclusory statements...will not suffice." *Campbell v. Cushwa*, 133 Md. App. 519, 534 (2000) (quoting *Bobo v. State*, 346 Md. 706, 708-09 (1997); *see also Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

In ruling on a motion to dismiss, "a dismissal with prejudice is [generally] ordered in cases where the dismissal is based on an appraisal of the legal sufficiency of the claim. It touches the substantive merits of the case." *Mohiuddin v. Doctors Billing & Mgmt. Sols., Inc.*, 196 Md. App. 439, 452, 9 A.3d 859, 867 (2010). By contrast, dismissal without prejudice is appropriate where "the dismissal is based on some procedural glitch or lapse in the necessary formalities,

something that does not engage the merits *of res judicata* and that can be readily rectified on the next try." *Id.*

Measured against these standards, there are a number of flaws in Plaintiffs' claims. Because some may be capable of remedy, dismissal with prejudice is not entirely appropriate now.

Res Judicata

With respect to all of Plaintiffs' claims, the Law Firms argue that *res judicata* prevents the claims from being pressed here. Specifically, the Law Firms point to Maryland Rule 3-611(d) and argue that because Plaintiffs could have raised legal or factual defenses to the confessed judgments with the filing of a timely motion in the District Court, defenses that would have raised the same issues, Plaintiffs cannot raise such matters through counterclaims now. This argument fails.

While *res judicata* generally bars a litigant from re-raising claims that have been, or could have been, adjudicated in prior litigation, it has little or no applicability where the filing of counterclaims is permissive, not mandatory. Thus, a permissive counterclaim " . . . need not be filed and does not therefore preclude a subsequent action on that claim. . . ." *Rowland v. Harrison*, 320 Md. 223, 233 (1990). As the *Rowland* court explained, " . . . we hold that where the same facts may be asserted as either a defense or a counterclaim, and the issue raised by the defense is not litigated and determined so as to be precluded by collateral estoppel, the defendant in the previous action is not barred by res judicata from subsequently maintaining an action on the counterclaim." *Id.* at 235-36. Here, the Law Firms make no argument regarding collateral estoppel. Accordingly, and because Plaintiffs were not required to package their current claims

as counterclaims in the District Court, *res judicata* does not bar them from presenting these claims now.

Beyond the implications of Maryland's permissive counterclaim rules, it is not clear that Plaintiffs could have pressed all of their claims in the District Court, given the limited nature of its subject matter jurisdiction. To start, Plaintiff's MCDCA claim (Count I), Money Had and Received claim, (Count V), which is a common law action at equity, and Declaratory Judgment claim (Count VI) fall outside the District Court's jurisdiction, regardless of the amount in controversy. *See* Md. Code Ann., Cts. and Jud. Proc., §§ 4-401, 4-402 (a), and 4-402(c). Plaintiffs' remaining claims are actions in tort, but because Plaintiffs seek more than $30,000, these claims also fall outside the District Court's jurisdiction. *See* Md. Code Ann., Cts. & Jud. Proc., § 4-402(a). Thus, even if Plaintiffs had wanted to press their claims in the District Court, they could not have done so.

Count I
(Violation of MCDCA)

On behalf of themselves and the putative class, Plaintiffs allege that the Law Firms' use of Confessed Judgment Promissory Notes and their pursuit of confessed judgments violated the MCDCA because, in doing so, the Law Firms enforced a right with knowledge that the right did not exist. *See* Com. Law. § 14-202(8). The Law Firms, contend, among other things, that their use of Confessed Judgment Promissory Notes does not violate the MCDCA.

Under Maryland's statutory construction rules, the Court must look at the plain meaning of a statute and "[i]f the language of the statute is unambiguously and clearly consistent with the statute's apparent purpose, our inquiry as to the legislative intent ends ordinarily and we apply the statute as written without resort to other rules of construction." *Gardner v. State*, 420 Md. 1,

8 (2011). And while we should "neither add nor delete language" from a statute, we must "not read statutory language in a vacuum, nor do we confine strictly our interpretation of a statute's plain language to the isolated section alone. Rather, the plain language must be viewed within the context of the statutory scheme to which it belongs. *Id.*

The MCDCA protects Maryland consumers from unfair and deceptive debt collection practices. It "protects consumers against certain threatening and underhanded methods used by debt collectors in attempting to recover on delinquent accounts." *Peete-Bey v. Educ. Credit Mgmt Corp.*, 131 F. Supp. 3d 422, 431 (D. Md. 2015) (quoting *Stewart v. Bierman*, 859 F. Supp. 2d 754, 769 (D. Md. 2012)). To prove an MCDCA violation, a plaintiff must prove that 1) defendant is a debt collector; 2) defendant's conduct in attempting to collect a debt was prohibited by the MCDCA; and 3) the underlying debt is "consumer" in nature. *In re Creditrust Corp.*, 283 B.R. 826 (Bank. D. Md. 2002); Paul Mark Sandler & James K. Archibald, Pleading Causes of Action in Maryland 980 (6th ed. 2018).

Focusing primarily on the first and third elements above, the Law Firms contend that they were not acting as "debt collectors" within the meaning of the MCDCA because the debts they are said to have collected did not arise from "consumer transactions." Moreover, their conduct, as alleged, did not violate the MCDCA because there is no suggestion that they actually knew, or recklessly disregarded, that they had no right to collect these debts. On the contrary, say the Law Firms, because the debts arose out of Confessed Judgment Promissory Notes, notes they describe as settlement agreements that are separate from the original consumer transaction, the Law Firms were well within their rights to collect them and, as a consequence, had no knowledge to the contrary. The Law Firms are partially correct.

On plain reading, the MCDCA reaches a debt collector who collects or attempts to "... collect an alleged debt arising out of a consumer transaction." Com. Law § 14-201(b). In turn, a "consumer transaction" is "... any transaction involving a person seeking or acquiring real or personal property, services, money, or credit for personal, family, or household purposes." Com. Law § 14-201(c). Here, both named Plaintiffs allege that the debts at issue arose from unpaid HOA dues, a "consumer transaction." Am. Compl. ¶¶ 54-55, 80-81. Specifically, Ms. Thomas alleges that Woodmore hired Cameron Mericle as its attorney to collect the unpaid dues. *Id.* at ¶ 50. After filing suit against Ms. Thomas for the unpaid debt, Cameron Mericle subsequently "threatened to move forward with trial" unless Ms. Thomas signed an instrument containing a confessed judgment clause. *Id.* at ¶¶ 53, 56. Mr. Delegall alleges that Vineyard Condominium hired Nagle & Zaller as its attorney to collect the debt on its behalf. *Id.* at ¶ 78. Nagle & Zaller "threatened to file suit" unless Mr. Delegall signed an instrument containing a confessed judgment clause. *Id.* at ¶¶ 80-81.

That the Law Firms' may have used Confessed Judgment Promissory Notes to settle their clients' HOA claims does not shield the Law Firms from liability. With the words "arising out of," the MCDCA reaches beyond the original consumer transaction itself to include collection of, and attempts to collect, debts arising from those consumer transactions. Here, the use of a Confessed Judgment Promissory Note, and the pursuit of confessed judgment, are two such attempts. Seen another way, these debts did not arise because the Law Firms went unpaid for legal work they did for the named Plaintiffs, or some other non-consumer transaction. They arose from Ms. Thomas' and Mr. Delegall's purchase of real property and the HOA fees they promised to pay as part of those purchases.

Although the Law Firms point to *McCarthy v. Rosenthal*, No. 95-3188, 1996 WL 249991 (D. Md. 1996), in an effort to overcome the plain meaning of § 14-201(b), *McCarthy* is unpersuasive when viewed in light of subsequent Fourth Circuit case law. McCarthy was sued by a collection agency for an unpaid credit card debt, suit being filed in the Circuit Court for Anne Arundel County. *Id.* at *1. After the Circuit Court entered summary judgment in favor of the collection agency, McCarthy entered into a post-judgment satisfaction agreement with the collection company. *Id.* at *1-2. Thereafter, in the United States District Court, McCarthy claimed that a letter and a telefax sent by the collection agency's attorney to Plaintiff's attorney violated the Fair Debt Collection Practices Act ("FDCPA") because these communications failed to include the now-familiar warnings required by the FDCPA. *Id.* at *2. In dismissing McCarthy's FDCPA claim, the Court concluded that " . . . the debt sought to be collected by [Defendant] arose out of an obligation Plaintiff McCarthy incurred by entering into the separate satisfaction agreement. Plaintiff McCarthy did not incur this obligation to receive consumer goods or services. Thus, his obligation under the agreement is not a "debt" as defined by the FDCPA." *Id.*

More recently, though, the Fourth Circuit has held that the FDCPA applies not only to the original debt, but also to the additional steps a debt collector undertakes in order to collect that debt. *See, e.g.*, *Powell v. Palisades Acquisition XVI, LLC*, 782 F.3d 119 (4th Cir. 2014) (holding that an assignment of judgment is subject to the FDCPA); *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 234 (4th Cir. 2007) (holding that a motion for summary judgment is subject to the FDCPA). This is so because debt collectors who hold an assignment of judgment or a summary judgment continue to " . . . have the right to collect on their judgments, and both must take additional steps to do so." *Powell*, 782 F.3d at 125.

Here, the Law Firms used Confessed Judgment Promissory Notes and then sought confessed judgments. Because use of those notes and pursuit of those judgments are additional steps the Law Firms allegedly took in order to collect HOA dues, both steps are subject to the MCDCA.

For the second element above, Plaintiffs allege the Law Firms "[c]laim[ed], attempt[ed], or threaten[ed] to enforce a right with knowledge that the right does not exist." Com. Law § 14-202(8). Whether this requires "actual knowledge" or "reckless disregard" as the Law Firms contend, or merely "constructive knowledge" as Plaintiffs contend, was the subject of some debate in the parties' papers and at the September 4, 2018 hearing. Specifically, the Law Firms contend that Plaintiffs must allege that the Law Firms actually knew, or recklessly disregarded, that they did not have the right to enforce the debts they pursued. Plaintiffs contend that because the Law Firms did not have the right to pursue those debts, the Law Firms should be deemed to know the law's requirements, and their constructive knowledge is adequate. Ultimately, because Plaintiffs allegations satisfy none of these standards, this is not a debate that must be resolved today.

Some federal authority suggests that a plaintiff must allege and prove actual knowledge or reckless disregard. *See Powell v. Palisades Acquisition XVI, LLC*, 782 F.3d 119, 127-28 (4th Cir. 2014); *Akalwadi v. Risk Management Alternatives, Inc.* 336 F. Supp. 2d 492 (D. Md. 2004) ("The MCDCA is not a strict liability statute."); *Spencer v. Henderson-Webb, Inc.*, 81 F. Supp. 2d 582, 595 (D. Md. 1999). In *Powell v. Palisades Acquisition XVI, LCC*, a non-party judgment preparer incorrectly transcribed an amount on an Assignment of Judgment. The defendant debt collectors filed the Assignment of Judgment against the plaintiff, without knowledge of the incorrect amount. The Fourth Circuit concluded defendants "legitimately believed they had the

legal right" to enforce the Judgment, despite the incorrect transcription, because they did not possess actual knowledge of the error. *Powell*, 782 F.3d at 127-28. This is the standard favored by the Law Firms.

Other federal cases adopt a "constructive knowledge" standard. *See, e.g., Fontell v. Hassett*, 870 F. Supp. 2d 395, 407-08 (D. Md. 2012) ("If this Court were to find Defendants' ignorance about the limitations period was a mistake of law, their professed lack of knowledge would not save them from liability under the MCDCA."); *Bradshaw v. Hilco Receivables, LLC*, 765 F. Supp. 2d 719, 732 (D. Md. 2011) ("The term 'knowledge' in the [MCDCA] does not immunize debt collectors from liability for mistakes of law."). Using this approach, Plaintiffs argue that because use of Confessed Judgment Promissory Notes is prohibited by the Maryland Consumer Protection Act as a matter of law, the Law Firms acted without right even if they had no actual knowledge, or reckless disregard, of having done same.

But, even if constructive knowledge is adequate, such that a lawyer could be held liable under the MCDCA based on constructive knowledge alone, the question here remains constructive knowledge of what? For a lawyer, the CPA does not prohibit the use of Confessed Judgment Promissory Notes to collect on debts arising from consumer transactions in all circumstances. Indeed, § 13-104 exempts lawyers from the CPA's restrictions. Com. Law. § 13-104 ("This <u>title</u> does not apply to: (1) the professional services of a...lawyer.") (emphasis added); *Hawkins v. Kilberg*, 165 F. Supp. 3d 386, 391 (D. Md. 2016); *see also Hogan v. Maryland State Dental Ass'n*, 155 Md. App. 556, 564-65 (finding that dental fillings fall within a dentist's professional services to a client for purposes of CPA exemption). This exemption includes § 13-301's restrictions on using confessed judgment clauses.

Beyond the plain language of the CPA, Plaintiffs look to Maryland Rule 3-611(a) on Confessed Judgment to argue that the Law Firms cannot use confessed judgment clauses, but Rule 3-611(a) does not say this. To be sure, Rule 3-611(a) lays out certain requirements for a confessed judgment complaint, including the provision of an affidavit that, "[t]he instrument does not evidence or arise from a consumer loan as to which a confessed judgment clause is prohibited by Code, Commercial Law Article, § 13-301." As above, though, § 13-301 does not prohibit confessed judgment clauses in all circumstances. Ultimately, then, if the Law Firms are held to have constructive knowledge of anything, it is merely of the fact that when they are providing professional services, the CPA does not generally prohibit them from using confessed judgment clauses.

Without a viable constructive knowledge theory, Plaintiffs are left to the specifics of the Confessed Judgment Promissory Notes they signed and the collection efforts that followed. Plaintiffs allege Mr. Delegall's Confessed Judgment Promissory Note required him to pay interest, late fees, collection costs, and attorneys' fees, all in addition to the HOA dues he owed. Am. Compl. ¶¶ 81-84. The promissory note Ms. Thomas allegedly signed provides that in addition to the overdue HOA dues, Ms. Thomas agreed to pay costs of collection, 18% interest on unpaid amounts, 15% for attorneys' fees, and eighty-five dollars in court costs upon default. *See* Def. Cameron Mericle Mot. to Dismiss Ex. 4. Whether these fees and costs were envisioned by the bylaws and other documents Ms. Thomas and Mr. Delegall signed when they purchased their homes is not evident from the First Amended Complaint.

At this juncture, the Law Firms contend that Plaintiffs should be denied leave to amend their complaint because whatever allegations Plaintiffs may have already made, a challenge to the validity of the underlying debts would not lie under the MCDCA. Our courts have

recognized the viability of MCDCA claims as to the collection of "add-on" fees and costs, i.e., fees and costs not owed under the original debt instrument. *See, e.g., Allstate Lien & Recovery Corporation, et al., v. Stansbury*, 219 Md. App. 575 (2014) (affirming recovery under the MCDCA where debtor challenged addition of a "front-loaded" processing fee to garageman's lien). If the fees and costs above are also "add-ons," and the Plaintiffs can allege with specificity that the Law Firms actually knew they had no right to collect them, or recklessly disregarded same, the named Plaintiffs should, in fairness, have the right to make their MCDCA claims. Accordingly, the First Amended Complaint will be dismissed without prejudice and with leave to amend.

Count II
Negligent Misrepresentation

Plaintiffs allege that Law Firms breached their duty of candor under Rule 19-304.1 of the Maryland Rules of Professional Conduct ("MARPC") when they negligently asserted that Confessed Judgment Promissory Notes arising from consumer transactions were legal and valid instruments. Am. Compl. ¶ 129. Specifically, Plaintiffs allege that Law Firms negligently asserted the legality of Confessed Judgment Promissory Notes, and that Law Firms knew or should have known that Plaintiffs would rely on these erroneous representations. *Id.* at ¶ 130. This claim fails as a matter of law.

Negligent Misrepresentation requires proof that " . . . the defendant, owing a duty of care to the plaintiff, negligently asserts a false statement[,]" among other elements. *See White v. Kennedy Krieger Inst., Inc.,* 221 Md. App. 601, 641 (2015) (quoting cases). Whether such a duty of care exists depends on the kind of loss that follows a failure to exercise such duty. Thus, for economic loss, Plaintiff must allege an intimate nexus between the parties, a nexus that can be

shown by contractual privity or its equivalent. For personal injury, foreseeability is the determining factor of whether a duty of care exists. *Weisman v. Connors*, 69 Md. App. 732 (1987), *rev'd on other grounds*, 312 Md. 428, 540 (1988).

Here, although Plaintiffs mention actual loss, emotional distress, mental anguish, and other damages (see First Amended Complaint at ¶ 132), they do not allege that the Law Firms owed them a duty of care.[2] Nor do they allege any "intimate nexus" between the parties or any foreseeability, such that the court could reasonably infer that a duty of care might exist. Instead, Plaintiffs rest this claim on the MARPC's duty of candor itself, a theory the Rules reject. Specifically, in the preamble, the Rules provide that "[v]iolation of a Rule does not itself give rise to a cause of action against an attorney nor does it create any presumption that a legal duty has been breached. . . . The [Rules] are not designed to be a basis for civil liability[,]" but leave open the possibility that " . . . in some circumstances, an attorney's violation of a Rule may be evidence of breach of the applicable standard of conduct." MARPC 19-300.1(20).

Ultimately, Plaintiffs provide no authority for the proposition that one may proceed on Negligent Misrepresentation in the absence of a duty of care, nor can the court identify any. Accordingly, this claim will be dismissed with prejudice.

<u>Count IV</u>
(Fraud)

Plaintiffs next allege that Law Firms made false representations to the Plaintiffs over the validity and enforceability of the Confessed Judgment Promissory Notes. Am. Compl. ¶ 142. A

---

[2] Given that the Law Firms owed a duty of care to their own clients, Woodmore and Vineyards Condominiums, it is difficult to imagine how the Law Firms could simultaneously owe a duty of care to their clients' opponents.

cause of action for fraud requires 1) the defendant made a false representation to the plaintiff; 2) the falsity was known to the defendant or that the representation was made with reckless disregard for its truth; 3) the defendant made the representation to defraud the plaintiff; 4) the plaintiff relied on the misrepresentation and had a right to rely on it; and 5) the plaintiff suffered compensable injury from that misrepresentation. *Hoffman v. Stamper*, 385 Md. 1, 28 (2005); *Alleco Inc. v. The Harry & Jeanette Weinberg Found., Inc.*, 340 Md. 176, 195 (1995) (quotation omitted). These facts must be proven with "certainty and particularity." *Edison Realty Co. v. Bauernscub*, 191 Md. 45, 461 (1948).

This ordinarily requires that a plaintiff "identify who made what false statement, when, and in what manner (i.e., orally, in writing, etc); why the statement is false; and why a finder of fact would have reason to conclude that the defendant acted with scienter (i.e., that the defendant either knew that the statement was false or acted with reckless disregard for its truth) and with the intention to persuade others to rely on the false statement." *McCormick v. Medtronic, Inc.*, 219 Md. App. 485, 528 (2014). Moreover, fraud must be established by clear and convincing evidence. *Mattingly v. Mattingly*, 92 Md. App. 248, 263 (1992) (citing *Lackey v. Bullard*, 262 Md. 428, 433 (1971)).

Plaintiffs' allege that the Law Firms knew and/or recklessly disregarded that the Confessed Judgment Promissory Notes were illegal, unenforceable, and void. Am. Compl. ¶¶ 143-44. Plaintiffs continue that they relied "to their detriment on the [Law Firms'] misrepresentations" and suffered actual, emotional, and other damages as a result. *Id.* at ¶ 147. These allegations generally challenge Law Firms' conduct, but do not provide the specificity required to allege fraud. Plaintiffs must provide <u>actual facts</u>, not general allegations, that defendants knew that the statements were false, or acted with reckless disregard to the truth.

Accordingly, the Court will grant the Law Firms' Motion to Dismiss with respect to this claim, with leave for Plaintiffs to amend.

Count V
(Money Had and Received)

Plaintiffs next allege a claim for Money Had and Received against the Law Firms. Money Had and Received arises "whenever the defendant has obtained possession of money which, in equity and good conscience, he ought not to be allowed to retain" or, "...where the defendant receives the money as a result of a mistake of law or fact and did not have a right to it." *Benson v. State*, 389 Md. 615, 652-53 (2005).

Here, Plaintiffs allege that Law Firms knew that the Confessed Judgment Promissory Notes were illegal, and, by doing so, Law Firms came into possession of money they had no right to at law. Am. Compl. ¶¶ 150-51. They continue that it would be inequitable for Law Firms to retain any such monies. *Id.* at ¶ 151. Again, these allegations generally challenge Law Firms' retention of money, but do not assert *how* Law Firms came into possession of money without a legal right to do so. Without specific facts about the amounts the Law Firms wrongfully retained, Plaintiffs cannot state a claim for Money Had and Received. As above, the Court will grant Law Firms' Motion to Dismiss with respect to this claim, with leave for Plaintiffs to amend.

Count VI
(Maryland Declaratory Judgment Act)

Plaintiffs request the Court to enter a Declaratory Judgment declaring the rights of Plaintiffs and the Law Firms regarding future use of confessed judgment promissory notes. The Maryland Uniform Declaratory Judgment Act permits a court to enter declaratory judgment

where, among other things, an actual controversy exists between the contending parties. Md. Code Ann., Cts. & Jud. Proc., § 3-409.

Here, with the granting of Law Firms' Motions, there is no current actual controversy between the Plaintiffs and the Law Firms. As a consequence, this claim will be dismissed ~~as well~~ as to the Law Firms. In the event that Plaintiffs elect to amend their complaint, they may re-plead this claim.

ORDER

For the above reasons, it is this 4th day of October, 2018, by the Circuit Court for Montgomery County, Maryland, hereby

ORDERED, that Defendant Law Firms' Motions to Dismiss (Docket Entries 49 & 51) are **GRANTED** as set forth below; and it is further

ORDERED, that Counts I, IV, V, and VI of Plaintiffs' First Amended Complaint (Docket Entry 24) are dismissed without prejudice, with leave to amend within 20 days of the docketing of this Memorandum Opinion and Order; and it is further

ORDERED, that Count II of Plaintiffs' First Amended Complaint (Docket Entry 24) is dismissed with prejudice.

The Honorable Anne K. Albright
Judge
Circuit Court for Montgomery County,
Maryland