IN THE SUPERIOR COURT OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

MICHAEL HUFFINGTON	)	
	)	
Plaintiff,	)	
	)	
v.	)	C.A. No. N11C-01-030 JRJ CCLD
	)	
T.C. GROUP, LLC, THE CARLYLE GROUP, CARLYE CAPITAL CORPORATION, LTD., CARYLE INVESTMENT MANAGEMENT LLC, and DAVID M. RUBENSTEIN,	)	
	)	
Defendants.	)	

OPINION

Date Submitted: January 19, 2012
Date Decided: April 18, 2012

Upon T.C. Group, LLC, the Caryle Group, Carlyle Investment Management, LLC, and David M. Rubenstein's Motion to Dismiss Converted to Motion for Summary Judgment: **GRANTED in part** and **DENIED in part.**

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Kurt M. Heyman, Esq. and Melissa N. Donimirski, Esq., Proctor Heyman LLP, 300 Delaware Avenue, Suite 200, Wilmington, DE 19801, Attorneys for Defendant Carlyle Capital Corporation, Ltd.

Jurden, J.

I. INTRODUCTION

Before the Court is Defendants T.C. Group, LLC, the Carlyle Group, Carlyle Investment Management, LLC, and David M. Rubenstein's Motion to Dismiss converted to a Motion for Summary Judgment.[1] Plaintiff Michael Huffington seeks to recover $20 million from Defendants for a failed investment. Defendants argue that several procedural and substantive defects in Huffington's claims require their dismissal.

Defendants argue that Huffington's primary claim, which he makes under the Massachusetts "Blue Sky" securities fraud statute,[2] is time-barred.[3] Defendants also argue that Huffington's Blue Sky claim and his unfair trade practices claim[4] are lacking as a matter of law because both claims hinge on statements that the Defendants allege are not factual, false, or material.[5] Defendants contend that the statements at issue amount to "mere puffery," and

[1] Carlyle Capital Corporation, Ltd. ("CCC") filed a Motion to Extend Time to Answer on June 27, 2011. (Trans. ID. No. 38363238). CCC indicates that it is currently bankrupt and in the process of compulsory liquidation on the Island of Guernsey, Channel Islands. *Id*. at ¶ 1. Since March 17, 2008, CCC "has been controlled by Guernsey court appointed Joint Liquidators . . . ." *Id*. In support of its Motion to Extend, CCC claims that: (1) service of the Complaint was invalid; (2) "the proper course would be for him to lodge a proof of debt with the Joint Liquidators . . ."; and (3) if the Court dismisses Huffington's claims against the "Carlyle Defendants," it necessarily follows that Huffington's claims would also fail as to CCC. *Id*. at ¶¶ 6-7. The Court granted CCC's Motion on July 15, 2011. (Trans. ID. No. 38722203). Consequently, CCC has thirty days after the Court issues a ruling on the "Carlyle Defendants" Motion to respond to Michael Huffington's Complaint.

[2] Mass. Gen. L. ch. 110A, § 410(e).

[3] Memorandum of Law in Support of Motion to Dismiss by Defendants TC Group, LLC, The Carlyle Group, Carlyle Investment Management LLC, and David M. Rubenstein ("Defs.' Mot. to Dismiss") (Trans. ID. No. 37459810) at 9.

[4] Huffington alleges that Defendants violated the Massachusetts Consumer Protection Act, Massachusetts General Laws chapter 93A, §11.

[5] Defs.' Mot. to Dismiss at 10.

thus, as a matter of law, are not actionable misrepresentations under the Blue Sky statute or the unfair trade practices statute.[6] Defendants point out that in addition to the statements, they provided a detailed written disclosure to Huffington outlining the nature of the investment, including its risks.[7] Next, Defendants argue that Huffington lacks standing to bring the Blue Sky claim because Huffington did not purchase the securities at issue.[8] Rather, a trust of which Huffington was the sole beneficiary purchased the securities at issue. Last but not least, Defendants assert that Huffington's unfair trade practices claim fails due to a contractual choice of law provision and because it does not sufficiently allege the falsity of any post-investment statements on which it is based.[9] For the reasons that follow, Defendants' Motion to Dismiss converted to a Motion for Summary Judgment is **GRANTED in part** and **DENIED in part**.

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[6] *Id*.

[7] *Id*. This written disclosure was a Private Placement Memorandum, which expressed the Defendants' intention to use extensive leverage in managing the investment. *Id*. at 1.

[8] *Id*.

[9] *Id*.

II. BACKGROUND

A. *The Parties*

Huffington is a former congressman with prior investment experience who resides in Boston, Massachusetts.[10] He claims that the Defendants[11] convinced him to invest $20 million by making misrepresentations as to the nature of the investment, specifically, that the investment was not as conservative as Defendants initially promised.[12] T.C. Group, LLC ("the "T.C. Group") is a limited liability company organized and existing under the laws of the State of Delaware. The T.C. Group's principal place of business is in Washington, D.C.[13] The Carlyle Group ("Carlyle") holds itself out as a private partnership owned by Carlyle senior management and two institutional investors.[14] Carlyle describes itself as an association of entities affiliated with the T.C. Group.[15] The Carlyle Capital Corporation, Ltd. ("CCC or "the Fund") is a limited company registered under the

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[10] For example, Huffington states in his Complaint that he told Rubenstein he "generally seeks a much lower return on his investments in order to lower his investment risk, about which he was very wary." Pl.'s Comp. at ¶ 13. Huffington also described himself as having a "conservative investment philosophy." Pl.'s Ans. Br. at 1. Huffington also does not refute Defendants' statement that Huffington is a "wealthy, experienced investor . . . ." Defs. Mot. at 1.

[11] Huffington's claim also extends to CCC as an entity affiliated with Defendants.

[12] *See generally* Pl.'s Complaint ("Pl.'s Comp.") (Trans. ID. No. 35172252).

[13] Pl.'s Comp. at ¶ 2.

[14] *Id*. at ¶ 3.

[15] *Id*.

laws of the Island of Guernsey, Channel Islands.[16] CCC is responsible for issuing the securities at issue in this case.[17] Carlyle Investment Management, LLC ("CIM") is a limited liability company organized and existing under the laws of the State of Delaware.[18] Like the T.C. Group, CIM maintains its principal place of business in Washington, D.C. CIM acted as the investment manager for the Fund, and charged management and incentive fees in return for its services.[19] CIM is affiliated with the T.C. Group and is part of Carlyle.[20] David M. Rubenstein is a principal of one or more of the corporate defendants named above, including Carlyle, for which he served as a Founder and a Managing Director.[21] Huffington alleges that all of these entities, acting together, solicited his investment in the Fund.[22]

B. *Procedural Background*

On July 19, 2009, Huffington filed a complaint in the Massachusetts Superior Court, Suffolk County.[23] He brought claims under Massachusetts

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[16] *Id*. at ¶ 4.

[17] *Id*.

[18] *Id*. at ¶ 5.

[19] *Id*.

[20] *Id*.

[21] *Id*. at ¶ 6.

[22] *Id*. at ¶¶ 2-6.

[23] *Id*. at ¶ 7.

General Laws chapter 110A, §410 (Count I of the present Complaint, the "Blue Sky" securities claim), common law negligent misrepresentation,[24] and Massachusetts General Laws chapter 93A, §11 (Count III of the Complaint, the unfair trade practices claim).[25] On July 28, 2009, Defendants removed the complaint to Federal District Court for the District of Massachusetts (the "District Court").[26]

On September 25, 2009, Defendants moved to dismiss the complaint for improper venue, arguing that the forum selection clause in the Subscription Agreement signed by both parties established that Delaware courts have exclusive jurisdiction over any disputes involving the Subscription Agreement.[27] On February 19, 2010, the District Court dismissed Huffington's complaint without prejudice, holding that the forum selection clause was enforceable, and thus Huffington was required to bring his claims in Delaware.[28] Rather than file a complaint in Delaware, Huffington appealed the District Court's decision to the

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[24] Huffington dropped this claim from his Complaint.

[25] Pl.'s Comp. at ¶ 7.

[26] *Id*. at ¶ 8.

[27] The Subscription Agreement states: "The courts of the State of Delaware shall have exclusive jurisdiction over any action, suit or proceeding with respect to this Subscription Agreement...." Defs.' Mot. to Dismiss, Exhibit 5, at 11.

[28] Pl.'s Comp. at ¶ 9; *Huffington v. T.C. Group, LLC*, 685 F.Supp.2d 239, 241 (D. Mass. 2010) (citing Def.'s Ex. 6 at 11).

United States Court of Appeals for the First Circuit on April 7, 2010.[29] While waiting for the First Circuit's decision, Huffington filed the instant complaint on January 4, 2011.[30] The First Circuit subsequently affirmed the District Court's decision on February 25, 2011.[31]

C. *Factual Background*

Huffington first learned of Carlyle on July 4, 2006 when a mutual friend introduced him to Carlyle's founder, principal, and managing agent, David Rubenstein.[32] The two discussed Carlyle's investment products and Rubenstein described Carlyle to Huffington as a firm that invested in private equity.[33] Rubenstein represented to Huffington that Carlyle "tried to return 20% per year on its investments."[34] Because of Huffington's self-described "conservative" investment philosophy, he initially expressed reservations about investing in private equity-based funds.[35] As their conversation concluded, Rubenstein

[29] Court of Appeals for the First Circuit Docket 10-1405, HUFFINGTON v. T.C. GROUP, LLC, ET AL.

[30] Pl.'s Comp.

[31] *Huffington v. T.C. Group, LLC*, 637 F.3d 18 (1st Cir. 2011).

[32] Plaintiff's Answering Brief in Opposition to Certain Defendants' Motion to Dismiss ("Pl.'s Ans. Br.") (Trans. ID. No. 37974069) at 1.

[33] Pl.'s Comp. at ¶ 13.

[34] *Id*.

[35] *See id*.

indicated that he would look for appropriate investment products consistent with Huffington's preference for low risk investments.[36]

In follow up to that initial meeting, Huffington and Rubenstein met in Boston, on October 20, 2006 to discuss investment options.[37] It was during this meeting that Rubenstein allegedly told Huffington that Carlyle had a conservative investment strategy and that Carlyle had a low-risk investment vehicle ("the Fund") that matched Huffington's current investment strategy.[38] Rubenstein provided Huffington with literature about the Fund that Huffington alleges expressly represented and explained Carlyle's conservative investment strategy.[39] Included in materials Rubenstein provided to Huffington was a printed power point presentation entitled, "An Overview of the Carlyle Group."[40] Huffington alleges that not once during this entire meeting did Rubenstein ever mention that the Fund would be leveraged, let alone heavily leveraged.[41] According to Huffington, after Rubenstein gave his assurances that the Fund did not invest in private equity, Huffington was under the impression that the risk profile of the Fund was similar

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[36] *Id*. at ¶ 14.

[37] *See id*. at ¶ 19.

[38] Pl.'s Ans. Br. at 1; Pl.'s Comp. at ¶¶ 19-20.

[39] Pl.'s Comp. at ¶ 21.

[40] Pl.'s Ans. Br. at 2. The overview stated, among other things, that Carlyle: (a) used a "conservative" investment strategy, (b) did "not chase the latest trends," (c) favored "consistent results," and (d) avoided over leverage. *Id*. at 2, n. 2.

[41] Pl.'s Comp. at ¶¶ 21-22.

to that of a money market fund.[42] Huffington claims that Rubenstein failed to mention the use of leverage, something that Rubenstein knew, or should have known, would be "material and critical to Huffington's investment decision: namely that contrary to Rubenstein and Carlyle's promise of [a] conservative investment strategy, Huffington's investment would be heavily leveraged."[43]

Following their October 2006 meeting, Rubenstein sent a letter to Huffington on October 24, 2006 encouraging him to invest in Carlyle because the "downside" for the investment was "very limited."[44] Huffington initially planned to invest $5 million in the Fund, but his investment increased to $20 million when John Stomber, who "headed the fund," provided encouraging remarks, which included statements that the Fund's directors and affiliates of CIM had invested approximately $64 million of their own money in the Fund.[45] Stomber provided further assurances by telling Huffington that one of the Fund's co-founders and managing directors of Carlyle, a former colleague of Huffington's, also invested $20 million in the Fund.[46] Upon hearing assurances from both Rubenstein and Stomber, Huffington finally committed to investing $20 million in the Fund on

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[42] *Id*. at ¶ 20.

[43] Pl's Ans. Br. at 2 (citing Pl.'s Comp. at ¶¶ 21-22).

[44] Pl.'s Comp. at ¶ 23. The Fund's composition was mainly residential mortgage-backed securities issued by the Federal National Mortgage Association and the Federal Home Loan Mortgage Corporation. Pl.'s Ans. Br. at 2, n. 3.

[45] Pl.'s Comp. at ¶ 31; Pl.'s Ans. Br. at 2, n. 4.

[46] *Id*.

January 9, 2007.[47] Huffington maintains that neither Rubenstein nor Stromber ever informed him that the Fund planned on leveraging the securities before signing the Subscription Agreement.[48]

After committing to the investment, Huffington attended a pre-investment meeting with Stomber and other Fund representatives on January 26, 2007.[49] He claims that at this meeting he learned for the first time that Defendants leveraged the fund.[50] Stomber assured Huffington that he need not be concerned with the Fund's risk profile.[51] Huffington claims that in reliance on Stomber's assurance, he wire transferred $20 million of his own funds to Carlyle on February 28, 2007.[52]

Over the next few months, Stomber continued to assure Huffington about the health of the fund. For example, on August 13, 2007, Stomber responded by email to an inquiry from Huffington and reassured him that his investment was safe and conservative.[53] Huffington alleges that Stomber made this representation even though the market had begun to decline, causing the Fund's performance to

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[47] Pl.'s Comp. at ¶ 32-33. Huffington used the Lanai Living Trust, a trust established by Huffington with his own assets, to finance the investment. Pl.'s Ans. Br. at 2, n. 4.

[48] Pl.'s Comp. at ¶¶ 22, 33.

[49] *Id*. at ¶ 34.

[50] *Id*.

[51] *Id*.

[52] *Id*. at ¶ 35.

[53] *Id*. at ¶ 39.

suffer.[54] The decline in the market caused the Fund to suffer because the mortgage-backed securities that made up a majority of the Fund began to decline as well.[55] Although the Fund was experiencing financial difficulties, Stomber nevertheless assured Huffington that the Fund was "in the black" and that his principal investment would be fully protected if held to maturity.[56] Huffington alleges that these statements were misleading.[57] On October 19, 2007, Huffington inquired as to whether the Fund's holding were affected by a downgrade on residential mortgage-backed securities.[58] Stomber reassured Huffington by email that the securities "have NO credit risk."[59]

The Fund's performance continued to flounder, and on March 5, 2008, CCC issued a press release detailing its woes.[60] Specifically, CCC announced that since filing its annual report in 2007, the Fund had leveraged its $670 million in equity thirty-two times in order to finance a $21.7 billion portfolio of residential mortgage-backed securities.[61] Eleven days later, on March 16, 2008, Carlyle

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[54] *Id*. at ¶ 40.

[55] *Id*; Pl.'s Ans. Br. at 3, n. 6.

[56] Pl.'s Comp. at ¶ 44.

[57] *Id*. at ¶ 45.

[58] *Id*. at ¶ 46.

[59] *Id*.

[60] *Id*. at ¶ 51.

[61] *Id*. at ¶¶ 51-52.

terminated the Fund.[62] Before doing so, Rubenstein called Huffington on March 14, 2008 to advise him of the Fund's impending demise. During this call, Rubenstein urged Huffington to maintain his investment, even though at the time the "share price dropped from $19 per share to $0.35 per share, a decrease of 98.1 percent" from where Huffington purchased the shares in 2007."[63] Bad news abound, Huffington claims that Rubenstein assured him that he would recover his investment.[64]

III. STANDARD OF REVIEW

In light of documents presented by Defendants with their Motion to Dismiss, which the Court deems are outside of the pleadings, the Court has converted Defendants' Motion to Dismiss to one for summary judgment and provided the parties with an opportunity to submit additional materials "pertinent to a Rule 56 Motion for Summary Judgment . . . ."[65]

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[62] Pl.'s Ans. Br. at 4.

[63] Pl.'s Comp. at ¶¶ 60, 62.

[64] *Id*. at ¶ 60.

[65] *See* The Court's November 29, 2011 letter to the parties regarding Defendants' Motion to Dismiss (Trans. ID. No. 41122470) (citing Sup. Ct. Civ. R. 12(b) which provides: "If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleadings to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the Court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56."). Defendants opted not to submit any additional materials. *See* Defendants' December 7, 2011 Letter to the Court (Trans. ID. No. 41275328) ("We do not intend to submit any additional documents at this time. We believe that Defendants [will] prevail when the Complaint is considered in conjunction with the materials properly before the Court – in the context of a motion to dismiss or a motion for summary judgment."). Huffington submitted affidavits and exhibits on December 23, 2011. (Trans. ID. No. 41563372). Defendants responded by writing a letter to the Court, stating, "Our view is that Plaintiff's submissions, even under

When considering a motion for summary judgment, the Court's primary task is to examine the record to determine whether genuine issues of material fact exist.[66] The Court views the record in a light most favorable to the non-moving party, and the Court will only grant summary judgment if the Court determines that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law.[67] If the record reveals that material facts are in dispute, or if the factual record is lacking so that the Court cannot apply the law, then summary judgment will not be granted.[68]

IV. DISCUSSION

A. *Huffington's Blue Sky Claim*

Huffington makes his first claim pursuant to the Massachusetts "Blue Sky" securities fraud statute.[69] Defendants allege that this claim is barred by the statute of limitations.[70] Generally, courts apply the statute of limitations of the state

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n. 65 continued . . . a summary judgment standard, fail to raise a genuine issue of material fact, and therefore, summary judgment should be granted in Defendants' favor as a matter of law." Defendant's December 29, 2011 Letter to the Court (Trans. ID. No. 41609804) at 1. Defendants also informed the Court of their intention to file a response to Plaintiff's submissions. *Id*. Defendants filed a response to Huffington's submissions on January 6, 2012. Defendants' Response to Huffington's Rule 56 Submissions (Trans. ID. No. 41737022). No further submissions have been provided to the Court.

[66] *Alta Berkely VI C.V. v. Omneon, Inc.*, 2011 WL 2923884, at *3 (Del. Super. 2011) (citing *Oliver B. Cannon & Sons, Inc. v. Dorr-Oliver, Inc.*, 312 A.2d 322, 325 (Del. Super. 1973)).

[67] *Id*.

[68] *Id*. (citing *Ebersole v. Lowengrub*, 180 A.2d 467, 470 (Del. 1962)).

[69] Mass. Gen. Law. ch. 110A, §410(e).

[70] Defs.' Mot. to Dismiss at 10.

where the plaintiff's alleged injury occurred, however, Delaware's borrowing statute creates an exception to the rule.[71] If the cause of action arose outside of Delaware, Delaware's borrowing statute provides, in pertinent part that:

> an action cannot be brought to enforce such cause of action after the expiration of whichever is shorter, the time limited by the law of this State, or the time limited by the law of the state . . . where the cause of action arose, for bringing an action upon such cause of action.[72]

The clear and unambiguous terms of the Delaware borrowing statute require the Court to apply "the shorter of the Delaware statute of limitations or the statute of limitations of the state where the cause of action arose . . . ."[73] The Massachusetts Blue Sky statute provides for a four year statute of limitations, while Delaware's corresponding statute provides for a three year statute of limitations.[74] Defendants argue that because the Delaware statute of limitations is shorter, it applies.[75] Huffington disagrees, arguing that his Blue Sky claim should not be time-barred because Defendants are judicially estopped from arguing that his claim is time

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[71] *Delargy v. Hartford Accident & Indem. Co.*, 1986 WL 11562, at *2 (Del. Super.) ("The Delaware borrowing statute is an exception to the common law rule that the law of the forum governs in matters relating to the statute of limitations.").

[72] 10 *Del. C.* § 8121. In addition to applying the shorter of the two limitations periods, the Court also applies any accrual and tolling rules of the applicable state. *Frombach v. Gilbert Assocs., Inc.*, 236 A.2d 363, 364-65 (Del. 1967).

[73] *Burrell v. Astrazeneca LP*, 2010 WL 3706584, at * 3 (Del. Super.) (quoting *Elmer v. Tenneco Resins, Inc.*, 698 F.Supp. 535, 539 (D. Del. 1988)).

[74] *See* Mass. Gen. Laws ch. 110A, § 410(e); 6 *Del. C.* § 73-605(e). Both statutes also state that the claim accrues on the date the contract is signed. *Id.*

[75] Defs.' Mot. to Dismiss at p. 11.

barred or, in the alternative, Massachusetts substantive law governs.[76] Huffington also argues that the Delaware borrowing statute is inapplicable because there are no forum shopping concerns in this matter.[77] Lastly, Huffington maintains that because the District Court dismissed his claim on a "procedural technicality," the Delaware Savings Statute should not apply.[78]

1. *Judicial Estoppel*

"Judicial estoppel acts to preclude a party from asserting a position inconsistent with a position previously taken in the same or earlier legal proceeding,"[79] and "also prevents a litigant from advancing an argument that contradicts a position previously taken that the court was persuaded to accept as the basis for its ruling."[80] To establish judicial estoppel, a party must show that the opposing party took a position that "contradicts another position that the litigant previously took *and* the Court was successfully induced to adopt in a judicial ruling."[81]

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[76] Pl.'s Ans. Br. at p. 6, 11.

[77] *Id*. at p. 12.

[78] *Id*. at p. 13.

[79] *Motorola Inc. v. Amkor Tech.*, 958 A.2d 852, 859 (Del. 2008).

[80] *Id*.

[81] *Id.* at 859-60 (quoting *Siegman v. Palomar Med. Techs., Inc.*, 1998 WL 409352, at *3 (Del.Ch.) (emphasis in original)).

Huffington claims that Defendants represented to the District Court that transferring the case to the District of Delaware would not present a statute of limitations issue.[82] According to Huffington, "Defendants consistently and repeatedly took the position that Huffington's claims would not be barred by the statute of limitations if the forum selection clause were enforced and Huffington had to litigate his claims in Delaware state courts."[83] In support of this argument, Huffington cites to the following exchange between the District Court and the attorneys in the Massachusetts action:[84]

> **The Court:** Don't I have the right to transfer it so we're not starting all over again?
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> **Mr. Van Kirk:** You have the right to transfer the case, your Honor. No party moved for a transfer, but you have the right to.
>
> **The Court:** Well, I've done this before, right?
>
> **Ms. Mirmira:** Yes, your Honor. In the Nisselson case, you noted that because the defendants did not bring a transfer motion, that it would be analyzed under the First Circuit's Silva jurisprudence, and you dismissed in favor of the forum selection clause in that case, and that's how the First Circuit handles this –
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> **The Court:** Well, would you want in the alternative a transfer?
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> **Mr. Brown:** Well, we would prefer to be in Federal Court rather than state court, but I think the way –

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[82] Pl.'s Ans. Br. at 7.

[83] *Id.*

[84] Phillip Brown, Esq. of Adler Pollock & Sheehan, P.C. represented Huffington, and Robert Van Kirk, Esq. and Vidya Atre Mirmira, Esq. of Williams & Connolly, LLP represented Defendants. Only Mr. Van Kirk has entered his appearance in this Delaware action.

> **The Court:** Why wouldn't it go to Federal Court? I'm not understanding it.
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> **Mr. Brown:** Well, because it says that the courts of the State of Delaware have exclusive jurisdiction. That, I think –
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> **The Court:** No one has made that argument here.
>
> **Mr. Van Kirk:** The issue hasn't come up, in all fairness, your Honor, as to what the clause means and whether either party would object to federal versus state court or take the position. There's been no need for that discussion as of the moment, so I think that's the reason why the issue hasn't been addressed.
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> **The Court:** Well, there's been no statute of limitations issue, right?
>
> **Mr. Brown:** Not at this point, you Honor, no. No, this was a 2008 –
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> **The Court:** So if I dismiss without prejudice, then you would have that battle in Delaware? Is that what you're both anticipating?
>
> **Mr. Mirmira:** Yes.[85]

Huffington argues that Defendants' statements that: (1) Delaware Courts have exclusive jurisdiction; (2) "Delaware Courts would be able to interpret and apply Massachusetts law";[86] and (3) "the Court [should] dismiss Huffington's case without prejudice"[87] implied to the District Court that Huffington's claims "would not be time-barred and could be filed in Delaware."[88]

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[85] *Id*. at 7-8, n. 13; Exhibit 1, p. 2-4.

[86] *Id*. at 9.

[87] *Id*. (emphasis removed).

[88] *See id*. 7-10.

Huffington has not satisfied the elements of judicial estoppel. He must show that Defendants took an inconsistent position to a previous one *and* that the Court was successfully induced to adopt that position.[89] The District Court held that "*the forum selection clause* [providing the forum is Delaware] *covers the claims asserted in this action*."[90] The District Court also held that public policy concerns did not prevent the forum selection clause from operating as intended.[91] Because the forum selection clause is valid, Huffington's claims are properly before this Court. Nothing in the District Court's opinion addresses the statute of limitations in Delaware, nor should it, as the affect the statute has on Huffington's claim in Delaware should have been of no consequence to the District Court's determination in this matter. The forum selection clause was either enforceable or not enforceable. The District Court ruled that the forum selection clause in the Subscription Agreement covers the claims asserted by Huffington, and thus Huffington's claims belong in Delaware.

Huffington's judicial estoppel argument also falls flat because a contractual agreement signed by Huffington required him to bring his claims in Delaware. Had Huffington filed his claim in Delaware - as the Subscription Agreement called for – there would be no "inducement" issue. Judicial estoppel is an "equitable

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[89] *Motorola, Inc.*, 958 A.2d at 859-60.

[90] *Huffington*, 685 F.Supp.2d at 242. (emphasis added).
[91] *Id*. at 243.

doctrine invoked by the Court at its discretion,"[92] and "[t]he primary concern of the doctrine of judicial estoppel is to protect the integrity of the judicial process."[93] Black's Law Dictionary defines "Equitable" as "Just; consistent with principles of justice and right."[94] Merriam-Webster's dictionary defines equitable as "having or exhibiting equity: dealing fairly and equally with all concerned . . . ." One must play fair to ask for fairness. Huffington deliberately ignored a clear and unambiguous forum selection clause in the Subscription Agreement and filed suit in his home state of Massachusetts. Having been dismissed there, because of the forum selection clause, he now asks this Court to ignore the express language of its borrowing statute and apply the Massachusetts statute of limitations so his claims are not time-barred. Huffington's argument does not comport with the principles of equity and fairness. Huffington consciously decided to ignore the forum selection clause and file his claim in another jurisdiction. He then chose to appeal the dismissal. He consciously decided not to file his suit in Delaware first. The Court will not invoke the equitable doctrine of judicial estoppel to now save him from the consequences of his strategic decisions in that regard.

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[92] *Banther v. State*, 977 A.2d 870, 884 (Del. 2009) (other citations omitted).

[93] *Id*. (other citations omitted).

[94] Black's Law Dictionary (9th ed. 2009).

2. *The Application of Substantive Massachusetts Law*

To avoid the application of the three-year Delaware statute of limitation, Huffington also argues that the Massachusetts Blue Sky statute confers a substantive right that did not exist at common law.[95] Huffington maintains that this requires the Court to apply the "built in" statute of limitations, in this case, a four year period.[96] In so arguing, Huffington relies on *Dymond v. Nat'l Broadcasting Co., Inc.*[97] There, the Court held that "the Delaware courts will apply the foreign state's statute of limitations whenever it [sic] would apply the foreign state's substantive law."[98]

This is not the first time a plaintiff has sought to rely upon this particular statement in *Dymond*; the plaintiff in *Elmer v. Tenneco Resins, Inc.*[99] did the same. In *Elmer*, the defendants argued that Delaware's borrowing statute required the Court to apply Delaware's statute of limitations, and thus, the plaintiff's claim for breach of implied warranty was time-barred.[100] Plaintiff, employing the same argument as Huffington, argued that the District of Columbia's substantive law and

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[95] Pl.'s Ans. Br. at 11.

[96] *Id*
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[97] *Dymond v. Nat'l Broadcasting Co,. Inc.*, 559 F.Supp. 734 (D. Del. 1983).
[98] *Id*. at 736.

[99] 698 F.Supp 535 (D. Del. 1988). The Court notes that Judge Caleb M. Wright authored both the *Dymond* and *Elmer* opinions.

[100] *Id*.

statute of limitations should apply, therefore, plaintiff's claim could proceed.[101] The *Elmer* Court agreed with the defendants that plaintiff's claims were time-barred, holding that the Court must apply Delaware's borrowing statute when a non-Delaware resident brings a cause of action in a Delaware court and the cause of action arose outside of Delaware.[102]

The *Elmer* Court clarified the holding in *Dymond* by stating:

> Plaintiff's reliance on *Dymond* is misplaced. *Dymond* was a multistate defamation action, an area in which choice of law questions have been called "special" and "unusual." *See Keeton v. Hustler Magazine, Inc.*, 828 F.2d 64, 66 (1st Cir. 1987). The specific question in *Dymond* was whether the Court should apply the Delaware two-year statute of limitations or the Louisiana one-year statute of limitations when the plaintiff lives and works in Louisiana. 559 F.Supp. at 735. The Court determined that the substantive law of Louisiana applied because of the plaintiff's numerous contacts with the state. *Id*. at 738. It also concluded that, in order to effectuate the Delaware borrowing statute's policy of preventing forum shopping, Louisiana's shorter statute of limitations applied. *Id*. at 736-37.[103]

The Court in *Elmer* went on to note that *Dymond* could not be followed because "[a]s subsequent Delaware decisions indicate, this statement cannot be read literally for the proposition that a Delaware court will in every instance apply a foreign state's statute of limitations when it is applying a foreign state's

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[101] *Id*.

[102] *Id*. (citing *McIntosh v. Arabian American Oil Co.*, 633 F.Supp. 942, 945 (D. Del. 1986)).

[103] *Id*. at 539.

substantive law."[104] The *Elmer* Court concluded by saying that "the *Dymond* decision should not be read so broadly as to mandate application of a foreign state's statute of limitations every time a foreign state's substantive law is applied."[105] The Court is not required to apply the Massachusetts statute of limitations to Huffington's Blue Sky claim and declines to do so. Under Delaware law, Huffington's Blue Sky claim is time-barred.

3. *The Borrowing Statute*

Huffington's next argument focuses on Court's application of the borrowing statute itself. Huffington relies upon *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*,[106] to argue that the borrowing statute is inapplicable because there "are no forum shopping concerns here."[107] Because borrowing statutes "are designed to prevent shopping for the most favorable forum,"[108] this type of statute typically operates to "shorten the time limit – not extend it."[109]

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[104] *Id*. *See Burrell*, 2010 WL 3706584, at * 4 ("Delaware courts have uniformly held that when a complaint alleging a cause of action that arose outside of Delaware is time-barred under the Delaware statute of limitations, the Court need not conduct a choice of law analysis and may apply the Delaware statute of limitations. This construction recognizes that, under the borrowing statute, Delaware courts are obliged to apply the Delaware limitations period if it is 'shorter' than the statute of limitations that might apply from another jurisdiction.").

[105] *Id*. at 540.

[106] 866 A.2d 1 (Del. 2005).

[107] Pl.'s Ans. Br. at 12.

[108] *Saudi Basic Indus. Corp.*, 866 A.2d at 16 (citing *Pack v. Beech Aircraft Corp.*, 132 A.2d 54, 58 (Del. 1957)).

[109] *Id*. (other citations omitted).

In *Saudi Basic*, Saudi Basic Industries Corporation ("SABIC") filed a lawsuit against "ExxonMobil" in the United States District Court for the District of New Jersey.[110] SABIC sought a declaratory judgment against ExxonMobil but ExxonMobil raised the defense of unclean hands.[111] For strategic reasons, SABIC withdrew its claim in New Jersey and filed suit in the Delaware Superior Court seeking a declaratory judgment against ExxonMobil. ExxonMobil responded by filing counterclaims against SABIC, alleging breaches of joint venture agreements and breaches of fiduciary duty.[112] After trial the jury returned a verdict against SABIC.[113] SABIC appealed to the Delaware Supreme Court, arguing that the Superior Court made multiple erroneous rulings as a matter of law, most importantly for the purposes of this opinion, that Delaware's statute of limitations barred ExxonMobil's counterclaims.[114]

Before trial, SABIC moved for summary judgment on ExxonMobil's counterclaims, arguing that because Delaware's borrowing statute applied, the Court was required to apply the shorter of the two limitations periods. ExxonMobil's counterclaims were subject to a three-year statute of limitations

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[110] Justice Jacobs refers to Mobil Yanbu Petroleum Company ("Mobil") and Exxon Chemical Arabia, Inc. ("Exxon") collectively as "ExxonMobil" in his opinion. *Saudi Basic Ind. Corp.*, 866 A.2d at 10, n. 2.

[111] *Id*. at 10.

[112] *Id*.

[113] *Id*. at 11.

[114] *Id*.

under Delaware law,[115] but in Saudi Arabia, where the causes of action arose, there was no statute of limitations.[116] SABIC argued on appeal that the trial court should have applied Delaware's statute of limitations as required by the borrowing statute, and had it done so, ExxonMobil's claims were time-barred as a matter of law.[117]

Relying on what SABIC characterized as clear language in the borrowing statute, SABIC argued that Delaware's statute of limitations applied because the cause of action arose outside of Delaware, and Delaware's statute of limitations was shorter.[118] The Delaware Supreme Court disagreed with SABIC, reasoning that SABIC's interpretation of the borrowing statute in this particular scenario was far too literal. The Court acknowledged the premise behind borrowing statutes is to prevent shopping for the most favorable forum,[119] and to effectuate that purpose those statutes generally shorten the statute of limitations, rather than extend it.[120] The Court also noted that borrowing statutes like Delaware's are "*typically* designed to address a specific kind of forum shopping scenario,"[121] such as:

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[115] *Id*. at 14. (citing *10 Del. C.* § 8106).

[116] *Id*. at 15.

[117] *Id*.

[118] *Id*. at 16.

[119] *Id*. (citing *Pack*, 132 A.2d at 58.).

[120] *Id*. (internal quotation marks omitted).

[121] *Id*. at 16 (emphasis added).

> [C]ases where a plaintiff brings a claim in a Delaware court that (i) arises under the law of a jurisdiction other than Delaware and (ii) is barred by that jurisdiction's statute of limitations but would not be time-barred in Delaware, which has a longer statute of limitations. Under that "standard scenario," the borrowing statute operates to prevent the plaintiff from circumventing the shorter limitations period mandated by the jurisdiction where the cause of action arose.[122]

The Delaware Supreme Court held that if it adopted SABIC's literal construction of the borrowing statute it "would subvert the statute's underlying purpose" by allowing SABIC to advance a defense that it otherwise would not have had available to it had it brought its claim in the jurisdiction where the cause of action arose.[123] In other words, the Court declined to allow SABIC to use Delaware as the forum in which to litigate its claims for the sole strategic purpose of insulating itself from ExxonMobil's counterclaims, and thus held the borrowing statute did not apply.[124]

Huffington urges the Court to adopt the same reasoning in this case as the Supreme Court in *Saudi Basic*, arguing that because he does not fit under the "typical" scenario, there are no forum shopping concerns, and therefore the Court should not apply the borrowing statute to his claims. But forum shopping is exactly what happened here. Huffington chose to bring his claim in Massachusetts, his "backyard," notwithstanding a valid forum selection clause

[122] *Id*. at 16-17.

[123] *Id*.

[124] *Id*. at 17-18.

requiring all claims to be brought in Delaware. He chose his forum, Massachusetts, knowing he had agreed in writing to a different forum. For whatever reason, he tried to avoid litigating his claims here. And while he was trying to keep his claims alive in Massachusetts, he allowed the statute of limitations (of the forum he agreed to) to expire. And now, relying on *Saudi Basic*, he asks the Court to basically forgive his failed forum shopping attempt and allow his claims to proceed here. This Court will not and cannot do so.

Saudi Basic did not create a broad rule banning the use of the borrowing statute in all situations except for the "typical" scenario.[125] Rather, it demonstrates the Delaware Supreme Court's unwillingness to allow the borrowing statute to be abused by a party shopping for a forum to avoid an adversary's counterclaims. The Delaware Supreme Court's use of the word "typical" to describe the most frequent scenario in which the borrowing statute applies simply provides an example of the manner in which the borrowing statute operates. At most, *Saudi Basic* provides a very narrow holding with respect to borrowing statute jurisprudence in that the Supreme Court recognized that applying the borrowing

[125] *See, e.g.*, *Burrell v. Astra Zeneca LP*, 2010 WL 3706584 (Del. 2010) (finding that all three plaintiffs' claims where their prescription for Seroquel®, use of Seroquel®, and diagnosis and treatment of diabetes took place in their respective home states were nevertheless time-barred by the Delaware statute of limitations because the Court recognized that "Delaware courts have uniformly held that when a complaint alleging a cause of action that arose outside of Delaware is time-barred under the Delaware statute of limitations, the Court need not conduct a choice of law analysis and may apply the Delaware statute of limitations" and that "[t]his construction recognizes that . . . Delaware courts are obliged to apply the Delaware limitations period if it is 'shorter' than the statute of limitations that might apply from another jurisdiction.").

statute in that scenario would "basically turn the borrowing statute on its head for the purpose for which it was enacted."[126]

The facts here differ from those in *Saudi Basic*. Unlike in this case, the parties in *Saudi Basic* had not signed a forum selection clause. Huffington argues that ignoring the forum selection clause and filing his claim in Massachusetts do not constitute an attempt to circumvent the shorter limitations period where the cause of action arose, and thus the borrowing statute does not apply.[127] But Huffington did forum shop. He tried to avoid the clear and unambiguous forum selection clause by filing in Massachusetts. He clearly sought to avoid litigating his claims here. Sometimes when you gamble, you lose.[128] Huffington could have hedged his bet by filing in Delaware immediately after the District Court dismissed his suit. Instead, he went "all in" and pursued an appeal rather than filing a claim within the statute of limitations in the forum he contractually agreed to. Under these circumstances, the Delaware borrowing statute most certainly applies, and thus, Huffington's claims are time-barred.

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[126] Bench Ruling, C.A. No. 000-07-161, Feb. 10, 2003 (Jurden, J.); *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 2003 WL 22016813 (Del. Super.), *aff'd*, 866 A.2d 1 (Del. 2005).

[127] Pl.'s Ans. Br. at 13. Indeed, a four year period of limitations applies where the cause of action arose.

[128] "You got to know when to hold 'em, know when to fold 'em . . . ." Kenny Rogers, *The Gambler*, *on* The Gambler (United Artists Group 1978).

4. *The Savings Statute*

Huffington's final argument is that his Blue Sky claim is saved from the statute of limitations by 10 *Del. C.* § 8118, the "Savings Statute." Huffington claims that because the District Court dismissed his claim without prejudice on the basis of a "procedural technicality," "improper venue," the merits of his claim have never been addressed, and therefore, the application of the Savings Statute is appropriate.[129]

Defendants argue that Delaware's Savings Statute only applies to claims brought under Title 10, Chapter 81 ("Chapter 81") of the Delaware Code.[130] According to Defendants, the clear language of the Savings Statute limits actions to claims brought under Chapter 81 because the first sentence reads, "[i]f any action duly commenced within the time limited therefore *in this chapter* . . . ."[131] Defendants rely on *Christiana Hosp. v. Fattorri*[132] and *Moore v. Graybeal*[133] in support of this argument.

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[129] Pl.'s Ans. Br. at 13-14.

[130] *See* 10 *Del. C.* § 8118. Title 10, Chapter 81 covers personal actions, and denotes the applicable statute of limitations for each action. The corresponding Delaware statute to Huffington's Massachusetts blue sky claim explicitly provides for a three year statute of limitations within 6 *Del. C.* § 73-605.

[131] Defs.' Rep. at 4 (citing 10 *Del. C.* § 8118 (a)) (emphasis added).

[132] 714 A.2d 754 (Del. 1998).

[133] 1989 WL 17430 (Del. Ch.).

In *Fattori*, the Delaware Supreme Court held that the Savings Statute is inapplicable to medical malpractice claims. The Court based its holding on the General Assembly's decision to amend Chapter 81 to include language that limited the period to initiate medical malpractice claims to the time periods provided for in 18 *Del. C.* § 6856.[134] The Supreme Court provided further support for its decision by discussing *Moore*, a Court of Chancery case later affirmed by the Delaware Supreme Court.[135] In *Moore*, on a motion to dismiss, the Court of Chancery considered the applicability of the Savings Statute to the review of a will where a federal action had been previously filed within the limitations period.[136] In holding that the Savings Statute did not apply to this claim based upon the unambiguous wording of the Savings Statute, the Court of Chancery in *Moore* stated that "the actual words of Section 8118 cannot be stretched to reach an action brought under Section 3109 of Title 12 . . . ."[137] The Court of Chancery also stated that "the time within which a will review is to be commenced is not set forth in Chapter 81 of

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[134] *Fattori*, 714 A.2d at 757. *See also* 10 *Del. C.* § 8128 ("[n]o action for the recovery of damages upon a claim based upon alleged health care malpractice, whether in the nature of a tort action or breach of contract action, shall be brought after the expiration of the time period for bringing such action set forth in § 6865 of Title 18, Delaware Code.").

[135] *Id*; *see also Moore v. Graybeal*, 1989 WL 114316 (Del. 1989) (ORDER) (affirming the Court of Chancery's decision below).

[136] *Moore*, 1989 WL 17430 (Del. Ch.). Review of a will is a statutory right provided by 12 *Del. C.* § 1309, and permits a party "at any time within 6 months after the entry of the order or probate" to the right of review.

[137] *Id*. at *6.

Title 10 and thus *is not subject to Section 8118*."[138] The Court in *Moore* explicitly acknowledged the General Assembly's effort to address an area of the law that presents special, complex issues or problems by establishing a "particular, not a general rule" to determine when a will review may be initiated.[139]

The clear language in the Savings Statute and precedent establish that the time period within which to bring a Blue Sky claim in Delaware is not covered under Chapter 81. Huffington argues that because there are no cases that hold that the Savings Statute does *not* apply to a Delaware Blue Sky claim, the Savings Statute should apply.[140] Huffington further argues that the Court has applied the Savings Statute to claims where the statute of limitations is not set forth in Chapter 81.[141] Huffington cites *Small v. MBNA Am.*[142] to support this argument, but, *Small* in no way supports Huffington's position. In fact, the Court in *Small* never even reached the applicability of the Savings Statute.[143] The Savings Statute is inapplicable here.

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[138] *Id*. (emphasis added).

[139] *Id*. The Court agreed with the Court of Chancery's rationale and affirmed its decision. *Fattori*, 714 A.2d at 757; *see also* n. 108.

[140] Pl.'s Ans. Br. at 15, n. 21.

[141] *Id*.

[142] 2008 WL 4365895 (Del. 2008).

[143] Plaintiff's argument that "in cases similar to this one, where the statute of limitations is not in the same chapter as the Savings Statute, but instead is embedded in the substantive statute itself, Delaware Courts have nevertheless applied the Savings Statute" is flat out wrong. Pl.'s Ans. Br. at 15, n. 21. *Small* was an appeal to the Superior Court from a decision rendered by a Delaware administrative agency. Judge Silverman *declined* to address the Savings

Assuming the Court were to ignore the limiting language in the Savings Statute, the Savings Statute still does not save Huffington's Blue Sky claim. The General Assembly designed the Savings Statute "to mitigate against the harshness of the defense of limitations raised against a plaintiff who, *through no fault of his own* finds his cause technically barred by the lapse of time."[144] Huffington created his predicament. He did not get here "through no fault of his own." He decided to pay no heed to the forum selection clause he agreed to in the Subscription Agreement, and he chose to file his cause of action in Massachusetts. Like *Saudi Basic*, he chose a strategy that backfired.[145] Delaware courts have not applied the Savings Statute "when the action was dismissed based on a failure to prosecute, total neglect of the attorney, or mistaken strategic decisions by counsel."[146] In the Court's view, it is equally inappropriate to apply the Savings Statute where a plaintiff purposely disregards a forum selection clause.

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n. 143 cont . . .Statute on appeal because the plaintiff had not raised the issue at her initial hearing. The Court is curious as to how one arrives at this conclusion, relying on *Small*, when Judge Silverman stated, "Small's savings statute argument is unavailable as a matter of longstanding procedure because she did not present it n. 143 continued . . . at the Board's April 19, 2007 hearing. The appeals process limits the court to examining the issues the litigant presented to the tribunal below. The record from the Board's April 19, 2007 hearing gives no indication that Small mentioned the savings statute. Therefore, Small cannot raise the savings statute on appeal." *Small*, 2008 WL 4365895, at *2. (other citations omitted).

[144] *Giles v. Rodolico*, 140 A.2d 263, 267 (Del. 1958).

[145] *Saudi Basic Indus. Corp. v. Mobil Yanbu Petrochemical Co.*, 2003 WL 22016864, at *1 (Del. Super. 2003) (noting that the plaintiff "made a conscious, strategic decision to file this case here rather than in its own backyard. That risky strategy backfired, miserably, and now . . . [Plaintiff] cries foul . . . .").

[146] *Kaufman v. Nisky*, 2011 WL 7062500, at *3 (Del. Super.) (citing *Russell v. Olmedo*, 275 A.2d 249, 249–50 (Del.1971) (purposeful seven month delay in service); *Towles v. Mastin*, 2007 WL 3360034, at *2 (Del.Super.) (purposeful service in New Jersey after considering service in Delaware); *Savage v. Himes*, 2010 WL 2006573, at *3 (Del. Super.) (failure to prosecute)).

For the foregoing reasons, Delaware's three year statute of limitations applies, barring Huffington's blue sky claim as a matter of law, and thus Defendants' Motion for Summary Judgment with respect that claim is **GRANTED**.[147]

B. *Huffington's Unfair Trade Practices Claim*

Huffington's second claim against Defendants comes under Massachusetts General Laws chapter 93A, Massachusetts's unfair trade practices statute.[148] Defendants argue that the Court should grant summary judgment on this claim because: (1) the choice of law provision in the the Subscription Agreement bars the claim, or, in the alternative; (2) Huffington has not alleged that Defendants' statements were made intentionally or in bad faith.[149]

1. *The Choice of Law Provision*

Defendants argue that Huffington's unfair trade practices claim under Massachusetts law ("93A claim") must be dismissed because the choice of law provision in the Subscription Agreement provides that "all terms and provisions" of the Subscription Agreement "shall be governed, construed and enforced solely under the laws of the State of Delaware, without reference to any principles of

[147] Because the Court holds that Huffington's Blue Sky claim is time-barred, the Court declines to address further arguments regarding that claim.

[148] Mass. Gen. Laws c. 93A, §11

[149] Defs.' Rep. at 14-15.

conflicts of law . . . ."[150] Defendants note that although the choice of law provision is narrow, it is nevertheless "backstopped by a broad forum selection clause."[151]

Delaware courts refer to the Restatement (Second) of Conflict of Laws for guidance in choice of law disputes.[152] Section 145(1) of the Restatement establishes that "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which, with respect to that issue, has the most significant relationship to the occurrence and the parties . . . ." Huffington alleges that Defendants solicited his investment in Massachusetts. Defendants have not contradicted that allegation, and therefore, application of Massachusetts law is appropriate. Defendants argue, however, that if the forum selection clause and the choice of law provision are read together, they preclude Huffington's 93A claim.[153]

The choice of law provision applies to "all terms and provisions" of the Subscription Agreement, and provides that any dispute as to those terms and provisions "shall be governed by, construed and enforced solely under the laws of

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[150] Transmittal Affidavit (Trans. ID. No. 37459816) at Exhibit 5, p. 11.

[151] *Id.* ("*The courts of the State of Delaware shall have exclusive jurisdiction over any action, suit or proceeding with respect to this Subscription agreement* and the Investor hereby irrevocably waives, to the fullest extent permitted by law, any objection that it might have, whether now or in the future, to the laying of venue in, or to the jurisdiction of, any and each of such courts for the purposes of any such suit, action, proceeding or judgment and further waives any claim that any such suit, action, proceeding or judgment has been brought in an inconvenient forum, and the Investor hereby submits to such jurisdiction. The parties hereby agree that no punitive or consequential damages shall be awarded in any such action, suit or proceeding.").

[152] *Gloucester Holding Corp. v. U.S. Tape and Sticky Products, LLC*, 832 A.2d 116, 123 (Del. Ch. 2003).

[153] Defs.' Mot. to Dismiss at 32; *See* Defs.' Rep. at 14 – 15.

the State of Delaware, without reference to any principles of conflicts of law . . . ."[154] Courts on occasion have held that *broad* choice of law clauses can sometimes include tort claims that relate to the formation of a contract.[155] But the choice of law provision here is not broad; rather, it is quite narrow.[156] It does not state that it covers litigation that *arises out of or relates* to the Subscription Agreement.[157] If Huffington had challenged the validity of the terms of the Subscription Agreement itself, Delaware law would apply, but Huffington's 93A claim does not challenge the terms and provisions of the Subscription Agreement; instead, he alleges Defendants' statements induced him to invest $20 million in an allegedly high risk fund.

Although Defendants urge the Court to consider the forum selection clause in conjunction with the choice of law provision and bar Huffington's 93A claim, the Court declines to do so. The forum selection clause does not mandate application of Delaware law to every claim; it merely requires an investor to bring his claim in the Delaware courts. The choice of law provision, without language

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[154] Transmittal Affidavit (Trans. ID. No. 37459816) at Exhibit 5, p. 11.

[155] *Gloucester Holding Corp.*, 832 A.2d at 124. (citing, *e.g.*, *VGS, Inc. v. Castiel*, 2003 WL 723285, at *7 & n. 29 (Del. Ch.) (New York law applied to fraud in the inducement claims because the choice of law provision provided for New York law "for any litigation arising out of or relating to [this]. [sic] Agreement and transactions contemplated hereby"); *Turtur v. Rothschild Registry Int'l, Inc.*, 26 F.3d 304, 309 (2d Cir. 1994) (holding that a New York choice of law provision was sufficiently broad to encompass tort and contract claims when the agreement covered any controversy "arising out of or relating to" the agreement))).

[156] Huffington and Defendants' agree that the choice of law provision is drafted narrowly. *See* Pl.'s Ans. Br. at 32; Defs.' Rep. at 14.

[157] *See*, *Gloucester Holding Corp.*, 832 A.2d at 124.

such as "*arising out of or relates to*," only requires the Court to apply Delaware law to claims challenging the terms and provisions of the Subscription Agreement. Huffington's claim is not barred by the choice of law provision in the Subscription Agreement.

2. *Huffington's 93A Claim*

Defendants argue they are entitled to summary judgment on Huffington's 93A claim regarding both pre and post-investment statements because: (1) the statements made by Defendants or representatives of Defendants are opinions, not factual statements; (2) "Huffington inadequately alleges falsity", and (3) "the statements are, as a matter of law, not material."[158]

The Court notes at the outset that Massachusetts General Laws chapter 93A is not easily applied. It is very broad, and Massachusetts courts have wrestled with its application.[159] The Court must determine, as a matter of law, "the boundaries of what may qualify for consideration as a [93A violation] [.]"[160] Massachusetts General Laws chapter 93A, § 2(a) prohibits "[u]nfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce . . . ."

[158] Defs.' Mot. to Dismiss at 16.

[159] As the First Circuit Court of Appeals has noted, Chapter 93A is "broad in scope and does not catalogue the type of conduct falling within its prohibition . . . ." *Cummings v. HPG Intern., Inc.*, 244 F.3d 16, 25 (1st Cir. 2001); *see also* Mass. Gen. Laws ch. 93A, §2(a). ."[159] In fact, "[t]he statute does not define 'unfair or deceptive' conduct; rather, it 'depends on the facts and circumstances of each case.'" *Swenson v. Yellow Transp., Inc.*, 317 F.Supp.2d 51, 54 (D. Mass. 2004) (quoting *Darviris v. Petros*, 795 N.E.2d 802 (Mass.App.Ct. 2003)).

[160] *Swenson*, 317 F.Supp.2d at 54 (quoting *Shepard's Pharmacy, Inc. v. Stop & Shop Cos.*, 640 N.E.2d 1112, 1115 (Mass.App.Ct. 1994)).

Section 9 of Chapter 93A "creates a cause of action in favor of plaintiffs who are injured as a result of an unfair or deceptive act or practice."[161] To prevail on a 93A claim, "a plaintiff must establish both that an unfair or deceptive act or practice has been committed *and* that the commission of that act or practice has caused him an injury. The plaintiff must also show that there was a causal connection between the deception and the loss and that the loss was foreseeable as a result of the deception."[162] While "an action under Chapter 93A need not articulate every element of a common law tort claim in order to survive,[163] a defendant's allegedly unfair conduct 'must at least come within shouting distance of some established concept of unfairness[.]'"[164] The Massachusetts courts have held that specific conduct, such as mere negligence, without more, does not establish a claim under 93A.[165] Although attempts have been made to determine what conduct constitutes "unfair or deceptive conduct," creating a concise, easy-to-apply rule remains a difficult task.[166] The Massachusetts courts that have grappled with this statute maintain that whether conduct rises to the level of an unfair or deceptive business

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[161] *Id*. (citing *Lord v. Commercial Union Ins. Co.*, 801 N.E.2d 303, 314 (Mass.App.Ct. 2004)).

[162] *Id*. (citing *Lord*, 801 N.E.2d at 317).

[163] *Massachusetts Farm Bureau Fed'n, Inc. v. Blue Cross, Inc.*, 532 N.E.2d 660, 664 (Mass. 1989).

[164] *Cummings*, 244 F.3d at 25 (quoting *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 42 (1st Cir. 1998)).

[165] *Swenson*, 317 F.Supp.2d at 54 (citing *Darviris*, 795 N.E.2d at 1201).

[166] *See* n. 159 *supra*.

practice depends on "all the circumstances" and "[a] practice may be deceptive if it reasonably could be found to have caused the plaintiff to act differently than he otherwise would have acted."[167]

Huffington claims that not only did Defendants misrepresent the nature of the proposed investment, but after convincing him to invest, they urged him not to withdraw his investment, even as it started to falter.[168] Huffington further claims that Rubenstein represented to him that this particular investment would "meet [my] criteria for a conservative investment."[169] Huffington alleges that the power point presentation by Rubenstein further led him to believe Rubenstein's representation that the investment was conservative.[170] According to Huffington, the power point stated that the Fund's investment strategy included "[a]void[ing] competitive budding, *overleveraging* and double-digit pricing multiples."[171] Huffington also claims that before he invested, Rubenstein never informed him that the Fund "could or would be highly leveraged, nor did he ever discuss . . . [the Fund's] use of leverage."[172] Huffington makes the same claim with respect to

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[167] *Id*. at 54 (quoting *Duclersaint v. Fed. Nat'l Mortgage Ass'n*, 696 N.E.2d 536, 540 (Mass. 1998)).

[168] *See* Pl.'s Ans. Br. at 1-5; Michael Huffington's Affidavit (Trans. ID. No. 41563372) at 2-7.

[169] Michael Huffington's Affidavit (Trans. ID. No. 41563372) at 2, ¶6.

[170] *Id*. at ¶7.

[171] *Id*. (emphasis added).

[172] *Id*. at 3, ¶8.

Stomber.[173] Huffington maintains that Rubenstein represented that the "downside is very limited" and that "this product will conform to our normal high standards."[174]

Although a Private Placement Memorandum "(PPM") and the Subscription Agreement were available to read, Huffington claims that he relied upon Rubenstein's and Stomber's representations, and in doing so he did not fully read either document.[175] He readily admits to "skimming" the PPM, but claims he did not notice any references to leverage.[176]

Huffington claims that the first time he learned that the Fund would be leveraged was on January 26, 2007 – after he invested.[177] Stomber allegedly told Huffington that he should not be concerned about the use of leverage, and that "it was not a problem from a risk standpoint."[178] On August 13, 2007, Stomber informed Huffington by email that the Funds "second quarter performance 'was on

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[173] *Id*. at ¶10.

[174] *Id*. at ¶9.

[175] *Id*. at ¶11.

[176] *Id*.

[177] *Id*. at 5, ¶17.

[178] *Id*. Further representations about the success of the fund were made later, indicating that the Fund did not have "any residential Mortgage Backed Securities (or any Mortgage Backed Securities or Whole Loans) in its portfolio that has exposure to sub-prime based collateral[,]" and that the Fund held "U.S. Government Agency (i.e. Fannie Mae and Freddie Mac) Residential Mortgage Backed Securities that are AAA rated and are guaranteed by either Fannie Mae or Freddie Mac . . . ." *Id*. at 5-6, ¶20.

target' and that the third quarter 'is on target despite market conditions."[179] Stomber also stated that the Fund's mortgages were "safe" and that Huffington's investment "remains safe and we are conservative."[180] However, the Fund had already begun leveraging. A month later, in September 2007, Stomber represented that the Fund "was in the black" and that "the securities are 100 cents on the dollar at maturity."[181] Stomber reassured Huffington in October 2007 that the securities in the Fund "have NO credit risk."[182] Huffington alleges that, despite a significant downturn in the market, Stomber's representations kept him from selling his shares in the Fund.[183]

Huffington alleges that after the Fund's collapse, Rubenstein called him and told him that he "would not lose money even if [the Fund] did not survive, and [Rubenstein] also asked [that Huffington] not [ ] sell any of [his] shares."[184] Although Rubenstein and Stomber allegedly made representations that the Fund was a "conservative" investment plan, Huffington claims that before the Fund collapsed, he learned that the Fund had allegedly been leveraged over three

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[179] *Id*. at 6, ¶21.

[180] *Id*.

[181] *Id*. at ¶22.

[182] *Id*.

[183] *Id*.

[184] *Id*. at 7, ¶24.

thousand percent.[185] In furtherance of his allegations against Defendants, Huffington points to a *Wall Street Journal* article published on March 14, 2008, three days before the Fund collapsed, in which Rubenstein is quoted as saying, "In hindsight the leverage was excessive."[186] As a result of the collapse of the Fund, Huffington lost his $20 million investment.

Defendants challenge the adequacy of Huffington's 93A claim on the basis that the representations made by Rubenstein and Stomber were opinions or puffery, not facts. Defendants also argue that Huffington inadequately alleges "falsity," the statements were not "material," and that Huffington fails to allege that Rubenstein or Stomber's statements were made in bad faith. Defendants' arguments for summary judgment ask the Court to engage in a very narrow analysis of a very broad statute. The Massachusetts courts "regularly emphasize" that to recover under Chapter 93A, §11, "a party must demonstrate the existence of an unfair or deceptive act or practice, a loss, and the causation of one by the other."[187] Chapter 93A only requires Huffington to come within "shouting distance of some established concept of unfairness."[188] With that in mind, "[a]

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[185] *Id*. at ¶26.

[186] *Id*.

[187] *Stamatakis v. Metro. Prop. & Cas. Ins. Co.*, 2011 WL 2923879, at *4 (Mass.App.Div. 2011) (other citations omitted) (internal quotation marks omitted).

[188] *Cummings*, 244 F.3d at 25 (quoting *Massachusetts School of Law at Andover, Inc. v. American Bar Ass'n*, 142 F.3d 26, 42 (1st Cir. 1998)).

practice may be deceptive if it reasonably could be found to have caused the plaintiff to act differently than he otherwise would have acted."[189] Consequently, the Court finds that a genuine issue of material fact exists as to whether Rubenstein and Stomber's alleged failure to inform Huffington of the Fund's intent to use leverage constitutes an unfair or deceptive practice. Likewise, the Court cannot hold as a matter of law that failing to disclose this information, when representations were allegedly made that the fund was a conservative investment, was not an unfair or deceptive practice.[190]

Although a PPM stated the Fund would use leverage, it is for the jury to decide whether Defendants engaged in an "unfair or deceptive act or practice" by (allegedly) failing to tell him about the use or extent of leverage. Moreover, assuming *arguendo* a jury finds Huffington should have read the entire PPM before investing, a genuine issue of material fact still exists as to whether "overleveraging" the Fund constitutes an "unfair or deceptive act or practice" under 93A.

Viewing the facts in the light most favorable to Huffington, he has met his burden by coming within "shouting distance" of a concept of unfairness, and genuine issues of material fact exist with regard to his 93A claim. Consequently,

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[189] *Swenson*, 317 F.Supp.2d at 54 (quoting *Duclersaint v. Fed. Nat'l Mortgage Ass'n*, 696 N.E.2d 536, 540 (Mass. 1998)).

[190] The Court also finds that a genuine issue of material fact exists as to the "materiality" and "falsity" of Rubenstein and Stomber's statements.

Defendants' Motion for Summary Judgment with respect to Huffington's 93A claim is **DENIED**.[191]

V. CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss converted to a Motion for Summary Judgment is **GRANTED in part** and **DENIED in part.**

IT IS SO ORDERED.

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Jan R. Jurden, Judge

[191] The Court notes that Defendants did not argue that Huffington lacks standing to pursue his 93A claim.