Anderson v. Hobart Fin. Grp., Inc., 2024 NCBC 10.

STATE OF NORTH CAROLINA

MECKLENBURG COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
22CVS001520-590

FRANCIS BURTON and JEAN M. BURTON, individually and on behalf of their IRA; BEVERLY BYRNES, individually, on behalf of her IRA, and as personal representative of KATHERINE R. GLEASON and her IRA; MICHAEL FORBIS, individually and on behalf of his IRA; JAMES LESHOCK and CAROLYN LESHOCK, individually and on behalf of their IRA; GARY OSTRANDER and PAM OSTRANDER, individually and on behalf of their IRA; CLIFFORD N. RHODES, individually and on behalf of his IRA; JAMES TANGER, individually and on behalf of his IRA; LARRY BRENT WILSHIRE and CYNTHIA WILSHIRE, individually and on behalf of their IRA; and JOSEPH ZUCKER, individually and on behalf of his IRA,

Plaintiffs,

v.

HOBART FINANCIAL GROUP, INC.; HOBART PRIVATE CAPITAL, LLC; HOBART INSURANCE SERVICES LLC; LEGACY GFIS & KCI HOLDINGS, L.L.C.; CHRISTOPHER SCOTT HOBART; STEVEN ANDREW GREER; and COREY S. SUNSTROM,

Defendants.

ORDER AND OPINION ON DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT

1. **THIS MATTER** is before the Court on the 21 June 2023 filing of *Defendants' Motion to Dismiss Plaintiffs' Second Amended Complaint* (the "Motion"). (ECF No. 67 ["Mot."].) Pursuant to Rules 9(b) and 12(b)(6) of the North Carolina Rules of Civil Procedure (the "Rules"), the Motion requests dismissal with prejudice

of all seven claims for relief alleged by one or more of the thirteen plaintiffs in the Second Amended Complaint. (Mot. 1–2; *see* Second Am. Compl., ECF No. 47 ["SAC"].)

2. For the reasons set forth herein, the Court **GRANTS** in part and **DENIES** in part the Motion.

Spengler & Agans, PLLC, by Eric Spengler, and Peiffer Wolf Carr Kane Conway & Wise, by Jason Kane, for Plaintiffs.

Moore & Van Allen, PLLC, by Mark A. Nebrig, Joseph Piligian, Alexandra Davidson, Christopher D. Tomlinson, and Caroline F. Savini, for Defendants.

Robinson, Judge.

I. INTRODUCTION

3. This action arises out of Defendants' alleged recommendation of unsuitable investment products to Plaintiffs, who purchased some of those recommended investments to their financial detriment. Plaintiffs, older adults who were retired or nearing retirement at the time they made their investments, now allege that the investments Defendants recommended bore undisclosed hidden fees and commissions and that the unsuitability of those investments ultimately caused Plaintiffs to collectively lose hundreds of thousands of dollars. Plaintiffs primarily contend that, if Defendants upheld their fiduciary obligations to Plaintiffs, for example by disclosing the information that made the investments unsuitable, Plaintiffs would not have entrusted Defendants with their retirement savings.

4. The issue before the Court is to consider the metes and bounds of this action by determining which causes of actions state a claim for Rule 12(b)(6) purposes.

II. FACTUAL BACKGROUND

5. The Court does not make determinations of fact on motions to dismiss under Rule 12(b)(6) but only recites those factual allegations of the Second Amended Complaint that are relevant and necessary to the Court's determination of the Motion. *Gateway Mgmt. Servs. v. Carrbridge Berkshire Grp., Inc.*, 2018 NCBC LEXIS 45, at *9 (N.C. Super. Ct. May 9, 2018).

A. The Parties

6. Francis Burton ("Mr. Burton") and Jean M. Burton ("Ms. Burton"; together, the "Burtons") are residents of Union County, North Carolina. (SAC ¶ 2.) The Burtons allege that some Defendants recommended they purchase "unsuitable Alternative Investments and fixed-index annuities" before 1 February 2012, and that in 2014 and 2015, the Burtons did purchase some of those investments. (SAC ¶ 2.)

7. Beverly Byrnes ("Ms. Byrnes") is a resident of Mecklenburg County, North Carolina and the beneficiary of the estate of her mother, Katherine R. Gleason ("Ms. Gleason"), who died in June 2016. (SAC ¶ 3.) Ms. Byrnes alleges claims for relief against Defendants both for herself and on behalf of (1) her Individual Retirement Account ("IRA") and (2) Ms. Gleason, as the beneficiary of her estate, contending that some Defendants recommended unsuitable alternative investments and fixed-index annuities to Ms. Byrnes and her mother before 1 February 2012. (SAC ¶ 3.) Ms. Byrnes affirmatively alleges that the investment advisor-client relationship was terminated around March 2013. (SAC ¶ 3.)

8. Michael Forbis ("Mr. Forbis") is a resident of Union County, North Carolina. (SAC ¶ 4.) He alleges individual claims for relief against Defendants both for himself and on behalf of his IRA. (SAC ¶ 4.) Mr. Forbis alleges that Defendants recommended he purchase unsuitable alternative investments starting in late 2015. (SAC ¶ 4.)

9. James Leshock ("Mr. Leshock") and Carolyn Leshock ("Ms. Leshock"; together, the "Leshocks") are residents of Union County, North Carolina. (SAC ¶ 5.) The Leshocks allege that Defendants recommended they purchase unsuitable alternative investments starting in April 2014. (SAC ¶ 5.)

10. Gary Ostrander ("Mr. Ostrander") and Pam Ostrander ("Ms. Ostrander"; together, the "Ostranders") were residents of Mecklenburg County, North Carolina but now reside in Manatee County, Florida. (SAC ¶ 6.) The Ostranders allege that Defendants recommended they purchase unsuitable alternative investments and fixed-index annuities in late 2012 and early 2013. (SAC ¶ 6.)

11. Clifford N. Rhodes ("Mr. Rhodes") is a resident of Lancaster County, South Carolina. (SAC ¶ 7.) He alleges that Defendants recommended he purchase unsuitable alternative investments and fixed-index annuities starting in 2013. (SAC ¶ 7.)

12. James Tanger ("Mr. Tanger") is a resident of Mecklenburg County, North Carolina. (SAC ¶ 8.) He alleges claims for relief against Defendants both for himself and on behalf of his IRA. (SAC ¶ 8.) Mr. Tanger alleges that Defendants recommended he purchase unsuitable alternative investments and fixed-index

annuities in 2014, and that the investment advisor-client relationship was terminated in May or June 2019. (SAC ¶ 8.)

13. Larry B. Wilshire ("Dr. Wilshire") and Cynthia Wilshire ("Ms. Wilshire"; together, the "Wilshires") are residents of Lancaster County, South Carolina. (SAC ¶ 9.) They allege claims for relief on their own behalf and for their IRA. (SAC ¶ 9.) In March 2015, according to the Wilshires, Defendants "recommended unsuitable Alternative Investments to Dr. Wilshire and unsuitable fixed-index annuities to Ms. Wilshire." (SAC ¶ 9.)

14. Joseph Zucker ("Dr. Zucker"; together with the Burtons, Ms. Byrnes, Mr. Forbis, the Leshocks, the Ostranders, Mr. Rhodes, Mr. Tanger, and the Wilshires, "Plaintiffs") is a resident of Mecklenburg County, North Carolina. (SAC ¶ 10.) He alleges claims for relief against Defendants both for himself and on behalf of his IRA. (SAC ¶ 10.) Dr. Zucker alleges that Defendants recommended and sold unsuitable alternative investments and fixed-index annuities to him from December 2011 through 2013. (SAC ¶ 10.)

15. Hobart Financial Group, Inc. ("Hobart Financial") f/k/a Senior Financial Planners, Inc., is a North Carolina corporation engaged in "financial sales." (SAC ¶ 12.) Plaintiffs allege that Hobart Financial "does not have a board of directors" and that it "fails to follow corporate formalities[.]" (SAC ¶ 12.)

16. Defendant Christopher Scott Hobart ("Mr. Hobart") is a resident of Mecklenburg County, North Carolina. (SAC ¶ 17.) Mr. Hobart is Hobart Financial's president and its sole officer and shareholder. (SAC ¶ 12.) Mr. Hobart was a

registered broker with the Financial Industry Regulation Authority ("FINRA") for the periods 1 January 2002 to 2 February 2012 and 23 September 2015 to 17 April 2019. (SAC ¶ 17.) Mr. Hobart is a registered investment advisor ("RIA") with the State of North Carolina and the U.S. Securities and Exchange Commission ("SEC"). (SAC ¶ 17.)

17. Hobart Private Capital, LLC ("Hobart Capital") d/b/a Hobart Wealth is a North Carolina limited liability company which provides investment advisory services. (SAC ¶ 13.) Hobart Capital allegedly provided investment services to Plaintiffs, and its sole member and manager is Mr. Hobart. (SAC ¶ 13.) Hobart Capital was registered with the State from 5 September 2013 to 27 July 2016 and the SEC beginning on 29 February 2016 through the filing of the Second Amended Complaint. (SAC ¶ 13.)

18. Hobart Insurance Services, LLC ("Hobart Insurance") is a North Carolina limited liability company whose sole member and manager is Hobart Financial. (SAC ¶ 14.) Hobart Insurance is an insurance agency that brokered the sale of fixed-index annuities and high-commission insurance products to certain Plaintiffs. (SAC ¶ 14.)

19. Legacy GFIS & KCI Holdings, LLC ("Legacy GFIS"; together with Hobart Financial, Hobart Capital, and Hobart Insurance, the "Hobart Entities") is a North Carolina limited liability company that does largely the same business as Hobart Financial and Hobart Capital. (SAC ¶ 15.) Mr. Hobart is the sole member and manager of Legacy GFIS. (SAC ¶ 15.)

20. Each of the Hobart Entities maintains its principal place of business at 7733 Ballantyne Commons Parkway, Suite 101, Charlotte, North Carolina 28277. (SAC ¶ 16.)

21. Steven A. Greer ("Mr. Greer") is a resident of Union County, North Carolina. (SAC ¶ 18.) Plaintiffs allege that Mr. Greer has been an RIA with the SEC since 2011 and the State of North Carolina since 5 September 2013. (SAC ¶ 18.) Mr. Greer was a registered broker with FINRA from 2011 through 17 April 2019 and was the only FINRA broker employed by the Hobart Entities from 2 February 2012 to 23 September 2015. (SAC ¶ 18.)

22. Corey S. Sunstrom ("Mr. Sunstrom"; together with Mr. Hobart, Mr. Greer, and the Hobart Entities, "Defendants") is a resident of Mecklenburg County, North Carolina. (SAC ¶ 19.) Mr. Sunstrom has been an RIA with the State of North Carolina since 6 February 2015. (SAC ¶ 19.) Plaintiffs allege that Mr. Sunstrom was a registered broker with FINRA at all relevant times until 20 February 2018. (SAC ¶ 19.) Mr. Sunstrom registered as an insurance agent with the State on 29 October 2019. (SAC ¶ 19.)

23. Plaintiffs allege that "[a]t all relevant times, Mr. Hobart, Mr. Greer, and Mr. Sunstrom have been employees of the Hobart Entities, and the wrongful acts complained of . . . were performed in furtherance of the business of the Hobart Entities." (SAC ¶ 20.)

B. A Brief Background on the Hobart Entities

24. Mr. Hobart began his career in the financial industry as an insurance salesman. (SAC ¶ 24.) In 2004, Mr. Hobart formed Hobart Financial as a "financial sales" company. (SAC ¶ 12.) Hobart Financial was branded as the "Senior Financial Planners: The Retirement Professionals," and later as the "Carolinas' Retirement and 401(k) Rollover Specialist." (SAC ¶ 25.) Based on the allegations in the Second Amended Complaint, it appears that Hobart Financial grew rapidly from a group of three employees in 2011 to a group of at least nineteen employees by 2015. (SAC ¶¶ 28–29.) It appears from the allegations of the Second Amended Complaint that Mr. Greer was hired to work at Hobart Financial sometime in 2011. (*See* SAC ¶¶ 18, 28.)

25. In its early years, Hobart Financial focused largely on selling insurance products, including fixed-index annuities, to senior citizens. (*See* SAC ¶¶ 24–26.) Around 2010 or 2011, Hobart Financial began to offer "certain commissioned, nontraded securities" including: real estate investment trusts ("REIT(s)"); business development corporations under the Investment Company Act of 1940 ("BDC(s)"); and other direct participation program securities ("DPP(s)"; together with REITs and BDCs, "Alternative Investments"). (SAC ¶ 27.)

26. Hobart Capital was formed on 12 July 2013 to provide investment advisory services, (SAC ¶ 13), and Hobart Insurance was thereafter organized in 2015, (SAC ¶ 14). Plaintiffs allege that Hobart Insurance is an "affiliate" with Hobart Capital, "under common ownership and control." (SAC ¶ 38.)

27. On 30 June 2015, Mr. Sunstrom was hired as an associate wealth advisor. (SAC ¶ 29.) Plaintiffs allege that "Mr. Hobart, [Mr. Sunstrom,] and Mr. Greer were primarily responsible for overseeing the process, structure, and management of client portfolios and accounts for [Defendants]." (SAC ¶ 31.) By no later than 2017, Mr. Sunstrom was holding "himself out to clients—including through his email signature line—as 'director of financial planning, Hobart Financial' and as 'senior wealth advisor.' " (SAC ¶ 31.)

28. Mr. Hobart, Mr. Greer, and Mr. Sunstrom performed several roles for the Hobart Entities. (*See* SAC ¶ 32.)

29. Plaintiffs allege that "Mr. Hobart established [Defendants'] policies and practices" in recommending "Alternative Investments and fixed-index annuities to [their] clients[,]" and was directly involved in recommending these to Plaintiffs. (SAC ¶ 33.)

30. Mr. Greer's role was serving as the registered broker through whom "substantially all" the Alternative Investment transactions at issue were processed. (SAC ¶ 34.) Mr. Greer also directly participated in recommending the sale of Alternative Investments and fixed-index annuities to numerous Plaintiffs. (SAC ¶ 35.)

31. Plaintiffs allege that Mr. Sunstrom's role was participating "in the recommendation of unsuitable Alternative Investments and fixed-index annuities to several of the Plaintiffs," including the Burtons, the Ostranders, Mr. Rhodes, and the Wilshires. (SAC ¶ 36.)

32. Legacy GFIS was organized on 26 March 2021. (SAC ¶ 15.) Plaintiffs do not allege its precise role in relation to the acts and omissions complained of in the Second Amended Complaint. (*See* SAC ¶ 15.)

C. <u>Overview of the Financial Products at Issue</u>

33. It is well settled that "[w]hen documents are attached to and incorporated into a complaint, they become part of the complaint and may be considered in connection with a Rule 12(b)(6) motion without converting it into a motion for summary judgment." *Laster v. Francis*, 199 N.C. App. 572, 577 (2009) (citations omitted). The Court may similarly consider documents "specifically referred to[] or incorporated by reference in the complaint." *Id.*

34. Various investment and insurance products are at issue in this litigation. The Court therefore finds it useful to describe the offerings that Defendants allegedly recommended to Plaintiffs. Since the Second Amended Complaint quotes from and specifically refers to documents attached to the Amended Complaint, the Court considers some of those documents to explain the investment products at issue without converting the Motion into one for summary judgment.

35. Plaintiffs assert that Defendants knew at all relevant times that the investments at issue are "unsuitable for retirees and near-retirees with conservative investment goals." (SAC ¶ 85.)

36. A 2007 Statement of Policy Regarding Real Estate Investment Trusts (the "Statement of Policy") issued by the National American Securities Administrators Association ("NASAA") describes the qualification and registration requirements for

REITs. The Statement of Policy provides that Real Estate Investment Trusts, or REITs, are corporations, trusts, associations, or other legal entities, excluding a real estate syndication, "engaged primarily in investing in equity interests in real estate (including fee ownership and leasehold interests) or in loans secured by real estate or both[,]" which may be publicly or non-publicly traded. (Am. Compl. Ex. 1 at 4, ECF No. 34.1 ["Ex. 1"]; SAC ¶ 86.)

37. The Statement of Policy further provides that REITs require special attention in order to determine if an investor can "bear the economic risk of the investment," meaning the investor should understand (i) "the fundamental risk of the investment;" (ii) "the risk that the [shareholder] may lose the entire investment;" (iii) "the lack of liquidity of REIT [shares];" and (iv) "the restrictions on transferability of REIT[s.]" (Ex. 1 at 10; SAC ¶ 86.)

38. The Statement of Policy also provides that subscription agreements for REITs are prohibited from including representations that "[t]he SHAREHOLDER understands or comprehends the risks associated with an investment in the REIT"; and "[i]n deciding to invest in the REIT, the SHAREHOLDER has relied solely on the PROSPECTUS, and not on any other information or representations from other PERSONS or sources." (Ex. 1 at 12; SAC ¶ 87.)

39. According to an 11 January 2013 FINRA Regulatory and Examination Priorities Letter from Chairman Rick Ketchum, business development corporations, or BDCs, are

> typically closed-end investment companies. Some BDCs primarily invest in the corporate debt and equity of private companies and may

> offer attractive yields generated through high credit risk exposures amplified through leverage. As with other high-yield investments, such as floating-rate/leveraged loan funds, private REITs and limited partnerships, investors are exposed to significant market, credit[,] and liquidity risks. In addition, fueled by the availability of low-cost financing, BDCs run the risk of over-leveraging their relatively illiquid portfolios.

(Am. Compl. Ex. 5 at 2, ECF No. 34.5 ["Ex. 5"].) Put simply, "BDCs are closed-end investment companies that are operated to make investments in small and emerging businesses and financially troubled businesses." (Am. Compl. Ex. 6 at 8 n.3, ECF No. 34.6 ["Ex. 6"].)

40. Finally, FINRA Regulatory Notice 13-18 describes direct participation program securities, or DPPs, as "investment programs that provide for flow-through tax consequences regardless of the structure of the legal entity or vehicle for distribution. DPPs include, among other investment vehicles, real estate programs that are not structured as REITs." (Am. Compl. Ex. 3 at 1, ECF No. 34.3 ["Ex. 3"].)

41. FINRA Regulatory Notice 15-02 stated that industry practice was to use the offering price of DPPs as the "per share estimated value during the offering period, which can continue [for] seven and one-half years. The offering price, typically $10 per share, often remains constant on customer account statements during this period," although various costs and fees may have caused the investments to decrease in value. (Am. Compl. Ex. 9 at 2, ECF No. 34.9 ["Ex. 9"].) This practice changed on 11 April 2016 by FINRA Regulatory Notice 15-02, which required increased transparency. (Ex. 9 at 1; SAC Ex. 8 at 2, ECF No. 55 ["SAC Ex. 8"].)

D. **Plaintiffs' Individual Allegations of Defendants' Misconduct**

42. Plaintiffs allege that Defendants designed each of their investment portfolios and recommended that Plaintiffs purchase the above-described Alternative Investments and fixed-index annuities. (SAC ¶ 30.) Plaintiffs further allege that Defendants consistently held themselves out to present and prospective "clients as a reputable, trustworthy firm that promised to uphold the highest of standards and to always act in the client's best interest." (SAC ¶ 40.) Plaintiffs allege that Defendants made numerous oral representations to each of them that Defendants were obligated to "act in the client's best interest," including that "Plaintiff(s) should engage only a fiduciary, like the Hobart [Entities], because only a fiduciary is obligated to have the client's best interests at heart;" and that "Plaintiffs could trust [Defendants were] complying with [their] fiduciary obligations by recommending only suitable investments in an appropriate amount[.]" (SAC ¶¶ 76.a., 76.c., 76.g.)

43. The allegations in the Second Amended Complaint largely concern the recommendation of the investments described herein and the marketing materials developed by Mr. Hobart and/or the Hobart Entities. (SAC ¶¶ 26, 33.) The allegations are particularly focused on whether the marketing materials provided to Plaintiffs "concealed and misrepresented the excessive fees and commissions [Defendants] received from the sale of fixed-index annuities and other insurance products, while at the same time 'warning' clients of the 'hidden fees' in mutual funds." (SAC ¶ 26.)

44. Plaintiffs also allege that Defendants failed to provide necessary disclosures regarding the illiquidity and high volatility of the Alternative Investments they sold. (SAC ¶ 129.) In fact, Plaintiffs allege that numerous misrepresentations were made by Defendants when providing investment-related advice, detailed herein.

45. First, Defendants allegedly "misrepresented to each and every Plaintiff that Alternative Investments were 'strong and secure' investments like the walls of a house." (SAC ¶ 130 (emphasis removed).) The "house analogy" was used by Mr. Hobart to describe the investments as safe, secure, and subject to different types of risks. (*See* SAC ¶ 133.) Plaintiffs allege that Mr. Hobart's analogy went as follows:

> At Hobart Financial, we believe you should build your portfolio kind of like you would build a house. A house has three main components: you've got foundation, which is safe and sound; you've got the walls, which need to be strong and secure; and you've got the roof, that is basically subject to different types of risk out there – and needs to be maintained on that basis. Retirement needs to be the same way.

(SAC ¶ 132 (emphasis removed).) Mr. Hobart used the "house metaphor to falsely minimize, in a simplistic manner, the level of risk associated with Alternative Investments." (SAC ¶ 135.)

46. The Burtons, Mr. Forbis, the Leshocks, the Ostranders, Mr. Rhodes, Mr. Tanger, and Dr. Zucker each allege that they received a copy of The Hobart Financial brochure, *Consumer's Guide to Finding the Right Advice Givers* ("Hobart Brochure"), around the time of their initial interactions with Defendants. (SAC ¶¶ 44–45, 253, 309, 329, 343, 385, 396, 429.) The Hobart Brochure is a six-part

handout that includes promotional information and materials and a quiz to assess "risk exposure to bad investments." (SAC ¶ 45; SAC Ex. 1, ECF No. 48 ["Brochure"].)

47. The Second Amended Complaint highlights Defendants' self-contradictions in the Hobart Brochure, including that: Defendants recommended potential clients do their own research on financial matters *but* that retained clients should sit back and rely on trusted advisors to make investment decisions on their behalf; clients should avoid relying on online resources and should view that information "with a very skeptical eye"; and, Hobart Financial could be trusted as a "real expert" that "really knows his or her stuff." (SAC ¶¶ 53–54; Brochure 12–13.) According to Plaintiffs, and as discussed more herein, these statements and others support the Court determining that a fiduciary relationship is adequately pleaded.

48. The Hobart Brochure provides that Defendants are "financial fiduciaries [that] provide advice on an independent, client by client basis. We represent the client, not a company. And we are legally responsible to promote full disclosure and do what is in the very best interest of our clients[.]" (Brochure 4.)

49. Plaintiffs also allege that Defendants' "policy and practice" was to send a welcome email to recently engaged clients, similar to the following email sent in February 2013 by Mr. Hobart:[1]

> We are a specialized group working in a unique environment with a proprietary process that we've developed over the past decade to assist clients, like you, in achieving their dreams and avoiding the common pitfalls that can damage a retirement. Many of our clients who have worked with us for years tell us that they always wanted to be represented by a comprehensive planning group but could never find a truly holistic financial group focused specifically on designing, building

[1] Plaintiffs do not allege to whom this email was sent.

> and maintaining a successful retirement planning [sic] with no unnecessary fluff or hidden costs. I am your lead financial planner and I will always remain completely involved with the proper management and oversight of your money.

(SAC ¶ 61 (emphasis removed).)

50. Plaintiffs allege that Defendants "expressly and repeatedly promised" that financial advice provided to them was "at the level of a fiduciary," including in promotional materials, public filings with the SEC, on Defendants' website, and in oral and written communications with Defendants. (SAC ¶ 41.) Plaintiffs relied on Defendants' representations that they were fiduciaries prior to entrusting Defendants with their retirement savings. (SAC ¶ 42.)

1. The Burtons

51. The Burtons met Defendants in the summer of 2011 at a solicitation dinner, and around that time, Mr. Hobart warned them against entrusting their retirement savings to other groups because those groups "did not have the Burtons' best interests at heart." (SAC ¶¶ 251–52.) The Burtons made clear to Defendants that they were unsophisticated and "conservative investors nearing retirement[.]" (SAC ¶¶ 254–55.)

52. Mr. Hobart first sold Alternative Investments and a fixed-index annuity to the Burtons in 2011. (SAC ¶ 256.) In late 2011, Mr. Hobart sold Mr. Burton "an unsuitable fixed-index annuity," which Mr. Hobart represented "had a guaranteed return of six percent (6%) and had the ability to grow when the S&P 500 index was up." (SAC ¶ 258.) Mr. Burton alleges that he paid undisclosed fees on that investment "for an income rider and death benefit[.]" (SAC ¶ 258.)

53. Mr. Hobart and Mr. Greer also recommended that the Burtons invest in non-publicly traded REITs, misrepresenting them as "a more stable and secure investment" that provided "safe, reliable income that would preserve and grow the principle [sic] forever." (SAC ¶ 259.)

54. The Burtons allege that when they expressed concerns regarding hidden fees and costs, Mr. Hobart misrepresented the commissions paid to Defendants, claiming that he had a "compensation arrangement" with the sellers or sponsors of the individual Alternative Investments.[2] (SAC ¶ 264.)

55. The Burtons allege that they followed all of Defendants' investment recommendations. (SAC ¶ 266.) The pair expressed "misgivings" for the first time in April 2015 when they "asked Mr. Greer to get them out of the Alternative Investments if their price ever dropped." (SAC ¶ 267.)

56. Mr. Sunstrom recommended and sold the Burtons additional Alternative Investments on 15 July 2015. (SAC ¶¶ 256, 267.)

57. Thereafter, in April 2016, "[t]he Burtons made clear they wanted out of the investments" after noticing the reported value decreased, but Defendants "insisted" the investments were suitable and that the Burtons should remain invested. (SAC ¶ 268.) Around the same time, the Burtons started to receive offers to purchase their Alternative Investments from potential buyers, and "[w]hen the REITs stopped paying the Burtons dividends, the Burtons were forced to sell the REITs . . . at a loss

[2] Plaintiffs further allege that these transactions were laden with concealed conflicts of interest related to commissions and fees. (SAC ¶¶ 90, 92, 114 (noting Defendants had a "financial incentive" to recommend certain products, which went undisclosed until 2021).)

in order to provide income for themselves." (SAC ¶ 270.) The Burtons claim they "remain stuck with non-traded Alternative Investments" including "BDCA, FS Energy and Power, and Phillips Edison Grocery Center REIT II[.]" (SAC ¶ 271.)

2. Ms. Byrnes

58. Following an introduction to Hobart Financial through her mother, Ms. Byrnes met with Mr. Hobart on 8 September 2010 to discuss her financial plan. (SAC ¶¶ 273–74.) Ms. Byrnes alleges that Mr. Hobart recommended she purchase "a hybrid life insurance and long-term care insurance plan." (SAC ¶ 274.)

59. On 18 October 2010, Ms. Byrnes again met with Mr. Hobart and he recommended that she open a new IRA and move her 401k to Hobart Financial. (SAC ¶¶ 276–77.) During the meeting, Mr. Hobart discussed the commission and fees Ms. Byrnes's previous financial advisor made when she purchased a Prudential variable annuity. (SAC ¶ 279.) He recommended that Ms. Byrnes switch from the Prudential annuity in favor of "a fixed-index annuity issued by Aviva, which [Mr. Hobart] misrepresented paid more in interest: an '8% compounding income benefit,' plus an '8% upfront bonus.' " (SAC ¶¶ 279–80.) Mr. Hobart misrepresented that Ms. Byrnes would not incur a surrender penalty by selling the Prudential annuity to purchase the Aviva annuity, and he failed to disclose that he would make a 10% commission on the purchase—roughly $32,500.00. (SAC ¶ 282.)

60. On 4 February 2011, Mr. Hobart alerted Ms. Byrnes that Aviva declined the transfer. (SAC ¶ 283.) Ms. Byrnes alleges that Mr. Hobart advised her of "an even better offer" from Security Benefit, another purveyor of fixed-index annuities,

but that he did not disclose that the better offer from Security Benefit had a surrender period of ten years. (SAC ¶¶ 284–85.) Mr. Hobart did, however, claim that any loss from surrendering the Prudential annuity "would be more than made up for by the better rate of return of the new fixed-index annuity issued by Security Benefit," which Ms. Byrnes alleges was untrue. (SAC ¶ 284.)

61. Plaintiffs allege that Mr. Hobart engaged in similar conduct with Ms. Gleason when he convinced her to make two annuity transfers: Mr. Hobart sold Ms. Gleason a Great American/American Valor II Annuity for $200,000.00 in December 2006, before engaging in an exchange in September 2009 to replace it in favor of an RBC Enhanced Choice 12 Annuity; Mr. Hobart then engaged in an exchange of the replacement annuity in October 2011 in favor of an annuity from National Western Life Insurance Company. (SAC ¶ 287.)

62. On at least one occasion, Ms. Gleason sent a letter to Mr. Hobart communicating that "she felt pressured by him and did not understand the paperwork she was asked to sign." (SAC ¶ 289.) Ms. Byrnes alleges that she and her mother were "unsophisticated investors" and "did not understand any of the material terms of the fixed-index annuities that Mr. Hobart sold to them." (SAC ¶ 290.)

63. In late March or early April 2011, Ms. Byrnes called Mr. Hobart "to ask questions," and on 5 April 2011, she received an email in response from Mr. Greer that "provided little clarity." (SAC ¶ 290.) She remained confused, and around 1 February 2012 she met with a different financial advisor who advised her that her investments may be unsuitable. (SAC ¶ 293.)

64. Around July 2012, Ms. Byrnes understood that she had been deceived by Defendants. (SAC ¶ 293.) Ms. Byrnes nonetheless remained invested with Defendants, and on 12 September 2012, emailed a list of questions to Mr. Hobart. (SAC ¶ 294.) Rather than responding by email, Mr. Hobart called Ms. Byrnes to answer some of her questions but not the pointed questions she posed regarding commissions. (SAC ¶ 295.) Ms. Byrnes followed up in December 2012, but received "evasive and misleading answers" which resulted in Ms. Byrnes removing her and her mother's investments from Defendants' supervision in March 2013. (SAC ¶¶ 298–99, 302.)

3. Mr. Forbis

65. Mr. Forbis was introduced to Defendants in the fall of 2015. (SAC ¶ 308.) Shortly thereafter, on 3 September 2015, Mr. Forbis received a template letter from Defendants scheduling an individual meeting with Mr. Greer and Mr. Hobart on 15 September 2015. (SAC ¶ 310.)

66. Mr. Forbis searched Google for any lawsuits involving Defendants prior to engaging Mr. Hobart, and even expressed concern to Mr. Greer about "falling victim to a Bernie Madoff-like Ponzi scheme[.]" (SAC ¶ 311.) Aiming for retirement within one year, Mr. Forbis hoped for an investment plan that would "provide reliable income in retirement," and he expressed concern about annuities and other investment products that "locked up retirement savings." (SAC ¶ 313.)

67. On 15 October 2015, Mr. Greer made an investment recommendation to Mr. Forbis that included Alternative Investments, which Mr. Greer described as "safe

and secure investments." (SAC ¶ 314.) When Mr. Forbis asked whether it would be difficult to sell the Alternative Investments, Mr. Greer "falsely" responded that he did not know of any investors having problems selling them. (SAC ¶ 316.) Mr. Greer also represented that there were no costs or fees associated with the Alternative Investments. (SAC ¶ 317.)

68. Plaintiffs allege that Mr. Forbis was an "unsophisticated investor" and that he followed Defendants' recommended investment plan. (SAC ¶ 319.) Mr. Forbis alleges that in November 2015, Defendants invested "$425,000 [of his investment funds] in illiquid and unsuitable Alternative Investments, well in excess of 20% of Mr. Forbis's liquid net worth. Of this amount, approximately $40,000 came from Mr. Forbis's IRA." (SAC ¶ 319.) Despite reinvesting all dividends in the Alternative Investments, in April 2016 Mr. Forbis noticed a decrease in the reported principal value. (SAC ¶ 320.) In April 2016, Mr. Forbis determined that one of his investments, which decreased by about $40,000, was "the worst investment he had ever been sold." (SAC ¶¶ 320–21.)

69. Mr. Forbis thereafter called Mr. Greer, who switched Mr. Forbis to receiving cash dividends from the Alternative Investments in late 2016 or early 2017. (SAC ¶ 322.) The dividends declined after about one year from $3,000.00 to $800.00 per month. (SAC ¶ 322.) Mr. Forbis complained to Mr. Greer again in 2017 after another Alternative Investment's principal declined by at least $20,000.00. (SAC ¶ 323.) Mr. Forbis thereafter began receiving unsolicited offers to purchase his Alternative Investments "for pennies on the dollar." (SAC ¶ 324.) For example, one

offer to purchase Mr. Forbis's shares in an Alternative Investment was for $2.60 per share, but the investment was reported to be worth $10.66 per share. (SAC ¶ 324.)

70. Mr. Forbis remains "stuck" with several of his investments "which have lost significant amounts of principal." (SAC ¶ 327.)

4. The Leshocks

71. The Leshocks were introduced to Defendants in 2014, and on around 10 April 2014, the pair received a letter from Mr. Hobart indicating that he would serve as their lead financial planner. (SAC ¶¶ 328–29.) The Leshocks sought "a conservative, low-risk investment portfolio" and were concerned about their ability to pay for long-term assisted living or future healthcare services. (SAC ¶ 330.) The Leshocks allege that, around this same time, Mr. Hobart represented to them that Alternative Investments were "safe and secure." (SAC ¶ 331.)

72. The Leshocks allege that, before investing, Defendants misrepresented several things by (1) "falsely minimiz[ing] limits on the liquidity of the Alternative Investments"; and (2) suggesting that, if the Leshocks took out a mortgage on their new residence, rather than paying for the house in cash, the Leshocks could invest more in the Alternative Investments and average a twelve percent return. (SAC ¶¶ 332, 334.)

73. On 15 April 2014, the Leshocks invested $140,000.00—"nearly half their net worth"—in five Alternative Investments. (SAC ¶ 335.) The pair allege that Mr. Hobart did not explain the risks associated with these investments. (SAC ¶ 335.)

The Leshocks reinvested their monthly dividends in the Alternative Investments. (SAC ¶ 340.)

74. In 2016, Mr. Hobart informed the Leshocks of a decline in the value of their investments, but he explained that it was the result of "a FINRA-mandated reporting change" and did not reflect an actual loss. (SAC ¶ 336.)

75. In June 2020, the Leshocks discovered that their investments were illiquid, and were "shocked" to learn that they could not sell the Alternative Investments for their reported value—except for the Global Net Lease investment, which went public in the intervening six years—because the sale would be at a "significant discount on their original investment." (SAC ¶ 337.)

5. The Ostranders

76. The Ostranders were introduced to Defendants in the fall of 2012 and communicated their conservative investment goals to Mr. Hobart. (SAC ¶¶ 343, 346.)

77. The Ostranders understood from their first meeting with Mr. Hobart that he was not affiliated with any company that sold investment products. (SAC ¶ 345.) Mr. Hobart communicated to the Ostranders that Alternative Investments were "significantly less risky than individual stocks," and "were recession proof." (SAC¶ 347.) They allege that Mr. Hobart (1) falsely minimized the liquidity restrictions of the Alternative Investments, and (2) along with Mr. Greer, misrepresented the commissions and sales load in the Alternative Investments. (SAC ¶¶ 348–49.)

78. On 6 February 2013, the Ostranders met with Mr. Hobart prior to investing. (SAC ¶ 350.) They allege that Mr. Hobart falsely stated that "all fees were disclosed" and that the Ostranders would be protected from risks associated with market slides available in more conservative portfolios from other advisors. (SAC ¶¶ 350–51.) The Ostranders allege that before investing they specifically confronted Mr. Greer and Mr. Hobart "with pointed questions about fees and commissions," and that both provided "materially false responses." (SAC ¶ 349.)

79. On 16 April 2013, Mr. Hobart prepared an investment summary for the Ostranders, recommending that the pair "invest a substantial portion of their retirement savings in unsuitable fixed-index annuities and Alternative Investments." (SAC ¶ 354.) Ms. Ostrander read a prospectus document for one of the recommended alternative investments, and on 18 April 2013, emailed Mr. Hobart and Mr. Greer with concerns about the high hidden fees she found. (SAC ¶ 355.) The email read, in relevant part, as follows:

> Another fee question please . . . it was my understanding that we would not have any fees on [the Alternative Investment], but in looking at the attached page from their prospectus, it appears that there are significant fees. Are these being waived or will we be incurring these? They reflect a 10% sales load, which I'm assuming was waived since there was not a reduction in our initial investment, but please confirm. Additionally, the 6% annual expense is quite high and I'm hoping we aren't subject to that.

(SAC ¶ 355.) On 19 April 2013, Mr. Greer responded, copying Mr. Hobart, stating that the fees would "never" come out of the Ostranders' pocket or earnings, which Plaintiffs allege was materially false. (SAC ¶ 356.)

80. Ms. Ostrander followed up with Mr. Greer the same day, asking him to confirm that the Ostranders would not incur the ten percent sales load. (SAC ¶ 357.) According to Ms. Ostrander, Mr. Greer called her, "lied to [her,] and confirmed the Ostranders would not pay the '10% sales load,' otherwise disclosed in the prospectus." (SAC ¶ 357; *see* SAC Ex. 4, ECF No. 51 ["SAC Ex. 4"].) On 22 April 2013, Ms. Ostrander attempted to confirm these representations through an email to Mr. Hobart, but he did not respond to her email inquiry. (SAC ¶¶ 358–59.)

81. The prospectus at issue provides that, "if you invest $100 in shares in this offering, only $88.50 will actually be invested in the Company." (SAC ¶ 361 (emphasis removed).) But Plaintiffs allege that there were numerous other fees and expenses that were not disclosed when the Ostranders ultimately invested. (*See* SAC ¶¶ 362–65.) The Ostranders allege that they were "unable to learn the extent of the embedded fees" in one of their recommended Alternative Investments and were similarly unable to learn that the "investment recommendations were tainted by pervasive conflicts of interest related to undisclosed commissions." (SAC ¶ 366.)

82. Between 2013 and May 2019, the Ostranders worked with Mr. Greer and then Mr. Sunstrom when he joined Hobart Financial. (SAC ¶¶ 271–72.) The Ostranders were repeatedly re-assured that decreases in value were not a cause for concern. (*See* SAC ¶¶ 373–75.) Ultimately, the Ostranders purchased over $270,000.00 in investments from Defendants, which they allege was roughly twenty percent of their savings. (SAC ¶ 371.)

83. After two non-traded REITs in which the Ostranders were invested went public in June 2020, the share price dropped dramatically. (SAC ¶¶ 377–78.) On 10 July 2020, Mr. Ostrander expressed concern about the drop by email, asking Mr. Greer "for an accurate valuation of their existing Alternative Investments, which they never received." (SAC ¶ 379.)

84. The Ostranders, having lost trust in Defendants, ended the relationship with them in December 2020. (SAC ¶ 380.)

6. Mr. Rhodes

85. Mr. Rhodes was introduced to Defendants in 2013 when he attended a solicitation dinner, and he thereafter went to Hobart Financial for a meeting with Mr. Hobart. (SAC ¶¶ 384, 386.) Mr. Rhodes had a "moderate/conservative risk tolerance," and Mr. Hobart represented that Alternative Investments were "safe and secure," emphasizing that Mr. Rhodes would see regular returns. (SAC ¶ 388.)

86. That same year, Mr. Rhodes purchased approximately $250,000.00 in Alternative Investments through Defendants. (SAC ¶ 387.) Mr. Rhodes alleges that Defendants did not disclose the (1) sales load on the investments or (2) commissions Defendants received from the sales. (SAC ¶ 387.) Further, "[a]t all relevant times, Mr. Hobart concealed the illiquidity and risks associated with Alternative Investments and recommended that Mr. Rhodes reinvest dividends in the same." (SAC ¶ 391.)

87. The reported value of Mr. Rhodes's investments declined in April 2016, but Mr. Greer reassured him there was nothing to worry about. (SAC ¶ 389.) Later that

year, when the investments did not rebound, Mr. Rhodes sent a letter to Defendants "complaining" about his investment portfolio. (SAC ¶ 390.)

88. Mr. Rhodes alleges that he learned for the first time that he was unable to sell the Alternative Investments in April 2017 because his CPA said to him, "[w]hat idiot put an 80-year-old in illiquid REITs?" (SAC ¶ 391.) Mr. Rhodes thereafter terminated his relationship with Defendants and transferred his investments to TD Ameritrade. (SAC ¶ 391.)

7. Mr. Tanger

89. Mr. Tanger was introduced to Defendants in 2014 and had his first meeting at Hobart Financial on 14 October 2014. (SAC ¶ 394.) On 25 November 2014, Mr. Tanger met with Mr. Greer, who largely served as Mr. Tanger's primary contact. (SAC ¶¶ 398, 402.) Mr. Tanger communicated to Mr. Greer his conservative investment goals and his hope to retire in 2016. (SAC ¶ 399.)

90. During the November 2014 meeting, Mr. Tanger alleges that Mr. Greer misrepresented that the Alternative Investments: (1) would be liquid within one to three years; (2) produced a "stable," "reliable" divide[n]d; and (3) had no hidden commissions or fees. (SAC ¶¶ 400–02.) Mr. Tanger trusted Defendants and invested about $300,000.00 in several Alternative Investments recommended by Defendants. (SAC ¶ 403.)

91. Around April 2016, the reported value of Mr. Tanger's investments decreased by approximately ten percent. (SAC ¶ 404.) Mr. Greer reassured him that the decline resulted from "merely a reporting change," and when Mr. Tanger asked

whether he should sell or make changes to his Alternative Investments, Mr. Greer said that he "still could not sell the Alternative Investments." (SAC ¶¶ 404–05.)

92. Mr. Tanger alleges that he was never told that the dividends could decrease or that he could stop receiving dividends altogether. (SAC ¶ 407.) Until mid-2019, Defendants reinvested Mr. Tanger's dividends in the Alternative Investments. (SAC ¶ 412.)

93. Plaintiffs allege that "[b]y late May or early June 2019, Mr. Tanger came to the conclusion that the Alternative Investments sold to him by [Defendants] were unsuitable investments, and he attempted to redeem his shares at every opportunity." (SAC ¶ 410.) When Mr. Tanger asked Mr. Greer for help liquidating his Alternative Investments, Mr. Greer allegedly told Mr. Tanger that he was "on his own." (SAC ¶ 411.)

8. The Wilshires

94. The Wilshires met Defendants in 2013 and that same year entrusted Defendants with "some of their retirement savings" to be invested into a fixed-index annuity and in Alternative Investments. (*See* SAC ¶¶ 416–18.) Mr. Hobart invested $250,000 of Ms. Wilshire's IRA in a fixed-index annuity, and "around March 2015, $735,000 of Dr. Wilshire's profit-sharing retirement account in five Alternative Investments." (SAC ¶ 418.)

95. The Wilshires allege that Mr. Hobart misrepresented the commissions that Defendants would receive, informing the Wilshires that the full purchase price for

the relevant investments "would be invested on their behalf, without accounting for any sales load." (SAC ¶ 419.)

96. Mr. Hobart "passed off" the Wilshires to Mr. Sunstrom after the March 2015 investments. (SAC ¶ 420.) In April 2016, the Wilshires "observed a six-figure decline in the reported value of the Alternative Investments," but Mr. Sunstrom reassured the Wilshires that the investments would rebound. (SAC ¶ 421.) The Wilshires continued to reinvest dividends in the Alternative Investments until 2018. (SAC ¶ 422.)

97. The Wilshires first began questioning the suitability of their investments in 2020, when dividends "dried up" and one of the REITs suffered a 2.43:1 reverse stock split. (SAC ¶ 423.)

98. The Wilshires allege that they suffered great loss on their principal in the Alternative Investments and that they remain stuck with several non-publicly traded Alternative Investments. (SAC ¶ 424.) Notwithstanding that the fixed-index annuity Ms. Wilshire was invested in produced "almost zero return over eight years," Plaintiffs allege that it was redeemed for roughly $267,000.00 in April 2021. (SAC ¶ 425.)

9. Dr. Zucker

99. Dr. Zucker was introduced to Defendants in late 2011 when he attended Hobart-sponsored events, and around this same time, met with Mr. Hobart at Hobart Financial. (SAC ¶¶ 428, 431.) Mr. Hobart allegedly misrepresented the volatility and income generation of Alternative Investments and fixed-index annuities,

describing them as "strong and secure," as he did with the other Plaintiffs. (SAC ¶ 431.) Mr. Hobart did not disclose that these investment products were illiquid, instead promising that "if Dr. Zucker followed his direction, he would earn between $10,000 to $15,000 per month in reliable dividends." (SAC ¶¶ 432–33.)

100. "Dr. Zucker followed Mr. Hobart's recommendations and, from approximately December 2011 through 2013, invested around $1 million in Alternative Investments and fixed-index annuities." (SAC ¶ 437.) Prior to investing with Defendants, Dr. Zucker was invested in a diversified portfolio of mutual funds and other investments. (SAC ¶ 427.)

101. Dr. Zucker alleges that he did not understand the "complicated terminology" used by Mr. Hobart, and that Mr. Hobart failed to explain any risks that might be associated with the recommended investments. (*See* SAC ¶¶ 435–36.)

102. In April 2016, when Dr. Zucker's investments dropped by double-digit percentages in one month, Defendants reassured him that the drop was the result of a reporting change and that the value of the investments would rebound. (SAC ¶ 438.)

103. Mr. Hobart recommended that Dr. Zucker reinvest his dividends into the Alternative Investments, and Dr. Zucker alleges that he "did not realize" taking cash dividends was an option until the summer of 2021. (SAC ¶ 439.) Dr. Zucker met with Mr. Woodrum, a junior financial advisor for Defendants, around the same time he was advised by Mr. Hobart to reinvest his dividends. (SAC ¶ 439.) Mr. Woodrum recommended, however, that Dr. Zucker discontinue reinvesting his dividends and to

sell for a loss, telling him to "get out of these [Alternative Investments], they're dead." (SAC ¶ 439 (modification in original).)

104. Dr. Zucker continues to try to liquidate his Alternative Investments but is unable to sell them because four of the five Alternative Investments he is invested in still have not gone public. (SAC ¶ 439.)

E. <u>The FINRA Disclosure Changes in 2016</u>

105. April 2016 appears to be the turning-point for many Plaintiffs. (*See, e.g.*, SAC ¶¶ 268, 320–21, 336, 389, 404–05, 421, 438.) Nearly all Plaintiffs allege that the value of their investments declined in April 2016 and that Defendants offered them reassurances. By way of example, Defendants "continued to recommend the Plaintiffs hold onto Alternative Investments and reinvest dividends into Alternative Investments[, causing] Plaintiffs to buy additional shares of the Alternative Investments for years after April 2016." (SAC ¶ 193; *see infra* ¶ 109.)

106. Plaintiffs allege that, prior to April 2016, Defendants sold them Alternative Investments at the "gross offering price," or the price offered during the initial offering period. (SAC ¶ 177.) The price was typically $10.00 per share and remained constant until the offering period concluded. (SAC ¶ 178; *supra* ¶ 41.)

107. On 11 April 2016, the SEC modified NASD Rule 2340—now FINRA Rule 2231—to require "increased transparency in the reported per-share value of Alternative Investments on periodic statements provided to retail investors." (SAC ¶ 180.) From that point forward, account statements were required to reflect a per-share estimated value in the form of (a) the net investment methodology, or

(b) the appraised value methodology. (SAC ¶ 181.) The rule change also required account statements to disclose that Alternative Investments "are generally illiquid and that, even if a customer is able to sell the securities, the price received may be less than the per-share estimated value[.]" (SAC ¶ 182.)

108. On 1 April 2016, just before the effective date of the new rule, Defendants emailed all their clients that held Alternative Investments, including Plaintiffs. (SAC ¶ 185.) Plaintiffs allege that the email "(a) minimized the impact of the regulatory reporting change, (b) reassured [the] clients that the Alternative Investments remained strong and secure investments, and (c) recommended that [the] clients continue to hold and reinvest dividends into the Alternative Investments." (SAC ¶ 186.)

109. Plaintiffs allege that they received various assurances from Defendants during this time: the Burtons allege that Mr. Hobart claimed "the value of the Alternative Investments would rebound when they went public," (SAC ¶ 268); the Leshocks were told that, "although it appeared their Alternative Investments had declined in value, this was simply due to a FINRA-mandated reporting change, not reflective of a loss," (SAC ¶ 336); and "Mr. Rhodes communicated with Mr. Greer, who blamed the change on 'bookkeepers' or 'bean counters' and assured Mr. Rhodes there was nothing to worry about—that the value of the Alternative Investments would rebound," (SAC ¶ 389).

110. Notwithstanding Defendants' assurances to Plaintiffs and other clients, Defendants stopped selling Alternative Investments around April 2016. (SAC ¶ 189.)

III. PROCEDURAL BACKGROUND

111. The Court sets forth herein only those portions of the procedural history relevant to its determination of the Motion.

112. This action was initiated by sixteen plaintiffs on 1 February 2022 with a Rule 3 Application. (*See* ECF No. 3.) On 21 February 2022, the Complaint was filed by Plaintiffs' counsel. (ECF No. 4.) On 24 March 2022, this action was designated as a mandatory complex business case, (ECF No. 1), and it was assigned to the undersigned on 17 May 2022, (ECF No. 13).

113. Following the filing of an Amended Complaint, (ECF No. 9), Defendants sought dismissal of all claims against them pursuant to Rule 12(b)(6), (ECF Nos. 22–23). After full briefing and a hearing on that motion, (ECF Nos. 29–31), the Court determined that a more definite statement pursuant to Rule 12(e) was "both necessary and appropriate," and therefore Plaintiffs were ordered to file a Second Amended Complaint that more clearly set forth the facts and claims alleged as to each Plaintiff against each Defendant, *see Baker v. Hobart Fin. Grp.*, 2023 NCBC LEXIS 45, at **9–10 (N.C. Super. Ct. Mar. 22, 2023).

114. On 1 May 2023, Plaintiffs filed the Second Amended Complaint. (*See* SAC.) Plaintiffs allege seven claims for relief against Defendants: (1) breach of fiduciary duty ("Count One"), (SAC ¶¶ 444–59); (2) constructive fraud ("Count Two"), (SAC ¶¶ 460–67); (3) violation of the North Carolina Securities Act ("NCSA"), N.C.G.S. § 78A-1 *et seq.* ("Count Three"), (SAC ¶¶ 468–79); (4) violation of the North Carolina Unfair and Deceptive Trade Practices Act ("UDTPA"), N.C.G.S. § 75-1.1 *et*

seq. ("Count Four"), (SAC ¶¶ 480–87); (5) fraud ("Count Five"), (SAC ¶¶ 488–96); (6) professional negligence ("Count Six"), (SAC ¶¶ 497–506); and (7) negligent misrepresentation ("Count Seven"), (SAC ¶¶ 507–13). As set forth in more detail in the Second Amended Complaint, most Plaintiffs join in only some claims and seek relief from only some Defendants. However, all Plaintiffs join in bringing Count Two for constructive fraud against Defendants. (*See* SAC ¶ 461.)

115. Defendants thereafter filed the Motion, again seeking dismissal of all claims against them pursuant to Rules 9(b) and 12(b)(6). (*See* Mot.; Defs.' Br. Supp. Mot., ECF No. 73 ["Br. Supp."].)

116. On 16 October 2023, following full briefing on the Motion but prior to the hearing, Plaintiffs William Baker III, individually, on behalf of his IRA, and as personal representative of Nancy Baker and her IRA, and Joyce Elizabeth Baker, as beneficiary to Nancy Baker, voluntarily dismissed with prejudice all claims against Defendants. (ECF No. 79.)

117. The Court held a hearing on the Motion on 24 October 2023 (the "Hearing"), at which all parties were present and represented through counsel. (*See* ECF No. 78.)

118. The Motion is ripe for resolution.

IV. LEGAL STANDARD

119. In ruling on a motion to dismiss pursuant to Rule 12(b)(6), the Court reviews the allegations in the Second Amended Complaint in the light most favorable to Plaintiffs. *See Christenbury Eye Ctr., P.A. v. Medflow, Inc.*, 370 N.C. 1, 5 (2017). The Court's inquiry is "whether, as a matter of law, the allegations of the complaint

. . . are sufficient to state a claim upon which relief may be granted under some legal theory[.]" *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 670 (1987) (citation omitted). The Court accepts all well-pleaded factual allegations in the relevant pleading as true. *See Krawiec v. Manly*, 370 N.C. 602, 606 (2018). The Court is therefore not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Good Hope Hosp., Inc. v. N.C. Dep't of Health & Human Servs.*, 174 N.C. App. 266, 274 (2005) (cleaned up).

120. Furthermore, the Court "can reject allegations that are contradicted by the documents attached, specifically referred to, or incorporated by reference in the complaint." *Moch v. A.M. Pappas & Assocs., LLC*, 251 N.C. App. 198, 206 (2016) (citation omitted). The Court may consider these attached or incorporated documents without converting the Rule 12(b)(6) motion into a motion for summary judgment. *Id.* (citation omitted). Moreover, the Court "may properly consider documents which are the subject of a plaintiff's complaint and to which the complaint specifically refers even though they are presented by the defendant." *Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 60 (2001) (citation omitted).

121. Our Supreme Court has observed that "[i]t is well-established that dismissal pursuant to Rule 12(b)(6) is proper when '(1) the complaint on its face reveals that no law supports the plaintiff's claim; (2) the complaint on its face reveals the absence of facts sufficient to make a good claim; or (3) the complaint discloses some fact that necessarily defeats the plaintiff's claim.' " *Corwin v. British Am. Tobacco PLC*, 371 N.C. 605, 615 (2018) (quoting *Wood v. Guilford Cty.*, 355 N.C. 161,

166 (2002)). This standard of review for Rule 12(b)(6) motions is the standard our Supreme Court "uses routinely . . . in assessing the sufficiency of complaints in the context of complex commercial litigation." *Id.* at 615 n.7 (citations omitted).

V. ANALYSIS

122. Defendants contend that dismissal of all claims with prejudice is proper. (Mot. 4.) Defendants argue that: (1) Counts One, Three, Four, Five, Six, and Seven fail as to the Leshocks, the Ostranders, Mr. Tanger, the Wilshires, and Dr. Zucker because those claims are barred by the applicable statute of limitations, and that Count Two as to Ms. Byrnes is similarly time barred, (Mot. 4–5); (2) Counts Five and Seven fail as to the Leshocks, the Ostranders, Mr. Tanger, the Wilshires, and Dr. Zucker because the allegations do not meet the particularized pleading standard set forth in Rule 9(b), (Mot. 6–7); and (3) the claims alleged otherwise fail to state a valid cause of action, (Mot. 5). The Court addresses each of these arguments in turn, beginning with the arguments related to the applicable limitations periods.

A. <u>Statute of Limitations Issues</u>

123. "A statute of limitations can provide the basis for dismissal on a Rule 12(b)(6) motion if the face of the complaint establishes that plaintiff's claim is so barred." *Soderlund v. N.C. Sch. of the Arts*, 125 N.C. App. 386, 389 (1997) (citation omitted). "Dismissal pursuant to Rule 12(b)(6) on the grounds that a claim is barred by the statute of limitations is proper only when all the facts necessary to establish that the claim is time-barred are either alleged or admitted in the complaint, construing the complaint liberally in favor of plaintiff." *Lau v. Constable*, 2017 NCBC

LEXIS 10, at **10 (N.C. Super. Ct. Feb. 7, 2017) (cleaned up) (citing *Fox v. Sara Lee Corp.*, 210 N.C. App. 706, 708-09 (2011)).

124. The Court begins the statute of limitations analysis by first addressing Ms. Byrnes's claim at Count Two, and then turns to Counts One, Three, Four, Five, Six, and Seven related to the other Plaintiffs.

1. Count Two as to Ms. Byrnes

125. Defendants contend that Ms. Byrnes's claim for constructive fraud is time-barred. (Br. Supp. 16.) Plaintiffs contend the claim is not time-barred because Ms. Byrnes did not discover or have reason to know the basis for her claim until July 2012. (Pls.' Br. Opp'n Mot. 17, ECF No. 76 ["Br. Opp."] (citing SAC ¶ 293).) Plaintiffs' counsel misunderstands the standard.

126. "[T]he the limitations period applicable to constructive fraud claims is ten years[.]" *Chisum v. Campagna*, 376 N.C. 680, 707 (2021) (citing N.C.G.S. § 1-56(a)). Thus, a cause of action for constructive fraud, "may not be commenced more than 10 years after the cause of action has accrued." N.C.G.S. § 1-56(a). "A cause of action generally accrues when the right to institute and maintain a suit arises." *Piles v. Allstate Ins. Co.*, 187 N.C. App. 399, 403 (2007) (citation omitted).

127. Count Two is based on allegations that Defendants breached a fiduciary duty owed to Plaintiffs by recommending unsuitable Alternative Investments and fixed-index annuities for Defendants' own benefit. (*See* SAC ¶¶ 462–64.) Therefore, it appears that the question, for purposes of determining when the limitations period

runs, is when did Defendants recommend that Ms. Byrnes purchase unsuitable investments?

128. Ms. Byrnes met with Mr. Hobart in September and October 2010, and she alleges that Mr. Hobart made various misrepresentations during that meeting about expected dividends and his own commissions for certain purchases. (*See* SAC ¶¶ 274, 276, 282.) Further, in February 2011, Mr. Hobart recommended and executed the annuity transfer for Ms. Byrnes by selling her Prudential variable annuity and purchasing one from Security Benefit. (*See* SAC ¶¶ 282–84.)

129. Ms. Byrnes's mother, "Ms. Gleason[,] wrote a letter to Mr. Hobart evidencing that, on one or more occasion, she communicated to Mr. Hobart that she felt pressured by him and did not understand the paperwork she was asked to sign." (SAC ¶ 289.) Further, in March or April 2011, Ms. Byrnes called Mr. Hobart to ask questions about her investments, and on 5 April 2011, she received an email from Mr. Greer providing "little clarity[.]" (SAC ¶ 290.)

130. Even reviewing the allegations in the Second Amended Complaint in the light most favorable to Ms. Byrnes, Defendants' recommendation regarding Alternative Investments and fixed-index annuities occurred on or around February 2011 when Mr. Hobart suggested Ms. Byrnes purchase a different fixed-index annuity and then executed on that advice. (*See* SAC ¶¶ 283, 462.) Thus, in February 2011, the ten-year statute of limitations for Ms. Byrnes's constructive fraud claim began to run. As for her late mother, Ms. Gleason, it appears that the last allegation of investment recommendations or advice occurred in October 2011.

(SAC ¶ 287.) As noted above, this action was initiated on 1 February 2022. (*See supra* ¶ 112.) Therefore, over ten years passed between when the limitations period began to run and when this action was filed.

131. The Court determines that the allegations contained in the Second Amended Complaint establish as a matter of law that Ms. Byrnes's claim, individually and as beneficiary to Ms. Gleason's estate, is time-barred. The question is not when Ms. Byrnes knew or should have known of the wrong, but rather when the act giving rise to the cause of action occurred. It was on that date that her constructive fraud claim accrued.

132. Therefore, the Motion is hereby **GRANTED** in part, and Ms. Byrnes's claim under Count Two is hereby **DISMISSED** with prejudice.[3]

2. Counts One, Three, Four, Five, Six, and Seven as to Mr. Tanger and Dr. Zucker

133. Defendants similarly seek dismissal of Counts One, Three, Four, Five, Six, and Seven as to Mr. Tanger and Dr. Zucker, contending that Plaintiffs' counsel previously conceded in briefing and at oral argument that these two plaintiffs did not file the claims "within a five-year statute of limitations." (Br. Supp. 4 n.1; Br. Opp'n Mot. Dismiss Am. Compl. 35 n.12, ECF No. 29.) Defendants argue that this admission bars Mr. Tanger and Dr. Zucker's claims, except their constructive fraud claims. (Br. Supp. 4, 25–27.)

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[3] "The decision to dismiss an action with or without prejudice is in the discretion of the trial court." *First Fed. Bank v. Aldridge*, 230 N.C. App. 187, 191 (2013).

134. "A judicial admission is a formal concession which is made by a party [(usually through counsel)] in the course of litigation for the purpose of withdrawing a particular fact from the realm of dispute." *Outer Banks Contractors, Inc. v. Forbes*, 302 N.C. 599, 604 (1981); *see Aspen Specialty Ins. Co. v. Nucor Corp.*, 2022 NCBC LEXIS 134, at **16 (N.C. Super. Ct. Nov. 8, 2022).

135. In its Order and Opinion Requiring Plaintiffs to File a Second Amended Complaint, the Court wrote that "Plaintiffs' Amended Complaint should itself reflect this concession. In other words, if Plaintiff recognizes that its claim is barred by the applicable statute of limitations, Plaintiff should not bring the claim." (ECF No. 43.)

136. The concession by Plaintiffs' counsel that these claims are untimely entitles Defendants to dismissal of those claims, as Plaintiffs did not respond to the assertion in the briefing and have therefore not met their burden of demonstrating that the limitations period has yet to run. *See McFee v. Presley*, 2023 NCBC LEXIS 173, at **9–10 (N.C. Super. Ct. Dec. 28, 2023) (dismissing a claim at summary judgment because plaintiff's counsel conceded at the hearing that the claim was untimely).

137. As a result, the Motion is **GRANTED** in part as to all of Mr. Tanger and Dr. Zucker's claims, except for Count Two, and those claims are hereby **DISMISSED** with prejudice.

3. Counts One, Three, Five, Six, and Seven as to the Leshocks, the Ostranders, and the Wilshires

138. The Court next turns to Defendants' argument that the Leshocks, the Ostranders, and the Wilshires' claims, as applicable, under Counts One, Three, Five, Six, and Seven fail because those claims are barred by the applicable statute of

limitations. (*See* Mot. 4–5.) The Court addresses Count Four separately in the next section, as it is subject to a different limitations period. (*See infra* § V.A.4.)

139. The Leshocks and the Ostranders allege claims for relief under Count One and Count Six, each of which has a three-year statute of limitations. *Scott & Jones, Inc. v. Carlton Ins. Agency, Inc.*, 196 N.C. App. 290, 297 (2009) (statute of limitations for a negligence claim); *Lau*, 2019 NCBC LEXIS 71, at *22 (statute of limitations for a breach of fiduciary duty claim). The same Plaintiffs, joined by the Wilshires, bring Counts Three, Five, and Seven, which similarly have a three-year statute of limitations. N.C.G.S. §§ 1-52(9), 78A-56(f) (limitations periods for fraud and violations of the NCSA, respectively); *Guyton v. FM Lending Servs.*, 199 N.C. App. 30, 35 (2009) (statute of limitations for negligent misrepresentation claim).

i. Count Six: Professional Negligence

140. Plaintiffs have not offered, and the Court has not located, any authority to support the legal proposition that a professional negligence claim exists in North Carolina for the negligent acts of investment advisors. *See Aldridge v. Metro. Life Ins. Co.*, 2019 NCBC LEXIS 116, at *137 (N.C. Super. Ct. Dec. 31, 2019).

141. North Carolina General Statutes § 1-52 imposes a three-year statute of limitations for negligence actions, *Scott & Jones*, 196 N.C. App. at 297, which accrue when the wrong giving rise to the right to bring suit is committed, "even though the damages at that time [may] be nominal and the injuries cannot be discovered until a later date[,]" *Harrold v. Dowd*, 149 N.C. App. 777, 781 (2002); *see Carpenter v. N.C.*

Dep't of Health & Human Servs., 2023 N.C. App. LEXIS 52, at *8 (2023) (unpublished) (following the rule stated in *Harrold*).

142. Plaintiffs allege that their negligence claim arises out of Defendants' failure to: (1) investigate the recommended securities or have any reasonable basis for recommending Alternative Investments to Plaintiffs; (2) perform investment advisory services with the requisite knowledge, skill, and judgment; and (3) stop the reinvestment of dividends in the Alternative Investments. (SAC ¶¶ 502–04.) Plaintiffs allege that the "last wrongful act or omission" did not occur until 1 February 2019. (SAC ¶ 505.) Thus, Plaintiffs' negligence claim is based on Defendants' conduct at the initial sale of the investments and the reinvestment of dividends thereafter, if the relevant plaintiff elected to reinvest dividends in their Alternative Investments.

143. Defendants argue that the wrongful conduct alleged—recommending and selling the Alternative Investments—ceased by 2016 at the latest, based on the allegations in the Second Amended Complaint. (Br. Supp. 5 (citing SAC ¶ 189).)

144. The Second Amended Complaint states that the Leshocks reinvested monthly dividends in recommended investments, (SAC ¶ 340), but the Ostranders took cash dividends, (SAC ¶ 373). Plaintiffs further allege that Defendants last gave investment advice or recommendations to the Leshocks in 2016, (SAC ¶ 336), and to the Ostranders on 2 August 2017 at the latest, (SAC ¶ 374). Notwithstanding these allegations, Plaintiffs argue that the continuing wrong doctrine protects their negligence claim from dismissal.

145. "Our Supreme Court has recognized the continuing wrong doctrine as an exception to the general rule that a claim accrues when the right to maintain a suit arises." *Babb v. Graham*, 190 N.C. App. 463, 482 (2008) (citing *Williams v. Blue Cross Blue Shield of N.C.*, 357 N.C. 170, 178–79 (2003)). Under the continuing wrong doctrine, the statute of limitations does not begin to run until the unlawful act ceases. *Soft Line, S.p.A. v. Italian Homes, LLC*, 2015 NCBC LEXIS 6, at **13 (N.C. Super. Ct. Jan. 16, 2015) (citing *Marzec v. Nye*, 203 N.C. App. 88, 94 (2010)).

146. However, the continuing wrong doctrine is not easily invoked. *Id.* For the doctrine to apply, Plaintiffs—who raised this exception—must show that Defendants "continuously committed unlawful acts, not merely that there were continual ill effects from an original unlawful act." *Id.* (citing *Marzec*, 203 N.C. App. at 94).

147. Plaintiffs argue that Defendants' reinvestment of dividends serves as the continuing wrong. (Br. Opp. 26.) However, the Ostranders took cash dividends. Thus, the last act by Defendants *potentially* giving rise to the Ostranders' negligence claim occurred on 2 August 2017 when Mr. Sunstrom assured the Ostranders to "stay the course with Alternative Investments." (SAC ¶ 375.) Three years following 2 August 2017 was 2 August 2020—nearly six months before this action was initiated.

148. Therefore, the Court **GRANTS** in part the Motion as to the Ostranders' claim for relief under Count Six and that claim is hereby **DISMISSED** with prejudice.

149. The Leshocks, however, allege that they reinvested dividends through at least 2020. (SAC ¶ 340.) Reading the allegations in the light most favorable to Plaintiffs, the Court determines that the Leshocks' negligence claim under Count Six is not time-barred. *See Piles*, 187 N.C. App. at 405 (where there are allegations in the complaint sufficient to support an inference that the limitations period has not expired, it is error to find that claims are time-barred). Therefore, the Court **DENIES** in part the Motion as to the Leshocks' claim for relief alleged under Count Six.[4]

ii. Count Three: Violations of the NCSA

150. The Leshocks, the Ostranders, and the Wilshires each allege violations of the NCSA under Count Three.

151. While claims for violations of the NCSA are subject to a three-year statute of limitations,

> [g]enerally, the suit must be initiated within five years following the sale or the rendering of the investment advice regardless of when the plaintiff discovered the violation. However, where the plaintiff alleges that the defendant acted fraudulently or deceitfully in concealing a violation of the NCSA . . . , a discovery rule applies, and the five-year limitation does not necessarily bar the plaintiff's ability to bring the claim.

Aldridge, 2019 NCBC LEXIS 116, at *55.

152. Defendants contend that all sales of securities occurred no later than 2015. (Br. Supp. 6.) Thus, they argue that Count Three is barred since this action was initiated more than five years later. (Br. Supp. 6.)

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[4] This determination is without prejudice to application of the statute of limitations with respect to this claim at a later stage of the litigation on a more developed record.

153. However, the Leshocks, the Ostranders, and the Wilshires allege that Defendants actively concealed their violations of the NCSA, including through their untrue statements and omissions regarding the Alternative Investments. (Br. Opp. 27–28; SAC ¶¶ 472, 474.) Therefore, at this time, the Court cannot conclude from the face of the Second Amended Complaint that Plaintiffs' NCSA claims are time-barred.

154. Therefore, the Court **DENIES** in part the Motion as to the Leshocks, the Ostranders, and the Wilshires' claim under Count Three.[5]

iii. Counts One, Five, and Seven

155. Defendants seek dismissal of Counts One, Five, and Seven, arguing that even with the benefit of the discovery rule, Plaintiffs' claims are untimely. (Br. Supp. 7.)

156. Claims for breach of fiduciary duty, fraud, and negligent misrepresentation are each subject to a three-year statute of limitations that begins to run when the claimant knew, or by exercising due diligence should have known, of the facts constituting the basis for the claim. *Lau*, 2019 NCBC LEXIS 71, at *22 (breach of fiduciary duty); *Forbis v. Neal*, 361 N.C. 519, 524–25 (2007) (fraud); *Guyton*, 199 N.C. App. at 35 (quoting *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666 (1997)) ("A claim for negligent misrepresentation does not accrue until two events occur: first, the claimant suffers harm because of the misrepresentation, and second, the claimant discovers the misrepresentation." (cleaned up)).

[5] This determination is without prejudice to application of the statute of limitations with respect to this claim at a later stage of the litigation on a more developed record.

157. Under the discovery rule, the limitations period begins to run when a plaintiff "first becomes aware of facts and circumstances that would enable him to discover the defendant's wrongdoing in the exercise of due diligence." *Doe v. Roman Catholic Diocese*, 242 N.C. App. 538, 543 (2015) (citing *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66 (2005)). Even where there is a special relationship between plaintiffs and defendants, this duty of inquiry begins "when an event occurs to 'excite [the aggrieved party's] suspicion or put her on such inquiry as should have led, in the exercise of due diligence, to a discovery of the [claim].' " *Forbis*, 361 N.C. at 525 (quoting *Vail v. Vail*, 233 N.C. 109, 117 (1951) (modifications in original)).

158. In this case, the allegations do not admit facts that would properly permit the Court to determine as a matter of law that the claims are time-barred.

159. The Leshocks and the Ostranders' claims at Counts One, Five, and Seven are based on allegations that Defendants: (1) recommended unsuitable Alternative Investments and fixed-index annuities; (2) concealed and misrepresented conflicts of interest that impacted their recommendations; and (3) concealed and misrepresented the material terms of the Alternative Investments and fixed-index annuities, including fees, liquidity, and income generation. (SAC ¶¶ 455–57, 490–94, 510.) The Wilshires join only in Counts Five and Seven on the same bases. (SAC ¶¶ 489, 508.)

160. Defendants contend that no later than 2017, Plaintiffs were armed with sufficient information to discover, with due diligence, the misrepresentations at issue. (Br. Supp. 8.) Defendants direct the Court's attention to their April 2016 disclosure

of the NASD rule change as the inquiry-triggering event. (Br. Supp. 8 (citing SAC ¶¶ 336, 421); *see also* SAC ¶ 374.)

161. However, the Ostranders allege that they did inquire and in turn received a false response because Mr. Sunstrom continued to recommend that they "stay the course" with their Alternative Investments. (SAC ¶ 375.) The Wilshires also inquired further, alleging that when they observed the decline, Mr. Sunstrom reassured them that their investments would recover. (SAC ¶ 421.) Plaintiffs argue that the "April 2016 email continued Defendants' pattern and practice of concealing the material risks, liquidity restrictions, and embedded fees in the Alternative Investments." (Br. Opp. 24 (citation omitted).)

162. Reading the allegations in the light most favorable to Plaintiffs, the Court determines that Plaintiffs have sufficiently met their burden of demonstrating, at this preliminary stage, that these claims were filed within the applicable limitations period. (Br. Opp. 23–24 (citing SAC ¶¶ 336–37, 380–81).) To determine otherwise would require the Court to perform a more fact-intensive inquiry that is inappropriate at this stage. *See Beam v. Sunset Fin. Servs.*, 2019 NCBC LEXIS 56, at **35 (N.C. Super. Ct. Sept. 3, 2019) ("Whether Plaintiffs need to prove that [they] could not have discovered Defendant's actionable conduct earlier is a question for a different day, and presumably one for the factfinder or for the Court on a more developed record.").

163. Therefore, the Court **DENIES** in part the Motion to the extent it seeks dismissal of Counts One, Five, and Seven on the basis that the claims are time-barred.[6]

4. Count 4: Violations of the UDTPA

164. The Wilshires allege violations of the UDTPA in Count Four. Defendants seek dismissal of that claim, arguing that it was not timely filed. (*See* Br. Supp. 7.)

165. Violations of the UDTPA have a four-year statute of limitations measured from when a plaintiff should have discovered the misconduct giving rise to a claim. N.C.G.S. § 75-16.2; *Nash v. Motorola Commc'ns & Elec.*, 96 N.C. App. 329, 331–32 (1989).

166. Count Four is premised on Defendants' alleged misrepresentations regarding the terms of the fixed-index annuities they sold to some Plaintiffs. (SAC ¶¶ 482–84.) Because the claim appears to be premised on Plaintiffs' fraud claim, and the Court has already determined that claim is not ripe for dismissal based on the statute of limitations defense, Count Four is similarly not ripe for dismissal, at least based on timeliness. *See Nash*, 96 N.C. App. at 331–32.

167. Therefore, the Court **DENIES** in part the Motion to the extent it seeks dismissal of Count Four on the basis that the claim is untimely.[7]

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[6] This determination is without prejudice to the raising of the defense at a later stage on a more developed record.

[7] This determination is without prejudice to the raising of the defense at a later stage on a more developed record.

B. <u>Claims Which Require Rule 9(b) Particularity</u>

168. Rule 9 requires that claims for fraud and negligent misrepresentation be pleaded with particularity. N.C.G.S. § 1A-1, Rule 9(b); *Value Health Sols. Inc. v. Pharm. Research Assocs.*, 385 N.C. 250, 265–66 (2023). "A pleader meets the requirements of [Rule 9] when its fraud claim alleges the 'time, place, and content of the fraudulent representation, identity of the person making the representation, and what was obtained as a result of the fraudulent acts or representations.' " *Lawrence v. UMLIC-Five Corp.*, 2007 NCBC LEXIS 20, at **6 (N.C. Super. Ct. June 18, 2007) (citing *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 39 (2006)). "Mere generalities and conclusory allegations of fraud will not suffice." *Sharp v. Teague*, 113 N.C. App. 589, 597 (1994).

1. Count Five: Fraud

169. Plaintiffs must allege the five essential elements of a fraud claim: "(1) [f]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, [and] (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138 (1974) (citing *Pritchard v. Dailey*, 168 N.C. 330, 332 (1915)). In addition, Plaintiffs' reliance on the fraudulent misrepresentation "must be reasonable." *Forbis*, 361 N.C. at 527 (citing *Johnson v. Owens*, 263 N.C. 754, 757 (1965)). Reliance is not reasonable if a plaintiff exercising reasonable diligence fails to make any independent investigation as to the truth of the assertion. *Calloway v. Wyatt*, 246 N.C. 129, 134–35 (1957).

170. The Leshocks and the Ostranders each allege claims for relief under Count Five against the Hobart Entities, Mr. Hobart, and Mr. Greer. (SAC ¶¶ 489.b.–c.) The Wilshires allege a claim for relief under Count Five against the Hobart Entities, Mr. Hobart, and Mr. Sunstrom. (SAC ¶ 489.e.)

i. The Leshocks

171. The Leshocks allege two false representations in detail: (1) that "[i]n meetings at the Hobart Headquarters in April 2014, Mr. Hobart represented the Alternative Investments were safe and secure investments, like the walls of [a] house[,]" (SAC ¶ 331); and (2) that

> Mr. Greer completed a "suitability checklist," prior to the sale of Alternative Investments to the Leshocks. The document lists the "surrender periods and percentages" of redemption allowed for each of five Alternative Investments. In the document, Hobart represented the Alternative Investments had "limited liquidity," but only because there was to be "no redemption in year 1" for each of the Alternative Investments. Hobart misrepresented in writing that, at the end of the first year, each Alternative Investment was fully redeemable at a price equal to or greater than 90% "of share value," with some of the Alternative Investments, such as Griffin Capital Essential Asset REIT, to be redeemable at 92.5% of net asset value ("NAV") after year 1, 95% after year 2, 97.5% after year 3, and 100% after year 4[,]

(SAC ¶ 332). However, neither statement is pleaded with sufficient particularity.

172. While the first statement contains the approximate time, place, content of the representation, and identity of the person making the representation, the Leshocks do not allege what was obtained as a result of the fraudulent representation. Even if the Court were to presume or infer that Defendants obtained the Leshocks' investment, there is also no allegation that the Leshocks exercised

reasonable diligence to independently investigate the truth of this assertion. Therefore, the allegation does not meet Rule 9(b)'s specificity requirements.

173. As for the second statement, Plaintiffs fail to provide the time and place of the alleged representation, stating only that it occurred "prior to the sale of Alternative Investments to the Leshocks." (SAC ¶ 332.) In addition, once again there is no allegation of reasonable diligence on the part of the Leshocks to investigate the truth of the representations by Mr. Greer and Mr. Hobart. Rule 9(b) is not satisfied. *See Martin Communs., LLC v. Flowers*, 2021 NCBC LEXIS 30, at **17 (N.C. Super. Ct. Mar. 31, 2021) (the Second Amended Complaint is "devoid of any allegations that Plaintiff[s] even attempted to investigate the veracity of Defendants' statements").

174. Therefore, the Court **GRANTS** in part the Motion, and Count Five as to the Leshocks is hereby **DISMISSED** with prejudice.

ii. The Ostranders

175. The Ostranders allege several representations that satisfy Rule 9(b), including the following:

> In a pre-investment meeting on around February 6, 2013, the Ostranders expressly asked Mr. Hobart whether fees paid to the Hobart Financial Advisory Team were "disclosed or embedded." Mr. Hobart falsely responded that all fees were disclosed, including as related to Alternative Investments, specifically. While Mr. Hobart disclosed that one fixed-index annuity carried a 0.95% fee, he falsely claimed there was "no fee received by Hobart" for the sale of the fixed-index annuity.

(SAC ¶ 350.) The Ostranders' allegations regarding Ms. Ostrander's interactions with Mr. Hobart and Mr. Greer in April 2013, (*see* SAC ¶¶ 355–59; SAC Ex. 4), as

well as the couple's April 2016 communications with Mr. Sunstrom, (SAC ¶ 374), meet the heightened pleading requirements of Rule 9.

176. But Defendants argue that the Ostranders' reliance on these statements was unreasonable. (Br. Supp. 25.) Defendants contend that "Ms. Ostrander clearly read and understood the prospectus and its plain language terms regarding the disputed 'sales load,' and therefore her reliance on Mr. Greer was unreasonable as a matter of law." (Br. Supp. 25 (internal citations omitted).)

177. In response, Plaintiffs argue that "Mr. Greer and Mr. Hobart expressly misrepresented the 'sales load' and excessive commissions they received," contending that it would be improper to charge the Ostranders with knowledge of the discrete meaning of terms in a prospectus, particularly when Ms. Ostrander questioned the meaning and was met with materially false responses. (Br. Opp. 20–21; *see also* SAC ¶ 366 (Defendants "effectively convinced Ms. Ostrander that her eyes had not seen what *she thought* they had seen in the prospectus document" (emphasis in original)).)

178. Unlike the Leshocks, Ms. Ostrander alleges that she read the prospectus for one of the Alternative Investments and asked questions about the fees described. (SAC ¶ 355.) Mr. Greer's response indicated that fees would not come out of her "pocket or earnings" and she would not pay the fees described in the prospectus for the investment. (SAC ¶¶ 356–57.)

179. Upon a careful review of the Second Amended Complaint, there are sufficient allegations that the Ostranders made a reasonable inquiry into Defendants'

representations. The pair allege that they attempted to investigate the veracity of Defendants' statements but were met with inaccurate responses. These allegations are sufficient to pass the Rule 12(b)(6) stage. The reasonableness of their reliance on Defendants' misrepresentations is best determined later in the litigation. *See Collier v. Bryant*, 216 N.C. App. 419, 435 (2011).

180. Therefore, the Court **DENIES** in part the Motion to the extent it seeks dismissal of the Ostranders' claim under Count Five.

iii. The Wilshires

181. The Wilshires allege one false representation by Defendants which attempts the specificity required by Rule 9(b):

> Mr. Hobart misrepresented Hobart's commissions, otherwise hidden in the fixed-index annuities and Alternative Investments, by misrepresenting to the Wilshires that the full amount of the purchase price (for the fixed-index annuity and the Alternative Investments, respectively) would be invested on their behalf, without accounting for any sales load.

(SAC ¶ 419.)

182. While this allegation contains the content of the representation and the identity of the person making the representation, Plaintiffs do not allege the approximate time and place of the representation or what was obtained as a result of it. Even if the Court were to presume or infer that Defendants obtained a commission and fees, there is no allegation of reasonable diligence on the part of the Wilshires to independently investigate the truth of the assertion. Therefore, the allegation fails to state a claim for fraud.

183. Accordingly, the Court **GRANTS** in part the Motion and Count Five as to the Wilshires is hereby **DISMISSED** with prejudice.

2. Count Seven: Negligent Misrepresentation

184. "It has long been held in North Carolina that '[t]he tort of negligent misrepresentation occurs when (1) a party justifiably relies (2) to his detriment (3) on information prepared without reasonable care (4) by one who owed the relying party a duty of care.' " *Simms v. Prudential Life Ins. Co. of Am.*, 140 N.C. App. 529, 532 (2000) (quoting *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 206 (1988)). The question of justifiable reliance in an action for negligent misrepresentation is "analogous to that of reasonable reliance in fraud actions[.]" *See Marcus Bros. Textiles, Inc. v. Price Waterhouse, LLP*, 350 N.C. 214, 224 (1999).

185. Count Seven is based on Defendants' alleged breach of the duty of care "in preparing information for Plaintiffs regarding the Alternative Investments and fixed-index annuities." (SAC ¶¶ 509–10.) Based on this allegation alone, the Court is unable to determine *what* information Defendants prepared that Plaintiffs take issue with.

186. Both the Leshocks and the Wilshires' claims for fraud under Count Five failed, in part, because neither couple alleged reasonable reliance. Therefore, to the extent Plaintiffs attempt a claim for negligent misrepresentation based on a statement or statements negligently made, their claims similarly fail. Therefore, the Court **GRANTS** in part the Motion and **DISMISSES** with prejudice Count Seven as to the Leshocks and the Wilshires.

187. As to the Ostranders, their negligent misrepresentation claim sufficiently alleges the misrepresentation of material facts about the investments. However, Plaintiffs do not allege with Rule 9(b) specificity the information that was deficiently prepared or that they undertook an inquiry into the veracity of the information. As a result, the Motion is **GRANTED** in part as to the Ostranders and this claim is **DISMISSED** with prejudice.

C. Sufficiency of the Allegations for the Remaining Claims

188. Having dealt with the statute of limitations issues and whether certain claims meet the heightened specificity required by Rule 9, the Court now turns to whether Plaintiffs' remaining claims sufficiently state a claim.

1. Counts One and Two: Breach of Fiduciary Duty and Constructive Fraud

189. Defendants seek dismissal of Plaintiffs' breach of fiduciary duty claim arguing, in relevant part, that no fiduciary relationship existed between any Plaintiff and one or more of the Defendants. (Br. Supp. 10–12.)

190. "A claim for breach of fiduciary duty requires the existence of a fiduciary relationship." *White v. Consol. Planning, Inc.*, 166 N.C. App. 283, 293 (2004). "The relation . . . extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other." *Id.* at 293 (quoting *Abbitt v. Gregory*, 201 N.C. 577, 598 (1931)). "A fiduciary relationship can be created either by law (*de jure*), or in fact (*de facto*)." *Beam,* 2019 NCBC LEXIS 56, at **8–9. Defendants contend that we have neither here.

i. Existence of a Fiduciary Duty

191. Defendants' counsel argues that Defendants were brokers, not RIAs, for the investments at issue. (Br. Supp. 10.) Defendants further argue that no *de jure* duty is available to Plaintiffs under North Carolina law. (Br. Supp. 10.) In response, Plaintiffs argue only that Defendants "provided individualized investment advice to Plaintiffs" at all times, directing the Court to *White v. Consol. Planning, Inc.*, 166 N.C. App. 283 (2004), and a case that supports federal RIAs being a fiduciary to their clients, *Transamerica-Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979); (Br. Opp. 4).

192. In *Hart v. First Oak Wealth Mgmt., LLC*, this Court explicitly recognized that "an investment adviser 'is a fiduciary and has a duty to act primarily for the benefit of its clients.' "[8] 2022 NCBC LEXIS 81, at **29 (N.C. Super. Ct. July 28, 2022) (quoting 18 N.C. Admin. Code 06A.1801(a) (2022)). There, plaintiff alleged that defendants were registered investment advisors and the Court concluded that, pursuant to 18 N.C. Admin. Code 06A.1801(a), defendants owed plaintiff a fiduciary duty as a matter of law. *Id.* at **30–31 (citing *SEC v. Capital Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 201 (1963)). This Court has similarly recognized that "status as a federally registered investment advisor . . . would create a fiduciary duty as a matter of law." *Charlotte-Mecklenburg Hosp. Auth. v. Wachovia Bank*, 2010 NCBC LEXIS 50, at *6 (N.C. Super. Ct. July 26, 2010).

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[8] While miniscule in the Court's overall consideration of the Motion, there appears to be inconsistent spelling of "advisor" and "adviser" in our State's caselaw. Notwithstanding that fact, there does not appear to be a material difference between the two words as used in our caselaw, and rather that the spellings may be used interchangeably.

193. Plaintiffs allege that Mr. Hobart, Mr. Greer, and Mr. Sunstrom were RIAs with the State of North Carolina. (SAC ¶¶ 17–19.) Further, Mr. Hobart and Mr. Greer were RIAs with the SEC. (SAC ¶¶ 17–18.) Plaintiffs also alleged that Mr. Hobart, Mr. Greer, and Mr. Sunstrom's wrongful acts complained of were at all times performed in furtherance of the business of the Hobart Entities. (SAC ¶ 20.)

194. Therefore, Plaintiffs have sufficiently alleged that Defendants are fiduciaries *de jure*. *See Hart*, 2022 NCBC LEXIS 81, at **31 n.3 ("Both the individual adviser and the firm with which the adviser works may be registered investment advisers and, as a result, concurrently owe fiduciary duties to clients.") (citing *SEC v. Bolla*, 401 F. Supp. 2d 43, 61 (D.D.C. 2005)).

195. Furthermore, and regardless of whether a *de jure* fiduciary duty exists under the allegations in the Second Amended Complaint, Plaintiffs allege sufficient facts to support an allegation that a *de facto* fiduciary relationship existed between them and Defendants.

196. "The standard for finding a *de facto* fiduciary relationship is a demanding one: Only when one party figuratively holds all the cards—all the financial power or technical information, for example—have North Carolina courts found that the special circumstance of a fiduciary relationship has arisen." *Lockerman v. S. River Elec. Mbrshp. Corp.*, 250 N.C. App. 631, 636 (2016) (cleaned up) (quoting *S.N.R. Mgmt. Corp. v. Danube Partners 141, LLC*, 189 N.C. App. 601, 613 (2008)).

197. In *Aldridge v. Metro. Life Ins. Co.*, the Court declined to infer the existence of a *de facto* fiduciary duty where plaintiffs failed to allege sufficient control—i.e.,

that defendants figuratively held all the cards. 2019 NCBC LEXIS 116, at *69–71. In making that determination, the Court considered whether plaintiffs pleaded: (1) lack of financial sophistication or another vulnerability; (2) any sort of "domination" by Defendants over Plaintiffs; or (3) that Defendants held all of Plaintiffs' " 'technical information' such that they had to rely exclusively on their investment advisors' advice and actions." *Id.* at *70. The pleadings there lacked allegations of each characteristic, ultimately resulting in the Court determining that no *de facto* fiduciary duty existed. *Id.* at *70–71.

198. Here, Plaintiffs allege that they lacked financial sophistication, (Br. Opp. 9), and that they were "vulnerable seniors," (SAC ¶ 89). Plaintiffs also allege that Defendants required them "to sign voluminous paperwork to effectuate the sale of the Alternative Investments, without providing copies of the signed documents to any of Plaintiffs[,]" (SAC ¶ 154), and none of them "actually received a prospectus document from [Defendants], except for the Ostranders[,]" (SAC ¶ 155). While the allegations do not demonstrate that Defendants withheld *all* financial information, which would result in Plaintiffs' being forced to rely exclusively on Defendants for advice and action, the allegations do appear to state that Defendants withheld at least some crucially important financial documents.

199. The allegations go on: the Hobart Financial website provided that Defendants were "legally obligated, as an RIA, to act in the very best interest of our clients," (SAC ¶ 72 (emphasis removed)); Defendants orally represented to at least some Plaintiffs that they "paid more for professional licenses and professional

liability insurance than other financial advisors, due to the increased obligations assumed by [Defendants] as a fiduciary[,]" (SAC ¶ 76.d.); and none of the Plaintiffs would have invested with Defendants if they had truthfully disclosed that the firm was only acting as a "financial salesperson" with no obligation to act in their clients' best interest, (SAC ¶ 77). Similar allegations of Defendants' representations and conduct is littered throughout the Second Amended Complaint, demonstrating how pervasive their practice of holding themselves out as a fiduciary was to their business.

200. Plaintiffs are, under the relevant allegations of the Second Amended Complaint, properly considered unsophisticated investors who were operating with less than complete information and relied on Defendants' reputation as a safe, secure investment company that always represented it was acting in Plaintiffs' best interest and without conflicts of interest. *See Edwards v. Vanguard Fiduciary Tr. Co.*, 2018 NCBC LEXIS 237, at *20–21 (N.C. Super. Ct. Dec. 21, 2018).

201. Reviewing the allegations in the light most favorable to Plaintiffs, it appears to the Court that Plaintiffs' allegations are sufficient at the Rule 12(b)(6) stage to plead the existence of a *de facto* fiduciary relationship.

ii. Breach of the Fiduciary Duty

202. Moreover, the Leshocks and the Ostranders each allege that the Hobart Entities, Mr. Hobart, and Mr. Greer breached fiduciary duties owed to them. Defendants respond that Plaintiffs fail to allege facts amounting to an actionable breach. (Br. Supp. 13–14.)

203. Plaintiffs allege that Defendants breached their duty by: (1) recommending unsuitable investments to Plaintiffs, as they were retirees or near-retirees who were poorly suited to illiquid, volatile investments with hidden fees and commissions; and (2) concealing and misrepresenting conflicts of interests in their recommendations and the material terms of the Alternative Investments and fixed-index annuities. (SAC ¶¶ 455–57.)

204. The Court concludes that the Leshocks and Ostranders' allegations of breach are sufficient at this stage. Accordingly, the Court **DENIES** the Motion to the extent it seeks dismissal of Count One as to the Leshocks and the Ostranders.

iii. Count Two: Constructive Fraud

205. All Plaintiffs join in alleging a claim for relief under Count Two.

206. "The primary difference between pleading a claim for constructive fraud and one for breach of fiduciary duty is the constructive fraud requirement that the defendant benefit himself [through the breach.]" *White*, 166 N.C. App. at 294. The receipt of the improper benefit must be alleged for each defendant individually. *See Trail Creek Invs. LLC v. Warren Oil Holding Co., LLC*, 2023 NCBC LEXIS 70, at **30–32 (N.C. Super. Ct. May 9, 2023); *White*, 166 N.C. App. at 294.

207. "The benefit sought by the defendant must be more than a continued relationship with the plaintiff." *Sterner v. Penn*, 159 N.C. App. 626, 631 (2003) (cleaned up) (citing *Barger*, 346 N.C. at 667). Further, "payment of a fee to a defendant for work done by that defendant does not *by itself* constitute sufficient

evidence that the defendant sought his own advantage in the transaction." *NationsBank v. Parker*, 140 N.C. App. 106, 114 (2000) (emphasis added).

208. The Court has determined that Plaintiffs sufficiently alleged that Defendants owed them a fiduciary duty and that Plaintiffs have adequately alleged breaches of that duty. Thus, the remaining question for the Court is whether Plaintiffs have adequately alleged that Defendants also sought to benefit themselves through the purported breach of that duty.

209. The answer is yes. The Second Amended Complaint is replete with allegations that the fees and commissions associated with the investment products recommended to Plaintiffs were excessive and undisclosed—the benefit Defendants allegedly sought through their breach. (*See* SAC ¶ 464.)

210. Defendants characterize Plaintiffs' argument as boiling down "to an allegation that the commission on the investments sold to them was higher than Plaintiffs think it should have been, not that Defendants manufactured a way to take a commission greater than what the investment provided." (Defs.' Reply Br. 11, ECF No. 77 ["Reply"].) Defendants misunderstand Plaintiffs' allegations.

211. While Plaintiffs do contend that the fees associated with the investments were "excessive," they also allege that they did not know there were commissions associated with the investments because Defendants either failed to disclose that information, or they actively misrepresented that there would be no fees associated with the investments. (*See* SAC ¶¶ 258, 264, 317, 349, 355, 366, 400–02.) These allegations distinguish this case from the line of cases relied on by Defendants

holding that receipt of fees for work done is insufficient. (Reply 11 (citations omitted).)

212. Plaintiffs allege more than mere payment of a fee to Defendants for work done. They allege that, in addition to Defendants' typical fee, Defendants received other fees and commissions that Plaintiffs were told either would not come from the funds intended for investing or would not be incurred at all. There is an important difference between (1) receiving all financial documents and being able to review that information for fees and commissions assessed, and (2) being told that there are no commissions and fees being deducted from your investment. The latter is what Plaintiffs allege happened to them.

213. Defendants unsuccessfully attempt to align the allegations in this case with the allegations in the Court of Appeals' decision in *Sterner v. Penn*. There, the Court held that an allegation that plaintiff's money "was traded through defendants and that defendants financially benefitted via commissions on sales transactions." 159 N.C. App. at 632. The Court determined there that this was insufficient "to show that defendants sought to benefit themselves by taking unfair advantage of plaintiff." *Id.*; *Cf. Long Bros. of Summerfield, Inc. v. Hilco Transp., Inc.*, 268 N.C. App. 377, 385 (2019) (determining that where a crucial financial document was omitted, a constructive fraud claim could arise out of defendant preventing plaintiff's access to that information prior to the transaction which resulted in a benefit to defendant). *Sterner* is easily distinguishable from the facts alleged here.

214. Plaintiffs allege that the fees received by Defendants were manipulated in the form of oral and email misrepresentations. Plaintiffs were thus prevented from accessing crucial information about the investment transactions prior to investing. At this stage, the Court must accept the allegations as true and make all reasonable inferences in favor of Plaintiffs. While the receipt of commissions or a standard fee alone would typically be insufficient to support a constructive fraud claim, allegations that Defendants received *undisclosed* or actively *misrepresented* fees and commissions are sufficient for the claim to survive at this stage.

215. Therefore, the Court **DENIES** the Motion to the extent it seeks dismissal of Count Two.

2. Count Three: Violations of the NCSA

216. The Leshocks, the Ostranders, and the Wilshires each allege violations of the NCSA in Count Three.

217. When claims under the NCSA are based on allegations of fraud in the sale of investments, the allegations must be pleaded with particularity. *Bucci v. Burns*, 2017 NCBC LEXIS 83, at *11 (N.C. Super. Ct. Sept. 14, 2017). Where claims for fraud and negligent misrepresentation have been dismissed and the conduct with respect to alleged violation of the NCSA is the same, the NCSA claims are likely similarly deficient. *Id.*

218. Such is the case here. Defendants argue that "Plaintiffs' claim for violations of the NCSA is predicated on the same behavior as Plaintiffs' fraud claim—that Defendants made fraudulent misrepresentations or omissions in connection with the

sale of Fraud Plaintiffs' investments—and likewise fails to satisfy the heightened pleading requirements of Rule 9(b)." (Mot. 6; *see also* Br. Supp. 27.)

219. The Court determines that Defendants' argument is well-grounded as it relates to the Leshocks and Wilshires' claims. For the same reasons that their fraud and negligent misrepresentation claims fail for lack of specificity, their NCSA claim similarly fails.

220. The Ostranders' fraud claim, however, survives dismissal, and Defendants have not raised arguments regarding why the Ostranders' claim under the NCSA should be treated differently. (Br. Supp. 27; Reply 14–15.)

221. Therefore, the Court **DENIES** in part the Motion as to the Ostranders' claim under Count Three, but **GRANTS** in part the Motion as to the Leshocks and the Wilshires' claims. The Leshocks and the Wilshires' claims under Count Three are hereby **DISMISSED** with prejudice.

3. Count Four: Violations of the UDTPA

222. Only the Wilshires have a claim remaining under Count Four.

223. Defendants argue that, "[b]ecause the UDTPA claim is based on purported fraudulent misrepresentations, it also must satisfy the heightened pleading standard of Rule 9(b)." (Br. Supp. 27.) The Court agrees that the Wilshires' claim for violations of the UDTPA is derivative of the fraud claim. *See Silverdeer, LLC v. Berton*, 2013 NCBC LEXIS 21, at **28–29 (N.C. Super. Ct. Apr. 24, 2013).

224. Given that the Wilshires' claim for fraud was dismissed herein, and that their claim for violations of the UDTPA concerns the same behavior, the Court

likewise **GRANTS** in part the Motion and **DISMISSES** the Wilshires' claim with prejudice.

4. Count Six: Professional Negligence

225. Only the Leshocks have a remaining claim under Count Six. Defendants make no arguments regarding dismissal of this claim, other than the statute of limitations defense already addressed herein. (*See* Br. Supp. 4; *but see* Br. Opp. 29.) The Court has previously determined that the Leshocks' negligence claim survives Defendants' statute of limitations defense at this stage. (*Supra* ¶ 148.) Therefore, to the extent the Motion requests dismissal of this claim as it remains, the Motion is **DENIED**.

VI. CONCLUSION

226. **THEREFORE**, for the foregoing reasons, the Court hereby **GRANTS** in part and **DENIES** in part the Motion as follows:

a. The Motion is **DENIED** in part as to: the Leshocks and Ostranders' claims for breach of fiduciary duty under Count One; all Plaintiffs' claims for constructive fraud under Count Two, except as to Ms. Byrnes; the Ostranders' claims for violations of the NCSA under Count Three and fraud under Count Five; and the Leshocks' claim for negligence under Count Six.

b. Except as expressly denied, the Motion is otherwise **GRANTED** as set forth more fully above, and those claims are hereby **DISMISSED** with prejudice.

227. The Case Management Order, (ECF No. 35 ["CMO"]), sets various deadlines for the parties to conduct discovery in this matter. The Court clarifies that the "second phase" of discovery, lasting seven months, shall begin upon entry of this order. (CMO 7.) Thus, the close of all discovery shall be 23 September 2024, and thirty days thereafter the parties shall file any post-discovery dispositive motions. (CMO 7, 12.)

IT IS SO ORDERED, this the 26th day of February, 2024.

/s/ Michael L. Robinson

Michael L. Robinson
Special Superior Court Judge
for Complex Business Cases