STATE OF NORTH CAROLINA COUNTY OF IREDELL	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 18-CVS-2925
DAVID M. BEAM, Jr, by and through his attorney-in-fact Donna B. Mayes; DONNA B. MAYES, as the Executrix of the Estate of DORIS P. BEAM; and DONNA B. MAYES, as the Trustee of the DAVID M. BEAM IRREVOCABLE TRUST dated September 12, 2001, Plaintiffs, vs. SUNSET FINANCIAL SERVICES, INC., Defendant.	**PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS**

NOW COME Plaintiffs David M. Beam, Jr., by and through his attorney-in-fact Donna B. Mayes; Donna B. Mayes, as the Executrix of the Estate of DORIS P. BEAM; and DONNA B. MAYES, as the Trustee of the DAVID M. BEAM IRREVOCABLE TRUST dated September 12, 2001, (hereinafter "Plaintiffs"); by and through counsel, and submit this Memorandum in Opposition to Defendant Sunset Financial Services, Inc.'s (hereinafter "Sunset" or "Defendant") Motion to Dismiss the Complaint.

SUMMARY OF THE ARGUMENT

Defendant seeks dismissal of each cause of action essentially for two reasons: (1) the statute of limitations, and (2) the sufficiency of the Complaint. As for the statute of limitations, Defendant ignores the application of the discovery rule to several of Plaintiffs' claims, and further ignores that Defendant's involvement with the accounts in question continued until

within three years of the effective filing date for purposes of this motion. That is, Defendant's last acts giving rise to the causes of action occurred much later than Defendant assumes. As for the sufficiency of the pleading, Defendant consistently insists upon far more detail than the Rules of Civil Procedure require. To the contrary, Plaintiffs have pled all of their claims sufficiently. Moreover, the Complaint includes allegations that Defendant misrepresented and omitted information about the accounts in question, including failing to inform Plaintiffs of the status of their accounts or even who was the manager of their accounts, but now Defendant seeks to benefit from the very lack of knowledge it caused. Not only were Plaintiffs elderly when they were taken advantage of by Defendant, but now Mrs. Beam has died and Mr. Beam is in failing health. The exacting detail Defendant contends is necessary not only goes beyond what is required to satisfy notice pleading, but is also well beyond what the Beams can reasonably be expected to provide until discovery occurs.

THE ALLEGATIONS OF THE COMPLAINT

Plaintiffs were an elderly couple when they had the misfortune of entering into a business relationship with Defendant, who shifted their investments from conservative investments suitable to their age and financial status, into highly speculative and aggressive investments that caused them to lose their life savings. (Compl. ¶¶ 6-10, and 22). Jeffrey Lipscomb, on behalf of Defendant Sunset, cultivated a very close personal and professional relationship with the Beams, and was given their total trust and confidence to handle their financial matters. (Compl. ¶ 8). Eventually, Defendant invested approximately $2,000,000.00 of the Beams' money in to highly risky investments. (Compl. ¶ 9).

The allegations against Sunset extend beyond merely the misdeeds of Mr. Lipscomb. When Lipscomb left Defendant Sunset and became employed by Allstate Financial, he could not

take the Beam's investments with him because Allstate had a policy against these types of speculative "alternative" investments. (Compl. ¶¶ 11-12). Therefore, many of the Beams' investments stayed with Defendant. (Compl. ¶¶ 11-14). Yet Defendant failed to inform the Beams of the status of their accounts, failed to inform them as to who was managing their accounts, and never again advised the Beams with regard to their investments or what they should do with them. (Compl. ¶ 15). So Defendant Sunset still housed the accounts, but did not tell the Beams that and did not provide services as to these accounts. (*Id.*). Moreover, Defendant did not inform the Beams of Mr. Lipscomb's termination, and even allowed him to continue acting as though he managed the accounts. (Compl. ¶¶ 16-18 and 20). Hearing nothing from Sunset and trusting their relationship with Lipscomb, the Beams were led to believe that their investments were doing fine until 2016, when they learned that some of their accounts may have failed. (Compl. ¶¶ 19-22). This led to the filing of the FINRA claims in 2017, far less than three years after discovery of the problem.

NOTE WITH REGARD TO FINRA PROCEEDINGS

Defendant makes much of the fact that these claims were previously filed in arbitration with the Financial Industry Regulatory Authority ("FINRA"), and argues that Plaintiff is now before this Court because its claims were unsuccessful in FINRA. Defendant misstates the situation. It is true Plaintiffs filed their claims through FINRA arbitration against Defendant and two other parties. Plaintiffs settled their claims with the two other defendants. Defendant in this case was relying upon a statute of repose applicable only in FINRA which is tied to the date various investments were made. This FINRA-specific statute of repose limited Plaintiffs' ability to rely upon provisions of North Carolina law, such as the discovery rule or the longer statute of limitations for claims such as constructive fraud. Plaintiffs therefore made the decision not to

oppose the dismissal of their claims in FINRA. Under the FINRA rules, it was necessary that such a dismissal be entered before Plaintiffs could file their claims in court, where North Carolina law would of course apply.

ARGUMENT

A. Plaintiffs' Claims Were Brought Within the Applicable Statutes of Limitations

1. The Discovery Rule Applies to Certain of Plaintiffs' Claims

Defendant's arguments with regard to the statutes of limitations ignore Plaintiffs' allegations as to their discovery of their injury, and therefore ignore the application of the discovery rule. Specifically, there are discovery rules which apply to the following claims: fraud/misrepresentation, breach of fiduciary duty, constructive fraud, unfair and deceptive trade practices, and violations of the North Carolina Securities Act.

A claim of fraud falls under the three-year statute of limitations contained in N.C. Gen. Stat. § 1-52(9). A claim of constructive fraud falls under the ten-year statute of limitations contained in N.C. Gen. Stat. § 1-56; *Nationsbank of N.C. v. Parker*, 140 N.C. App. 106, 113, 535 S.E.2d 597, 602 (2000).[1] A ten-year statute of limitations similarly applies to breach of fiduciary duty claims when they rise to the level of constructive fraud; otherwise the statute of limitations for breach of fiduciary duty is three years. *Toomer v. Branch Banking & Tr. Co.*, 171 N.C. App. 58, 66, 614 S.E.2d 328, 335 (2005).

Fraud encompasses "all acts, omissions, and concealments involving a breach of legal or equitable duty and resulting in damage to another or the taking of undue or unconscientious advantage of another." *Vail v. Vail*, 233 N.C. 109, 113, 63 S.E.2d 202, 205 (1951). Due to the clandestine and concealing nature of the tortfeasors, it is "difficult to establish with certainty

[1] There is no argument that the claims here were not filed within a ten-year statute of limitations.

when the statute of limitations on a claim of fraud begins to run." *Jennings v. Lindsey*, 69 N.C. App. 710, 715, 318 S.E.2d 318, 321 (1984).

Consequently, the General Assembly specifically provided claimants of fraud actions a discovery rule. Under N.C. Gen. Stat. § 1-52(9), a claim based on fraud "shall not be deemed to have accrued until the discovery by the aggrieved party of the facts constituting fraud." There are discovery rules that apply to several of Plaintiffs' other claims as well. *See Toomer*, 171 N.C. App. at 68-69, 614 S.E.2d at 336 (holding that breach of fiduciary duty claims accrue when the plaintiff "knew or, by due diligence, should have known of the facts constituting the basis for the claim"); *Carlisle v. Keith*, 169 N.C. App. 674, 685, 614 S.E.2d 542, 549-50 (2005) (holding same for constructive fraud claims); and *Cebula v. Givens Estates, Inc.*, No. COA13-1316, 2014 WL 3510515, at p. *5 (July 15, 2014) (holding same for unfair and deceptive trade practices claims). According to our Supreme Court, accrual begins "at the time of discovery regardless of the length of time between the fraudulent act or mistake and plaintiff's discovery of it." *Forbis v. Neal*, 361 N.C. 519, 524, 649 S.E.2d 382, 386 (2007) (emphasis added).

In determining when actionable conduct could reasonably be discovered, courts recognize that "the failure of the defrauded person to use diligence in discovering the fraud may be excused where there exists a relation of trust and confidence between the parties." *Vail*, 233 N.C. at 116, 63 S.E.2d at 207. "This is so for the reason that a confidential or fiduciary relation imposes upon the one who is trusted the duty to exercise the utmost of good faith and to disclose all material facts affecting the relation." *Id.*

In addition, North Carolina courts recognize that "determining 'when [the] plaintiff should, in the exercise of reasonable care and due diligence, have discovered the fraud is a question of fact to be resolved by the jury.' " *Hunter v. Guardian Life Ins. Co. of Am.*, 162 N.C.

App. 477, 486, 593 S.E.2d 595, 601 (2004) (quoting *Feibus & Co. v. Construction Co.*, 301 N.C. 294, 304-05, 271 S.E.2d 385, 392 (1980)).

Based on the allegations of the Complaint, which are accepted as true at this stage, Plaintiffs did not discover the facts constituting the basis of their claims until 2016. (Compl. ¶ 22). The delay in discovering these facts was directly attributable to the acts of Defendant and its agent, Mr. Lipscomb. Because Allstate had a policy against these alternative investments, they remained at Sunset even after Lipscomb left his employment there. (Compl. ¶¶ 11-15). Consequently, these investments were still Sunset investments even after Lipscomb's departure, but Sunset failed to communicate this to Plaintiffs, failed to advise Plaintiffs of the status of their accounts, and failed to provide any advice about their investments. (*Id.*). Moreover, Defendant failed to inform Plaintiffs of Lipscomb's termination, and allowed him to continue to act as though he was the manager of the accounts. (Compl. ¶¶ 16-21). In the absence of any communication from Defendant Sunset, including a failure to communicate that Lipscomb no longer managed their accounts, Plaintiffs of course believed that their investments were doing fine when told so by the man who had developed such a close relationship of confidence with them while he was an employee of Sunset. This is exactly the effect of a close relationship recognized in the *Vail* case: a trusted party's duty to disclose is heightened and the trusting party's relative lack of diligence is understood.

Here, this relationship and the other acts and omissions of the Defendant led to Plaintiffs not discovering the relevant facts until 2016. Assuming *arguendo* that Defendant is correct that July 23, 2017 is the correct filing date for statute of limitations issues, said filing was well within three years of the accrual of Plaintiffs' claims in 2016. The shortest statute of limitations available to any of Plaintiffs' claims is three years, so the discovery rule prevents dismissal based

upon the statute of limitations, at least as to fraud/misrepresentation, breach of fiduciary duty, unfair and deceptive trade practices and constructive fraud.

A similar discovery rule applies to Plaintiffs' claims under the North Carolina Securities Act. As noted in Defendant's Brief, the statute itself includes a discovery rule which substantially mirrors those set forth above. The Securities Act contains a three-year statute of limitations and a five-year statute of repose, but both are subject to an exception that applies to a defendant who acts in a "fraudulent or deceitful act that conceals the violation or induces the person to forego or postpone commencing an action." N.C. Gen. Stat. § 78A-56(f). If the exception applies, suit may be filed within three years of discovery. *Id.* As set forth above, as well as in the Complaint, Defendant not only acted in a fraudulent manner with regard to the original sale of the investments in question, but also acted in a way that postponed the Beams discovery of their dilemma. They were not told of the status of their accounts, not told who was managing their accounts and not sent statements. Moreover, they were not told of Lipscomb's termination or that he was no longer managing their accounts, so they continued to trust his representations. As with the claims for fraud/misrepresentation, breach of fiduciary duty, constructive fraud and unfair and deceptive trade practices, the discovery rule operates to prevent dismissal of the Securities Act claim as well.

2. Defendant's Actions Continued Well After Lipscomb Left its Employment

Defendant ignores the fact that its actionable behavior continued well after Lipscomb stopped working for Defendant Sunset in approximately 2010. This case is not just about the sale of the unsuitable investments, it is also about the complete lack of communication and advice after Lipscomb left Sunset. It is about Sunset's failure to advise Plaintiffs as to the status of their accounts, the management of those accounts, and what decisions should be made about those

accounts continuing well after Lipscomb's departure. In fact, the Complaint alleges that these acts and omissions prevented Plaintiffs from knowing the status of their accounts or even who managed those accounts through the date of the filing of the Complaint on November 26, 2018. (Compl. ¶ 21). Giving the Defendant the benefit of the doubt, its Brief alleges that Plaintiffs closed their accounts with Sunset on November of 2014. (Def. Brief, p. 3. n. 2). If so, Defendant was the manager of Plaintiffs' accounts less than three years prior to July 23, 2017, which Defendant contends is the effective filing date for statute of limitations purposes. At least as of November 2014, Defendant still had a contractual duty and a duty of reasonable care to Plaintiffs, was still failing to inform Plaintiffs about their accounts, still failing to communicate with them, still concealing what was happening with those accounts, etc. Therefore, the last act of Defendant giving rise to Plaintiffs' causes of action extended to within three years of filing. Therefore, the statute of limitations cannot bar any of Plaintiffs' claims, including any claims to which no discovery rule applies.

B. Plaintiffs' Complaint is Sufficient as to All Causes of Action

Plaintiffs have adequately pled their causes of actions as required by the liberal notice pleading standards of North Carolina. N.C. R. Civ. P. 8. A statement of a claim is adequate if it gives sufficient notice of the claim asserted, enabling the adverse party to answer and prepare for trial. *See, e.g.*, *Feltman v. City of Wilson*, 238 N.C. App. 246, 252, 767 S.E.2d 615, 620 (2014).

The sole purpose of a Rule 12(b)(6) motion is to test the legal sufficiency of the pleading: it "test[s] the law of a claim, not the facts which support it. This rule generally precludes dismissal except in those instances where the face of the complaint discloses some insurmountable bar to recovery." *Id*. at 251, 767 S.E.2d at 619 (citation and internal quotation marks omitted). This Court "should not dismiss the complaint unless it appears beyond a doubt

that the plaintiff could not prove any set of facts to support his claim which would entitle him to relief." *Holleman v. Aiken*, 193 N.C. App. 484, 491, 668 S.E.2d 579, 584-85 (2008) (emphasis added). Drawing all reasonable inferences in its favor, and as elaborated below, Plaintiffs have adequately stated their claims upon which relief can be granted. Defendant's motion to dismiss should therefore be denied.

Plaintiffs will address each of their claims below:

Breach of Fiduciary Duty (Count 1): Defendant essentially argues that Plaintiffs have not sufficiently pled breach of fiduciary duty either because broker-dealers do not automatically rise to the level of fiduciaries, or based on an assumption beyond the four corners of the Complaint that Plaintiff's investment accounts were non-discretionary accounts over which they maintained complete control.

First of all, it should be noted that each element of a breach of fiduciary duty claim under North Carolina law is set forth plainly in the Complaint. (Compl. ¶¶ 28-34). Moreover, it is further alleged that Lipscomb, on behalf of Sunset, developed a close personal relationship with the Beams, frequently visited their home, became their most trusted advisor and became involved in every aspect of their lives. (Compl. ¶¶ 7-8). These allegations are sufficient under North Carolina law regardless of whether there was a broker-dealer relationship. Moreover, the fact that a particular relationship does not automatically give rise to a fiduciary duty does not mean there is no such duty based upon the close personal relationship. *Smith v. GMAC Mortgage Corporation*, 2007 WL 2593148, at *5 (W.D.N.C. Sept. 5, 2007) (surveying relationships which automatically give rise to fiduciary relationships and those which do not; emphasizing issue "depends ultimately on the circumstances"). Plaintiffs are not required to plead every detail of that relationship. They have pled that it was very close, that he was their most trusted advisor,

and that they invested approximately $2,000,00.00 "**at the direction of** Lipscomb." (Compl. ¶¶ 7-9) (emphasis added).

Defendant's argument about the Beams maintaining control over a non-discretionary account assumes facts outside of the Complaint and is based on one case which is unpublished and represents the recommendations of a federal magistrate. Also, again, all that argument can accomplish is to say that management of such an account would not generally or automatically give rise to a fiduciary duty. That is not the question. The question is whether such a duty arose based upon the close relationship in this case, and that is a question which is best left to a jury. *Smith*, 2007 WL 2593148, at *6 ("the question of the existence or non-existence of a fiduciary relationship is 'determined by the specific facts and circumstances of the case' and is 'a question of *fact* for the jury.' ") (citations omitted) (emphasis original).

Constructive Fraud (Count 2): Constructive fraud is not a claim that has to be pled with particularity.

> A claim of constructive fraud does not require the same rigorous adherence to elements as actual fraud." "Constructive fraud differs from actual fraud in that 'it is based on a confidential relationship rather than a specific misrepresentation.' " "A constructive fraud complaint must allege facts and circumstances '(1) which created the relation of trust and confidence, and (2) led up to and surrounded the consummation of the transaction in which defendant is alleged to have taken advantage of his position of trust to the hurt of plaintiff.' " "Further, an essential element of constructive fraud is that 'defendants sought to benefit themselves' in the transaction." "Put simply, a plaintiff must show (1) the existence of a fiduciary duty, and (2) a breach of that duty."

Hunter v. Guardian Life Ins. Co. of Am., 162 N.C.App. 477, 482, 593 S.E.2d 595, 599 (2004), *rev. denied*, 358 N.C. 543, 599 S.E.2d 49 (citations omitted).

Here, Plaintiffs have alleged a close relationship that surrounded the transactions in question, and that said relationship was used to injure the Plaintiffs and benefit Defendant. (Compl. ¶¶ 36-40). Additional allegations as to this relationship are discussed above with regard

to the breach of fiduciary duty claims. Essentially, Defendant sought to make high stakes gambles with Plaintiffs' money, despite the fact that Plaintiffs were elderly and in a stage in life during which such speculative investments were unsuitable. (Compl. ¶¶ 6-9). Thereafter, Defendant benefitted itself by concealing the status of the accounts and the failing nature of the investments, preventing Plaintiffs from being able to extricate themselves from said investments and minimize their losses. (Compl. ¶¶ 13-22).

Fraud/Misrepresentation (Count 3): Defendant essentially contends that the fraud claim should be dismissed because it is not pled with sufficient detail pursuant to Rule 9(b).[2] Despite the application of Rule 9(b), every detail is not required. Consider the following:

> While the facts constituting the fraud must be alleged with particularity, there is no requirement that any precise formula be followed or that any certain language be used. "It is sufficient if, upon a liberal construction of the whole pleading, the charge of fraud might be supported by proof of the alleged constitutive facts."

Hunter v. Guardian Life Ins. Co. of Am., 162 N.C.App. 477, 481, 593 S.E.2d 595, 598 (2004), *rev. denied*, 358 N.C. 543, 599 S.E.2d 49 (citations omitted).

Plaintiffs have listed several material misrepresentations and omissions in the Complaint. (Compl. ¶¶ 26-27). Some are as general as that the investments were unsuitable for the Beams, but others are specific, such as that the representations that the investments were doing well when they were in fact failing, and the omissions as to who was managing the accounts, the status of the accounts, that Lipscomb was no longer with Defendant, that companies in which Defendant had invested Plaintiffs were failing, etc. (Compl. ¶¶ 26-27). As to the who, where and when, the Beams have pled these matters as specifically as they can given that Mrs. Beam is deceased, Mr. Beam is in failing health, and discovery has not taken place. It is certainly alleged that some of these representations were made by Lipscomb (Compl. ¶ 19), that they "began in

[2] Defendant does not appear to argue that the same provision applies to the claim for negligent misrepresentation that is also part of Count 3, and in fact Rule 9(b) on its face does not apply to such a claim.

2008 and continued systematically and continuously through 2016" (Compl. ¶ 43), and that as to Lipscomb some were made in the Beams' home. (Compl. ¶ 8). To require more specificity in this case would be unreasonable based upon the repeated nature of the misrepresentations over a significant period of time, the difficulty of stating what individuals at a company made omissions at what point in time, and based upon the death of Mrs. Beam and the infirmity of Mr. Beam. It would also require far more specificity than that required in the *Hunter* case cited above.

As discussed in detail above, these representations and omissions created a situation in which the Beams were not even sure who managed their accounts, and where they were given no reason to doubt the one person who was doing the talking – Mr. Lipscomb. Based on their close relationship with him and the lack of communication from Defendant Sunset, they had no reason to engage in an investigation to go behind what he told them.

Unfair and Deceptive Trade Practices (Count 4) and the North Carolina Securities Act (Count 5): Plaintiffs address these together due to the similarities of the arguments made by Defendant. First of all, Defendant contends that these claims, like the fraud claim, should be dismissed for failure to plead with particularity. For this argument, Plaintiffs stand on the arguments made above with regard to Count 3.

Defendant's second argument, essentially, is that there cannot be simultaneous claims under both of these statutes because this would allow overlapping statutory coverage for the same torts. This argument assumes that all of Plaintiffs' investments were subject to coverage by the Securities Act. As noted above, as well as in the Complaint, Plaintiffs' investments through Defendant were alternative investments, and Plaintiff is not fully aware of the status of many of these due to the confusion which ensued after Lipscomb left Sunset. Whether each and every investment directed by Lipscomb and Defendant was subject to coverage by the Securities Act is a matter that should be addressed after discovery has taken place. The Complaint itself does not

establish that all such investments were covered by the Act, and Plaintiffs contend that this Court should not make such an assumption at the 12(b)(6) stage of this litigation.

Negligence (Count 6): Defendant focuses on the negligent hiring claims for the hiring of Lipscomb. Plaintiffs encourage the Court to review the list of negligent acts set forth in the Complaint, which are actually substantially broader than this single issue. (Compl. ¶ 53). There are seventeen different allegations of negligence, many of which do not deal with the hiring of Lipscomb. Some deal with negligent acts undertaken by Lipscomb as an agent of Defendant, while others include issues such as failure to properly keep Plaintiffs' informed about their accounts (including the termination of Lipscomb, who was managing the accounts and the status of the accounts), failure to review Plaintiffs' portfolios (including for the several years Defendant maintained the accounts after Lipscomb's departure) and failure to properly manage the accounts. (*Id.*). The allegations include that Defendant essentially let the accounts disintegrate after Lipscomb's departure without communicating with the Plaintiffs, and while allowing them to believe Lipscomb still managed the accounts.

Defendant contends that Plaintiffs have not alleged a duty, but it is undeniable that such a duty exists under North Carolina law from the very broker/customer relationship alleged throughout the Complaint. "Securities broker/dealers like defendants have long been subject to liability for negligence to customers." *Sterner v. Penn*, 159 N.C. App. 626, 629, 583 S.E.2d 670, 673 (2008). Moreover, duty is pled in several places in the Complaint: the "duty to exercise reasonable care to Plaintiffs" (Compl. ¶ 45), "the duty to act in good faith and with due regard for the best interest of Plaintiffs" (Compl. ¶¶ 32 and 39) and a duty to "invest and safeguard Plaintiffs' funds and to do so with due caution" (Compl. ¶¶ 57).

There is no question that there is a duty, that Plaintiffs have alleged that Defendant committed negligence in several ways in its handling of Plaintiffs' accounts, and that

Defendant's management of said accounts continued within three years of the effective filing date. Therefore, the negligence claim should not be dismissed.[3]

Breach of Contract (Count 7): Defendant contends that Plaintiffs have not pled a contract between themselves and Defendant. Defendant has clearly been alleged to be the broker that not only initiated the tragic alternative investments involved in this case, but also managed those investments for several years, including well after Lipscomb left his employment at Defendant Sunset. (Compl. ¶¶ 7-21). It is undisputed that Plaintiffs agreed to provide their funds to Defendant, and that Defendant agreed to invest and manage those funds. (Compl. ¶¶ 7-10). Defendant would have this Court assume that Defendant invested and managed Plaintiffs' money for several years with no contractual obligations whatsoever. At a minimum, by accepting, investing and managing Plaintiffs' funds, Defendant had the contractual duties alleged by Plaintiff: (1) a duty to "hold, invest and safeguard Plaintiffs' funds, and to do so with due caution, in [Plaintiffs'] best interests, and to protect and secure their funds;" and (2) a covenant of good faith and fair dealing toward Plaintiffs, as implied in all contracts. (Compl. ¶¶ 57-59). "In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement." *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 228, 333 S.E.2d 299, 305 (1985) (citation omitted).

Defendant nevertheless contends that Plaintiffs should have pled their contract claims with more particularity. The cases Defendant relies upon are distinguishable. In *Plasman*, plaintiffs asserted oral contracts, despite the existence of written contracts between the parties which precluded oral contracts covering the same subject matter. *Plasman v. Decca Furniture*

[3] Defendant's argument with regard to negligent hiring is essentially that Plaintiffs have to know and plead, prior to discovery, those matters Defendant knew or did not know about back when it hired Lipscomb. Plaintiffs contend that this creates an impossible standard in this particular case.

(USA), Inc., 2016 NCBC 78 at ¶ 28 (N.C. Super. Ct. 2016) (Bledsoe, J.). In *Regency Centers*, the parties had negotiated towards a written contract but never finalized their agreement. Plaintiffs alleged a non-cognizable claim for "Equitable Estoppel by Fraud," and in the alternative argued that there was an implied contract despite the fact that the parties had never consummated the written agreements they were negotiating. *Regency Ctrs. Acquisition, LLC v. Crescent Acquisitions, LLC*, 2018 NCBC 7, at ¶¶ 25-31 (N.C. Super. Ct. 2018) (McGuire, J).

Here, Plaintiffs do not seek to create contracts or contractual duties that do not exist. Defendant invested and managed Plaintiffs' funds, and had basic contractual duties, including the covenant of good faith and fair dealing that exists in every contract.

Punitive Damages (Count 8): Based on Defendant's argument, there is no cause of action to dismiss. The question rather, will be whether Plaintiffs ultimately forecast sufficient evidence to go to the jury on punitive damages. There are certainly claims here which can support punitive damages, including fraud, misrepresentation, breach of fiduciary duty, negligence and constructive fraud. Based on the misrepresentations and other actions pled, Plaintiffs should have the opportunity to proceed to discovery on punitive damages.

Although Defendant argues that there can be no punitive damages because Plaintiffs' claims arose from the actions of Lipscomb, this contention again fails to consider the many additional allegations in the Complaint which have been discussed herein. Plaintiffs will not list all of these allegations again, but instead simply reiterate that the Complaint does not stop with Lipscomb's departure in 2010, but continues to include Sunset's behavior for years thereafter.

Finally, Defendant contends that the claim for punitive damages should be dismissed because Plaintiffs do not specifically allege that officers or directors of Defendant participated in or condoned the behavior justifying punitive damages. Defendant cites no case which holds that a plaintiff must specifically use these words in a complaint (as opposed to meeting notice

pleading and then meeting this standard with its evidence), and Plaintiffs here know of no such case.

CONCLUSION

For the reasons stated above, Plaintiffs respectfully request that the Motion to Dismiss be denied.

This the 21st day of February, 2019.

/s/ Sam McGee
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CERTIFICATE OF COMPLIANCE WITH RULE 7.8

The undersigned attorney for Plaintiffs does hereby certify that the foregoing **MEMORANDUMIN IN OPPOSITION TO DEFENDANT'S MOTION TODISMISS** complies with Business Court Rule 7.8, in that the foregoing brief contains fewer than 7,500 words.

/s/ Sam McGee

CERTIFICATE OF SERVICE

The undersigned attorney for Plaintiffs does hereby certify that a copy of the foregoing **MEMORANDUM IN OPPOSITION OF DEFENDANT'S MOTION TO DISMISS** was served on the following parties pursuant to Business Court Rule 3.9(a) through the Business Court's e-filing system and first-class United States mail, postage prepaid, addressed as follows:

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This the 21st day of February, 2019.

/s/ Sam McGee