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 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, v. SUNSET FINANCIAL SERVICES, INC., Defendant.	**MEMORANDUM IN SUPPORT OF MOTION TO DISMISS**

Pursuant to Rules 12(b)(6) and 9(b) of the North Carolina Rules of Civil Procedure, Defendant Sunset Financial Services, Inc. ("Sunset"), by and through counsel, submits this memorandum in support of its motion to dismiss the complaint filed by Plaintiffs David M. Beam, Jr. and Donna B. Mayes ("Plaintiffs").

SUMMARY OF ARGUMENT

Plaintiffs seek a second bite at the apple on claims that are time-barred and not supported by North Carolina law. In May 2017, Plaintiffs commenced an arbitration against Sunset with the Financial Industry Regulatory Authority ("FINRA"), asserting the same claims that it asserts here in an almost identical complaint. Claimants alleged, as they do here, that investments they made over a decade ago, some of which turned out to be unprofitable, were unsuitable for them. In September 2018, after the arbitration had been pending for 16 months, the FINRA panel dismissed all of Plaintiffs' claims against Sunset under FINRA's six-year eligibility rule, which provides that

no claim is eligible for arbitration "where six years have elapsed from the occurrence or event giving rise to the claim." FINRA Rule 12206(a). Despite arbitrating for more than a year and having the benefit of written discovery and the briefs and exhibits filed by Sunset, Plaintiffs have filed a barebones complaint in this Court that intentionally excludes the identification of the investments about which they complain, the dates of those investments, acknowledgment of the agreements they executed when purchasing their investments, and other basic facts regarding their investments and accounts. However, even in light of Plaintiffs' attempt to ignore the pertinent facts and events that took place, their claims cannot fare any better in this Court than they did in the FINRA arbitration.

The claims against Sunset should be dismissed for several independent reasons. First, almost all of Plaintiffs' claims are barred by the applicable statutes of limitations, as the face of the complaint demonstrates. Second, each claim fails for substantive reasons, as the complaint reveals the absence of facts sufficient to state a valid claim under North Carolina law or discloses facts that defeat each claim. Third, the complaint falls woefully short of meeting the heightened pleading requirements of Rule 9(b) of the North Carolina Rules of Civil Procedure, which applies to Plaintiffs' claims sounding in fraud, and those claims should be dismissed on that ground. For these reasons, Plaintiffs, who already unsuccessfully pursued their claims in FINRA, have failed to state a claim upon which relief can be granted, and the complaint against Sunset should be dismissed in its entirety.

STATEMENT OF FACTS

The following facts alleged by Plaintiffs in the complaint are accepted as true solely for the purposes of this motion to dismiss. Plaintiffs allege that, beginning in 2008, they shifted their investments from conservative investments to "investments in high risk companies such as start-

up energy companies and oil well drilling speculation companies." (Compl. ¶ 7.) Plaintiffs do not identify the companies in which they invested or the specific investments. These investments, which totaled $2 million, allegedly were made upon the advice of Jeffrey Lipscomb, a broker who was a registered representative at Sunset at the time. (*Id.* ¶¶ 7, 9-10.) Plaintiffs allege that they had a close personal relationship with Mr. Lipscomb and that he became their trusted advisor. (*Id.* ¶ 8.) Mr. Lipscomb is the only individual identified in the complaint, and Plaintiffs do not allege that they interacted with any other representative, agent, or employee of Sunset. Plaintiffs allege that Mr. Lipscomb was terminated by Sunset "at some point in 2010 or thereafter,"[1] after which time he went to work for Allstate Financial Services, LLC ("Allstate"). (*Id.* ¶ 11.) Therefore, according to the complaint, Plaintiffs made the investments about which they complain between 2008 and 2010.

Plaintiffs allege that, "[d]uring 2016, it finally came to [their] attention that some of their investments had failed" and that their investments were substantially depleted. (Compl. ¶ 22.) Plaintiffs do not allege which of their investments failed. Plaintiffs now claim that the unidentified "investments in question" were unsuitable for them. (*Id.* ¶ 24.) Plaintiffs do not allege or explain how the investments were unsuitable for them. Plaintiffs also disingenuously allege that they "no longer receive statements on most of their investments from Defendant." (*Id.* ¶ 20.)[2] Notably, Plaintiffs do not allege that they did not receive statements regarding their investments from Sunset during the period they had accounts with Sunset and their investments were held at Sunset.

[1] Plaintiffs cannot escape the fact that Lipscomb's association with Sunset ended in 2010 by adding "or thereafter" to the end of its allegation. Plaintiffs are well aware that Lipscomb left Sunset in April 2010 and that they did not purchase any investments after he left in 2010, and they do not allege that they purchased any investments after 2010.

[2] Plaintiffs ignore that they closed their accounts with Sunset in November 2014.

On May 23, 2017, Plaintiffs commenced a FINRA arbitration against Sunset, Allstate, and Mr. Lipscomb, alleging the same claims alleged in this case. *See Beam v. Allstate Fin. Servs.*, No. 17-01340, 2018 FINRA Arb. LEXIS 990, at *1 (Sept. 26, 2018) (the "FINRA Award").[3] Sunset subsequently filed a motion to dismiss all of the claims asserted against it pursuant to FINRA's six-year eligibility rule, which provides that no claim is eligible for arbitration "where six years have elapsed from the occurrence or event giving rise to the claim." FINRA Rule 12206(a). Plaintiffs chose not to oppose Sunset's motion to dismiss, effectively conceding that more than six years had elapsed from the events giving rise to Plaintiffs' claims. *See* FINRA Award at *6. On September 11, 2018, the FINRA panel granted Sunset's motion to dismiss in full. *Id.* While the FINRA arbitration was pending, Mr. Lipscomb and Doris P. Beam passed away. *Id.* at *4-*5. Plaintiffs filed their complaint in this Court on November 26, 2018.

LEGAL STANDARD

Pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, a complaint is to be dismissed if it fails to state a claim upon which relief can be granted. N.C. Gen. Stat. § 1A-1, Rule 12(b)(6). A motion to dismiss pursuant to Rule 12(b)(6) tests the legal sufficiency of a complaint. *Alamance Family Practice, P.A. v. Lindley*, 2018 NCBC 82, ¶ 24 (N.C. Super. Ct. 2018) (Robinson, J.). Rule 12(b)(6) dismissal is proper in any of three scenarios: "(1) when the complaint on its face reveals that no law supports [the] claim; (2) when the complaint reveals on its face the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats the . . . claim." *Id.* at ¶ 26. Although a complaint's allegations

[3] The FINRA Award is a record publicly available on Lexis (as cited above) and on FINRA's website, http://www.finra.org/sites/default/files/aao_documents/17-01340.pdf. The Court may take judicial notice of the FINRA Award at the motion to dismiss stage. *See, e.g.*, N.C. Gen. Stat. § 8C-1, Rule 201; *CBP Res., Inc. v. SGS Control Servs.*, 394 F. Supp. 2d 733, 737 n.3 (M.D.N.C. 2005) (holding that it is appropriate to take judicial notice of an arbitration award at the motion to dismiss stage pursuant to Rule 201(b) of the Federal Rules of Evidence).

are generally assumed to be true, the Court is not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Id*. at ¶ 27.

A defendant can raise a statute of limitations defense in a motion to dismiss if the defense appears on the face of the complaint. *Horton v. Carolina Medicorp*, 344 N.C. 133, 136 (1996). Once a statute of limitations issue is raised by a defendant, "the burden of showing that the action was instituted within the prescribed period is on the plaintiff." *Id.* (citing *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 491 (1985)). "A cause of action generally accrues and the statute of limitations begins to run as soon as the right to institute and maintain a suit arises." *Bissette v. Harrod*, 226 N.C. App. 1, 11 (2013) (quoting *Penley v. Penley*, 314 N.C. 1, 19-20 (1985)).

In addition to the general pleading requirements, Rule 9(b) requires that, in all averments of fraud, "the circumstances constituting fraud . . . shall be stated with particularity." N.C. Gen. Stat. § 1A-1, Rule 9(b). To meet the Rule 9(b) standard, a plaintiff must, at a minimum, describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what was obtained as a result of the false representations. *Alamance Family Practice*, 2018 NCBC 82, at ¶ 71.

ARGUMENT

Plaintiffs' complaint fails to state a claim upon which relief can be granted. Each claim asserted against Sunset should be dismissed for multiple, independent reasons. First, the applicable statutes of limitations bar almost all of Plaintiffs' claims. Plaintiffs commenced the FINRA arbitration against Sunset on May 23, 2017; the FINRA panel issued its award on September 26, 2018; and Plaintiffs filed its complaint with this Court on November 26, 2018. Because the statutes of limitations were tolled during the pendency of the FINRA arbitration, *see*

FINRA Rule 12206(c), the operative date of the filing of Plaintiffs' claims for statute of limitations purposes is July 23, 2017.[4] The limitations periods for most of Plaintiffs' claims expired years before July 2017.

Second, Plaintiffs' claims cannot be maintained under North Carolina law. The face of the complaint both alleges facts that defeat Plaintiffs' claims and reveal the absence of facts sufficient to make valid claims. Third, the allegations purporting to support Plaintiffs' claims sounding in fraud fall woefully short of the heightened pleading standards of Rule 9(b). All of the above reasons warrant dismissal of Plaintiffs' complaint in its entirety.

I. Breach of Fiduciary Duty (Count One)

A breach of fiduciary duty claim is established by showing: (1) that the defendant owed the plaintiff a fiduciary duty; (2) the defendant breached that duty; and (3) the breach proximately caused injury to the plaintiff. *Miller v. Burlington Chem. Co., LLC*, 2017 NCBC 6, ¶ 54 (N.C. Super. Ct. 2017) (Robinson, J.). The foundation of a breach of fiduciary duty claim is a fiduciary relationship between the parties. *Harrold v. Dowd*, 149 N.C. App. 777, 783-85 (2002). "A fiduciary duty exists when there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Id.* at 784. "In North Carolina, a fiduciary duty can arise by operation of law (*de jure*) or based on the facts and circumstances (*de facto*)." *Lockerman v. S. River Elec. Membership Corp.*, 794 S.E.2d 346, 351 (N.C. Ct. App. 2016). As an initial matter, a traditional broker/investor relationship does not support a *de jure* fiduciary duty in North Carolina. *See, e.g.*, *Kastel v. Nuveen Invs. Inc.*, 2015 U.S. Dist. LEXIS 113250, at *14-*21 (M.D.N.C. Aug. 25, 2015)

[4] The statutes of limitation were tolled during the pendency of the FINRA arbitration (May 23, 2017 through September 26, 2018). Following the September 26, 2018 dismissal of the arbitration, two months passed before Plaintiffs filed this action, which makes the operative date for statute of limitations purposes July 23, 2017.

(holding that a non-discretionary brokerage account does not create a *de jure* fiduciary duty on behalf of a broker-dealer); *Trumball Invs. Ltd. I v. Wachovia Bank, N.A.*, 436 F.3d 443, 445-46 (4th Cir. 2006) (holding same). Plaintiffs do not allege that their Sunset accounts were discretionary (they were not), and Plaintiffs acknowledge that they made the decisions to purchase their investments upon the advice of Mr. Lipscomb. (Compl. ¶¶ 7, 9, 10.) No court applying North Carolina law has ever recognized a *de jure* fiduciary duty in the present circumstances. Therefore, Plaintiffs must sufficiently allege a *de facto* fiduciary duty.

"The standard for finding a *de facto* fiduciary relationship is a demanding one." *Lockerman*, 794 S.E.2d at 352. "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." *Broussard v. Meineke Disc. Muffler Shops*, 155 F.3d 331, 348 (4th Cir. 1998).

As stated above, under North Carolina law, a broker-dealer generally does not owe a fiduciary duty to investors who maintain non-discretionary accounts. And courts consistently have held that there is not a *de facto* fiduciary duty owed by a broker-dealer when the investors retain decision-making authority and the ability to make decisions regarding their investments – that the investors trusted the broker-dealer's advice is not enough to create a fiduciary duty. *See, e.g.*, *Kastel*, 2015 U.S. Dist. LEXIS 113250, at *14-*21 (dismissing claim for breach of fiduciary duty under North Carolina law where defendant financial advisor provided advice and direction to plaintiffs, but plaintiffs retained decision-making authority and failed to allege facts showing a lack of ability to make decisions); *Indep. Order of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 940-41 (2d Cir.1998) (emphasis added) ("Under New York law, as generally, there

is no general fiduciary duty inherent in an ordinary broker/customer relationship. . . . Such a duty can arise only where the customer has delegated discretionary trading authority to the broker.").

Here, Plaintiffs simply allege that they developed a close, personal relationship with Mr. Lipscomb and he became their trusted advisor. (Compl. ¶ 8.) They do not allege that they lacked decision-making authority or the ability to make investment decisions, that they were unsophisticated, or even that they did not understand the investments they made. Plaintiffs acknowledge that Mr. Beam spent his career working for Duke Energy, so it should come as no surprise that the Beams chose to invest in energy companies and oil well drilling companies. (*Id.* ¶¶ 6-7.) Nor do Plaintiffs allege in more than conclusory fashion how a purported fiduciary duty to them was breached. Fundamentally, Plaintiffs complain that their investments did not perform as hoped. When taken as a whole, Plaintiffs' allegations cannot support a breach of fiduciary duty claim against Sunset.

Even if Plaintiffs could establish that they were owed a fiduciary duty, their claim clearly would be barred by the statute of limitations. A breach of fiduciary duty claim is governed by N.C. Gen. Stat. § 1-52(1), which provides a three-year limitations period. N.C. Gen. Stat. § 1-52(1); *see also Toomer v. Branch Banking & Trust Co.*, 171 N.C. App. 58, 66 (2005). Plaintiffs allege that Sunset owed them a fiduciary duty based on their relationship with Mr. Lipscomb. Therefore, assuming *arguendo* that Plaintiffs had a special relationship with Mr. Lipscomb that rose to the level of a fiduciary duty, that duty could not be imposed upon Sunset after Mr. Lipscomb left Sunset in 2010, approximately seven years before Plaintiffs filed their FINRA arbitration. Plaintiffs do not allege that they interacted with or received advice from any other person affiliated with Sunset, much less that they had a relationship supporting a fiduciary duty. Because Plaintiffs

did not bring a breach of fiduciary duty claim within three years of Mr. Lipscomb's 2010 departure from Sunset, their claim is barred by the statute of limitations.

II. Constructive Fraud (Count 2)

A claim for constructive fraud also requires a fiduciary relationship between the parties. *Sterner v. Penn*, 159 N.C. App. 626, 631 (2003). Therefore, Plaintiffs' constructive fraud claim cannot be maintained for the substantive reasons set forth above. This claim fails for additional reasons, as stating a constructive fraud claim requires more than just a breach of fiduciary duty. In order to maintain a claim for constructive fraud, plaintiffs must show that they and defendants were in a "relation of trust and confidence . . . [which] 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." *Barger v. McCoy Hillard & Parks*, 346 N.C. 650, 666 (1997). "[A]n essential element of constructive fraud is that defendants sought to benefit themselves in the transaction," and it is this element that distinguishes a constructive fraud claim from a claim for breach of fiduciary duty. *Sterner*, 159 N.C. App. at 631. Moreover, "[t]he benefit sought by the defendant must be more than a continued relationship with the plaintiff," and a defendant's receipt of fees for work actually performed is also insufficient to establish the "benefit" required for a constructive fraud claim. *Id*. at 631-32.

Critically, Plaintiffs do not even attempt to allege how Sunset sought to benefit itself with regard to the transactions about which they complain. Plaintiffs do not allege a single specific benefit that Sunset received in purportedly breaching a duty owed to them, much less a benefit that could support a constructive fraud claim. This failure is fatal to Plaintiffs' constructive fraud claim. *See, e.g.*, *Sterner*, 159 N.C. App. at 632 (affirming dismissal of constructive fraud claim

for failure to allege sufficiently that defendant broker-dealers sought to benefit themselves by taking unfair advantage of plaintiff).

III. Fraud and Misrepresentation (Count 3)

Under North Carolina law, a plaintiff must prove the following elements to establish a claim of fraud: "(1) a false representation or concealment of material fact, (2) reasonably calculated to deceive, (3) made with the intent to deceive, (4) that does in fact deceive, and (5) results in damage to Plaintiffs." *Lawrence v. UMLIC-Five Corp.*, 2007 NCBC 20, ¶ 34 (N.C. Super. Ct. 2007) (Diaz, J.) (citing *Harrold*, 149 N.C. App. at 782). "[W]hen the party relying on [a] false or misleading representation could have discovered the truth upon inquiry, the complaint must allege that he was denied the opportunity to investigate or that he could not have learned the true facts by exercise of reasonable diligence." *Hudson-Cole Dev. Corp. v. Beemer*, 132 N.C. App. 341, 346 (1999) (citation omitted). "Where the claim arises by concealment or nondisclosure, [a plaintiff] also must allege that [the defendant] . . . had a duty to disclose material information . . . as silence is fraudulent only when there is a duty to speak." *Lawrence,* 2007 NCBC 20, at ¶ 34.

As an initial matter, Plaintiffs have failed to plead their fraud claim with particularity as required by Rule 9(b). To meet this standard, plaintiffs are required, at a minimum, to describe the time, place, and contents of the false representations, as well as the identity of the person making the misrepresentation and what was obtained as a result of the false representations. *Alamance Family Practice, P.A.*, 2018 NCBC 82, at ¶ 71 (Robinson, J.). Plaintiffs have described none of these requisite facts. Plaintiffs' fraud and misrepresentation claim relies on vague allegations of misrepresentations and omissions made by unidentified persons on unidentified dates. Plaintiffs' pleading deficiencies include the failure to allege the following:

- The time of any false representation or material omission;

- The place of any false representation or material omission;
- The specific content of any false representation or material omission;
- The identity of the person who made a false representation or material omission;
- How any false representation or material omission was made; and
- What was obtained by any false representation or material omission.

Plaintiffs do not even allege about which investment any misrepresentation was made. Plaintiffs' fraud claim, which fails to allege the requisite facts with particularity, is precisely the type of claim that warrants dismissal under Rule 9(b). *See, e.g.*, *Alamance Family Practice, P.A.*, 2018 NCBC 82, at ¶¶ 74-75 (dismissing fraud claim for failure to satisfy Rule 9(b)); *Bucci v. Burns*, 2017 NCBC 81, at ¶¶ 18-26 (N.C. Super. Ct. 2017) (Conrad, J.) (same); *Bob Timberlake Collection, Inc. v. Edwards*, 176 N.C. App. 33, 39 (2006) (affirming dismissal of fraud counterclaim where "defendant did not identify which representatives [of the plaintiff] gave him false information, nor did he specifically allege where or when he received the information"); *Topshelf Mgmt. v. Campbell-Ewald Co.*, 117 F. Supp. 3d 722, 726-27 (M.D.N.C. 2015) (dismissing fraud claim for failure to satisfy Rule 9(b) where complaint failed to identify the time or place of any misrepresentation).

Even setting aside Rule 9(b) and its heightened pleading standard, Plaintiffs' complaint reveals that they cannot maintain a fraud claim against Sunset for substantive reasons. As indicated above, Plaintiffs do not identify a single specific misrepresentation by Sunset. The vague misrepresentations and omissions alleged by Plaintiffs fall into two general categories, neither of which are sufficient to support their fraud claim. First, they allege that Sunset represented that their investments were suitable, would be profitable, and would recover from any difficulties. However, recovery for fraud requires that a subsisting or ascertainable fact, as opposed to a matter of opinion or representation relating to future prospects, be misrepresented. *Berwer v. Union*

Central Life Ins. Co., 214 N.C. 554, 557-58 (1938). Plaintiffs have not identified any ascertainable fact that Sunset misrepresented. There also is not a single non-conclusory allegation in the complaint suggesting that Sunset intended to deceive Plaintiffs or had knowledge of the falsity of any representations, which are essential elements of a fraud claim. *See Lawrence*, 2007 NCBC 20, at ¶ 34.

Second, Plaintiffs allege that Sunset misrepresented or concealed the fact that some of their investments were performing poorly or facing financial difficulties. Critically, Plaintiffs do not allege they were denied the opportunity to conduct an investigation of the relevant facts or that they could not have determined the relevant facts through due diligence. *See Oberlin Capital, L.P. v. Slavin*, 147 N.C. App. 52, 59-60 (2001) (where complaint for fraud did not allege plaintiffs were denied the opportunity to investigate or that plaintiffs could not have learned true facts through reasonable diligence, it was properly dismissed); *Cascadden v. Household Realty Corp.*, No. COA08-805, 2009 N.C. App. LEXIS 396, at *8 (Apr. 21, 2009) (affirming dismissal of fraud claim pursuant to Rule 12(b)(6) where "[p]laintiffs did not allege they were denied the opportunity to conduct an investigation or that they could not have discovered the facts through due diligence."). Plaintiffs do not allege that they made any efforts at all to determine the state or profitability of their investments, which is fatal to their fraud claim.

Additionally, even if Plaintiffs had stated a valid fraud claim, it would be barred by the statute of limitations, which is three years for fraud claims, N.C. Gen. Stat. § 1-52(9); *Ussery v. Branch Banking & Trust Co.*, 368 N.C. 325, 333 n.5 (2015). Plaintiffs have not identified any actionable fraud within the limitations period.

IV. Unfair and Deceptive Trade Practices (Count 4)

Plaintiffs' claim for violation of the Unfair and Deceptive Trade Practices Act ("UDTPA") should be dismissed for the basic and well-established reason that the UDTPA does not apply to securities transactions. *See, e.g.*, *Sterner*, 159 N.C. App. at 633 ("[T]he UDTPA does not apply to securities transactions because such application would create overlapping supervision, enforcement, and liability in an area of law that is already pervasively regulated by state and federal statutes and agencies."); *Atkinson v. Lackey*, 2015 NCBC LEXIS 21, at *45-46 (N.C. Super. Ct. Feb. 27, 2015) (Bledsoe, J.) (holding same). Plaintiffs' allegations purportedly supporting a UDTPA claim all concern their securities transactions, (*see* Compl. ¶¶ 47-48), and the allegations are the same as those purportedly supporting violation of the North Carolina Securities Act, (*see id.* ¶¶ 50-51).

Even if the UDTPA applied to the conduct alleged by Plaintiffs, dismissal would be warranted for additional reasons. First, because Plaintiffs' UDTPA claim relies on their claims for fraud, constructive fraud, and breaches of fiduciary duty, (Compl. ¶ 47), all of which should be dismissed, the UDTPA falls with these claims. Second, Plaintiffs were required to plead their UDTPA claim with particularity to satisfy Rule 9(b). *See, e.g.*, *Regency Ctrs. Acquisition, LLC v. Crescent Acquisitions, LLC*, 2018 NCBC 7, at ¶ 46 (N.C. Super. Ct. 2018) (McGuire, J.) ("When a [UDTPA claim] is based on allegations of deceptive conduct, such allegations must be pleaded with particularity."); *Hilco Transp., Inc. v. Atkins*, 2016 NCBC 6, at ¶ 79 n.5 (N.C. Super. Ct. 2016) (Gale, C.J.) ("More-detailed allegations may be required for a [UDTPA] claim to survive dismissal under Rule 12(b)(6) when the claim is predicated on allegations of deceptive conduct."). As detailed in the above discussion of Plaintiffs' fraud claim, Plaintiffs have not come close to alleging fraudulent or deceptive conduct with the requisite particularity.

Finally, Plaintiffs' UDTPA claim also is barred by the four-year statute of limitations of the act. *See* N.C. Gen. Stat. § 75-16.2. Plaintiffs have not alleged any actionable conduct that occurred within four years of July 23, 2017, and therefore the statute of limitations is yet another ground for dismissal of the UDTPA claim.

V. Violation of the North Carolina Securities Act (Count 5)

The North Carolina Securities Act ("NCSA") prohibits untrue statements made "in connection with the offer, sale or purchase of any security." N.C. Gen. Stat. § 78A-8. A purchaser can only recover under the NCSA if he or she did not know, and in the exercise of reasonable care, could not have known of "the untruth or omission." § 78A-56.

As with Plaintiffs' fraud claim, their claim for violation of the NCSA must satisfy the heightened pleading requirements of Rule 9(b). *Bucci*, 2017 NCBC 81, at ¶¶ 27-28. As discussed above, Plaintiffs have not come close to meeting Rule 9(b)'s standard. (*Supra* § III.) Therefore, Plaintiffs' NCSA claim should be dismissed for the same reason as their fraud claim. *See, e.g.*, *Bucci*, 2017 NCBC 81, at ¶¶ 27-28 ("Plaintiffs' briefing confirms that the [NCSA] claim is based on the same allegations of fraud . . . . Having concluded that Plaintiffs' claims for fraud and negligent misrepresentation lack the required particularity under Rule 9(b), the Court further concludes Plaintiffs' securities claims are insufficient on the same basis."). Moreover, Plaintiffs have not alleged that they did not know or could not have known, with the exercise of reasonable care, the truth regarding any representations or omissions. Consequently, their NCSA claim is deficient and should be dismissed. *See, e.g.*, *Bob Timberlake Collection, Inc.*, 176 N.C. App. at 41 (dismissing defendant's counterclaim under the NCSA where the defendant "fail[ed] to allege he did not know, and in the exercise of reasonable care, could not have known of the [relevant]

untruth or omission[,]" instead "attempt[ing] to allege the elements of a claim for securities fraud only in general terms").

Plaintiffs also have not asserted their NCSA claim within the limitations period. The NCSA provides: "No person may sue . . . more than three years after the person discovers facts constituting the violation, but in any case no later than five years after the sale or contract of sale, except that if a person who may be liable under this section engages in any fraudulent or deceitful act that conceals the violation or induces the person to forgo or postpone commencing an action based upon the violation, the suit may be commenced not later than three years after the person discovers or should have discovered that the act was fraudulent or deceitful." N.C. Gen. Stat. § 78A-56(f). The NCSA applies to statements made in connection with the offer or purchase of a security. *Id.* § 78A-8. Here, Plaintiffs purchased the securities at issue no later than 2010 – more than six years before commencing their arbitration against Sunset. Therefore, any statements made in connection with their purchase of the securities occurred outside even the longer five-year limitations period.

Moreover, Plaintiffs have not alleged any facts that would permit the tolling of the statute of limitations. The only allegations regarding any representations in connection with Plaintiffs' purchase of their securities is that the investments and their risks were suitable for Plaintiffs and that the investments would be profitable. Even if these representations were sufficient to state a claim, which they are not, Plaintiffs have not alleged that Sunset prevented Plaintiffs from discovering the truth. If Plaintiffs' securities were unsuitable for them, they were unsuitable at the time of purchase. Not only have Plaintiffs not alleged how the securities were unsuitable, but they have not alleged that Sunset misrepresented any details at all about the securities. Additionally, as discussed above, the alleged statement that the securities would be substantially profitable is an

opinion, not an actionable factual statement. For all of these reasons, Plaintiffs' NCSA claim is time-barred as a matter of law.

VI. Negligence, Including Negligent Hiring, Supervision, and Retention (Count 6)

Under North Carolina law, Plaintiffs must prove the following elements to establish a claim for negligent hiring, supervision, and retention: (1) a specific negligent act of an employee on which the action is founded; (2) incompetency of the employee by inherent unfitness or previous specific acts of negligence from which incompetency may be inferred; (3) an employer's actual or constructive notice of such unfitness; and (4) resulting injury. *Medlin v. Bass*, 327 N.C. 587, 590-91 (1990). Plaintiffs do not even attempt to allege facts supporting the elements of this claim. They do not allege a specific negligent act upon which their action is founded; they allege neither incompetency of Mr. Lipscomb nor previous specific acts of negligence upon which incompetency may be inferred; and they do not allege that Sunset had actual or constructive knowledge of any incompetency of Mr. Lipscomb. *See, e.g., Bratcher v. Pharm. Prod. Dev., Inc.*, 545 F. Supp. 2d 533, 546-47 (E.D.N.C. 2008) ("With respect to her negligent hiring [and supervision] claim, [plaintiff] fails to allege any facts that show [defendant] had either actual or constructive knowledge of [the employee's] incompetency or unfitness at the time of his hiring . . . . Accordingly, [plaintiff] fails to state a claim for negligent hiring or supervision."). Thus, there simply are no allegations that could support a claim for negligent hiring, supervision, or retention against Sunset.

Moreover, any such claim would be barred by the statute of limitations. The statute of limitations for negligence is three years. *Ussery*, 368 N.C. at 333 n.5 (citing N.C. Gen. Stat. § 1-52). Because Mr. Lipscomb has not been associated with Sunset since 2010, any claim related to his hiring, supervision, or retention clearly was barred years ago.

To the extent Plaintiffs are attempting to assert a negligence claim distinct from negligent hiring, supervision, and retention, the complaint also fails to state a claim. To state a claim for negligence, Plaintiffs must allege "the existence of a legal duty or standard of care owed to the plaintiff by the defendant, breach of that duty, and a causal relationship between the breach of duty and certain actual injury or loss sustained by the plaintiff." *Sterner*, 159 N.C. App. at 629 (internal quotation marks and citation omitted). Plaintiffs do not sufficiently allege any of these elements. They do not allege a cognizable duty owed by Sunset, a breach of that duty, or causation, much less a breach that occurred within the limitations period. For all of these reasons, Plaintiffs' negligence claim should be dismissed.

VII. Breach of Contract (Count 7)

To prove a claim for breach of contract, Plaintiffs must show the existence of a valid contract and a breach of the terms of that contract. *Poor v. Hill*, 138 N.C. App. 19, 26 (2000). Plaintiffs do not sufficiently allege either element. First, Plaintiffs do not identify a contract between themselves and Sunset. Plaintiffs vaguely allege that Sunset "agreed to hold, invest and safeguard Plaintiffs' funds, and to do so with due caution, in its best interests, and to protect and secure their funds." (Compl. ¶ 57.) Notably, Plaintiffs do not allege what form this purported agreement took (written or oral), when it was made, or who made it. "The well-settled elements of a valid contract are offer, acceptance, consideration, and mutuality of assent to the contract's essential terms." *Se. Caissons, LLC v. Choate Constr. Co.*, 247 N.C. App. 104, 110 (2016). Plaintiffs do not allege any of these elements. Moreover, Plaintiffs do not identify any terms of the purported agreement that Sunset breached. Conclusory allegations such as these cannot support a breach of contract claim and warrant dismissal. *See, e.g., Plasman v. Decca Furniture (USA), Inc.*, 2016 NCBC 78, at ¶ 28 (N.C. Super. Ct. 2016) (Bledsoe, J.) (dismissing claim after

noting that "conclusory and non-specific statements" that a contract exists between parties are legal conclusions "not entitled to a presumption of validity"); *Global Promotions Group, Inc. v. Danas Inc.*, 2012 NCBC 38, at ¶ 44 (N.C. Super. Ct. 2012) (Jolly, J.) (dismissing complaint that alleged neither a particular contract nor the specific contractual provisions that were breached); *Regency Ctrs. Acquisition, LLC*, 2018 NCBC 7, at ¶¶ 29-35 (dismissing claim for breach of oral contract where the complaint did not allege facts supporting offer or acceptance and holding that "[t]he [c]ourt is not required to accept [p]laintiff's conclusory claim that the parties formed an 'oral contract' in the absence of some factual allegations [necessary] to support such a conclusion"). Plaintiffs' conclusory allegations are not an oversight, as Sunset has not breached any contract with Plaintiffs, and this claim cannot be maintained.

Plaintiffs' breach of contract claim is also time-barred. Breach of contract claims are subject to a three-year statute of limitations. N.C. Gen. Stat. § 1-52(1). Plaintiffs have not alleged, and cannot allege, a contractual breach that occurred after July 23, 2014.

VIII. Punitive Damages (Count 8)

Plaintiffs' punitive damages claim should be dismissed out of hand because it is not an independent, cognizable cause of action. *See Alamance Family Practice, P.A.*, 2018 NCBC 82, at ¶ 78 ("A request for punitive damages is not a separate cause of action but is a type of relief that may be awarded in appropriate circumstances."). In any event, punitive damages are not available to Plaintiffs in this case. Under North Carolina law, punitive damages are not available except in certain circumstances involving fraud, malice, or willful or wanton conduct. *Id.*; *see also* N.C. Gen. Stat. § 1D-15(a). Because Plaintiffs' claim for fraud fails, and Plaintiffs' have not alleged any malicious, willful, or wanton conduct, they cannot recover punitive damages. The nature of Plaintiffs' claims against Sunset, which are based on vicarious liability for the actions of a third-

party – Mr. Lipscomb – also renders punitive damages unavailable. *See* N.C. Gen. Stat. § 1D-15(c) (providing that punitive damages "shall not be awarded against a person solely on the basis of vicarious liability for the acts or omissions of another"). Finally, North Carolina law provides that punitive damages may be awarded against a corporation only if "the officers, directors, or managers of the corporation participated in or condoned the conduct constituting the aggravating factor giving rise to punitive damages." *Id.* Because Plaintiffs do not allege that any Sunset officers, directors, or managers participated in or condoned the conduct about which they complain, they cannot recover punitive damages from Sunset as a matter of law.

CONCLUSION

Plaintiffs' conclusory and time-barred claims already have been dismissed by a FINRA panel. Their claims should fare no better in the Business Court. As set forth above, there are multiple grounds for dismissing each and every claim asserted against Sunset by Plaintiffs, and Plaintiffs' claims against Sunset should be dismissed with prejudice.

This the 1st day of February, 2019.

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CERTIFICATE OF COMPLIANCE WITH RULE 7.8

The undersigned attorney for Defendant Sunset Financial Services, Inc. does hereby certify that the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** complies with Business Court Rule 7.8, in that the foregoing brief contains fewer than 7,500 words.

This the 1st day of February, 2019.

/s/Christopher D. Tomlinson

CERTIFICATE OF SERVICE

The undersigned attorney for Defendant Sunset Financial Services, Inc. does hereby certify that a copy of the foregoing **MEMORANDUM IN SUPPORT OF MOTION TO DISMISS** will be filed in Iredell County Superior Court in accordance with Business Court Rule 3.11, and 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 1st day of February, 2019.

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