United States Court of Appeals

for the

First Circuit

Case No. 24-2000

YOON DOELGER; PETER DOELGER,

Plaintiffs-Appellants,

v.

JPMORGAN CHASE BANK, N.A.,
CHICKASAW CAPITAL MANAGEMENT, LLC,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS, BOSTON, IN CASE NO. 1:21-cv-11042-AK

BRIEF FOR PLAINTIFFS-APPELLANTS

(previously filed under seal and now being filed publicly as per the Court's order, dated June 6, 2025)

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STATEMENT IN SUPPORT OF ORAL ARGUMENT

Plaintiffs respectfully request oral argument. This appeal involves legal issues that this Court has not previously addressed. Oral argument will enable the parties to address these issues and to respond directly to the Court's questions and concerns.

PRELIMINARY STATEMENT

The Defendant investment advisers breached their fiduciary duties under Massachusetts law. Plaintiffs Yoon ("Yoon") and Peter ("Peter") Doelger (together, "Plaintiffs") are an elderly couple who entrusted Defendants JPMorgan Chase Bank, N.A. ("JPMC") and Chickasaw Capital Management, LLC ("Chickasaw"; together with JPMC, "Defendants") with their life savings between 2015 and 2020. In its summary judgment order ("Order") denying Plaintiffs a trial, the District Court ignored controlling law, including the Supreme Judicial Court ("SJC") decision, *Robinhood Fin. LLC v. Secretary of the Commonwealth*, 492 Mass. 696, 716, 214 N.E.3d 1058, 1075 (2023), wherein the SJC made clear that investment advisers, like Defendants "must comply with the full complement of fiduciary duties of utmost good faith, and full and fair disclosure of all material facts…." Defendants admit these duties include a duty of loyalty (putting client interest ahead of adviser) and duty of care, including an ongoing obligation to ensure their investment advice is suitable based on several factors, including client investment objectives, financial condition (e.g. net worth) and investment experience. Indeed, counsel for Defendants stated that suitability is the "key issue" in the case. JA3076:14-19. Yet, in nearly 90 pages of written opinions, the amount of times the Magistrate and District Judges discussed Defendants' suitability obligations is **0**.

Instead, the District Court accepted Defendants' argument that they could limit their fiduciary duties by contract even though Defendants (i) failed to explain what duties they believed they had or how their duties could be limited, (ii) cited no case law supporting this proposition, and (iii) ignored federal court authority stating investment advisers/fiduciaries cannot limited their fiduciary duties. In any event, Chickasaw was not even a party to the contract upon which Defendants rely. Moreover, that contract does not even limit JPMC's fiduciary duties; it affirms them.

The facts of Defendants' malfeasance would make for a good John Grisham novel, if they were not, sadly, true. JPMC forged documents and emails to circumvent compliance when Peter was suffering from paranoia and dementia, violated regulations and its own policies, including against exploiting seniors, repeatedly told lies about Peter's net worth to get around internal suitability controls, profited from Plaintiffs' losses and repeatedly encouraged Plaintiffs to run up debt for the benefit of JPMC and urged them to stay invested in toxic master limited partnerships ("MLPs"). Chickasaw recklessly abandoned its duty of loyalty and suitability obligations, claiming, without any legal support, that it could rely on JPMC to perform these duties for it. Defendants, motivated by greed, sought to squeeze out nearly every dollar they possibly could from Plaintiffs, making millions of dollars in interest and fees for themselves, while squandering Plaintiffs' life savings of $20 million.

The opinions turn summary judgment on its head – requiring Plaintiffs to put forward **"incontrovertible proof,"** and the District Court admittedly engaged in its own fact finding by, among other things, pulling, and misreading, documents on which Defendants themselves did not rely, weighing evidence and ignoring key evidence that goes to the heart of central issues, including through the following:

- Blessing an email James Baker (investment adviser) indisputably forged (ADD107-11) as not "incontrovertible proof that Baker falsely represented the size of the proposed investment to get around suitability limits" by digging through the record and finding an irrelevant document Defendants did not even cite to purportedly demonstrate Baker did not act with fraudulent intent. ADD75-76.

- Accepting "M.J. Boal's **finding of fact** that Peter 'represented to Baker that his net worth was in in the range of $100 million,'" while ignoring evidence contradicting Baker's self-serving affidavit, including an internal email Baker wrote to his boss in August 2015 about a phone call he had with Peter: "I honestly don't think he knows an exact number. He asked us to touch base with his accountant about it, which we will." ADD112. The District Court also ignored testimony from Doug Moon, Baker's colleague, who was on that phone call with Peter and testified that he never heard Peter say he was worth $100 million. ADD113-14. The accountant testified that Baker never asked him. ADD115.

- Ignoring the personal financial statement Baker was required to have Peter sign in 2016 for regulatory reasons, which showed a total net worth of $39 million and confirmed what Baker knew all along: Peter was not worth

anywhere close to $100 million. ADD117. Chickasaw's expert testified that JPMC should have performed a suitability re-evaluation upon receiving that document. ADD118. JPMC never did.

- Ignoring internal JPMC statements demonstrating that JPMC did not want Peter paying down $16 million in debt he owed to JPMC because paying down the debt would require divesting his MLP investments, which were pledged as collateral, generating profits for JPMC. ADD120 ("we do not want to change pricing and risk the client paying down the entirety of the line as a result."); *see also* ADD121. Internally, JPMC acknowledged it was creating confusion by acting in conflicting roles of adviser and lender simultaneously. ADD122.

- Ignoring that JPMC's recommendation that Plaintiffs borrow more money from JPMC in the form of a mortgage on their home rather than sell declining MLPs only benefited Defendants. ADD124 ("I like the HELOC option…. It can provide an effective emergency backstop in the event of a significant decline in MLP prices with little upfront costs.")

- Concluding that Peter did not have "diagnosable dementia during the relevant time [2015-2020]" (ADD68; ADD92-93), relying on a medical record from 2014, but ignoring a medical record from 2015 that states "Diagnosis: **paranoid ideation; cognitive deficits; dementia**." ADD127 (emphasis added).

- Concluding that Peter was not impaired in part because from "2015 through 2020" he supposedly "rowed." (ADD18, 44; ADD94). But the very 2018 medical record the District Court relied on actually states: Peter is **"giving up his lifelong passion of rowing."** JA673 (emphasis added).

The District Court's Order is riddled with improper fact finding.

The outcome of this appeal will have a substantial impact on countless investors, particularly the elderly and vulnerable. Investor confusion with the roles of investment-advisers and broker-dealers and the duties owed to investors led the Secretary of the Commonwealth to promulgate the rule on fiduciary duties at issue in *Robinhood*. 492 Mass. at 722-23. Those regulations sought to impose upon broker-dealers a standard of care more in line with the stricter standard of care of investments advisers. *See id*. If the District Court's decision were to stand, investment advisers in Massachusetts would be subject to a much lower standard of care than that of broker-dealers, which would be an absurd result and not what the SJC recognized the law to be in Massachusetts.

For these and the reasons discussed below, this Court should reverse. Plaintiffs' right to a trial is long overdue.

STATEMENT OF JURISDICTION

The district court had original jurisdiction pursuant to 28 U.S.C. § 1332(d)(2)(A) because there is complete diversity and the amount in controversy exceeds $75,000. This Court has jurisdiction under 28 U.S.C § 1291 because this is an appeal from a final judgment (ADD103) and the Doelgers timely filed notices of appeal. (JA53, JA63).

ISSUES PRESENTED FOR REVIEW

1. Did the District Court err in ignoring and/or misapplying controlling law concerning fiduciaries and investment advisers in holding there were no genuine issues of material fact as to whether Defendants breached their fiduciary duties?

2. Did the District Court err in failing to address whether there are genuine issues of material fact as to whether Defendants adhered to their duty of loyalty, duty of care and suitability obligations, despite Defendants admitting they had such obligations and that suitability is the key issue in the case?

3. Did the District Court err in holding that a fiduciary/investment adviser can limit its fiduciary duties by contract despite case law and rulings of the Securities & Exchange Commission ("SEC") explicitly stating a fiduciary/investment adviser cannot do so and the contract JPMC signed provided for no such limitation?

4. Did the District Court err in holding that Chickasaw limited its fiduciary duties to Plaintiffs by contract despite that it admittedly never entered into a written contract with Plaintiffs?

5. Did the District Court erroneously grant summary judgment to Defendants by engaging in fact finding, failing to view the evidence in the light most favorable to the non-moving Plaintiffs, drawing inferences in favor of Defendants and ignoring key evidence, all in violation of the FRCP 56 standard?

6. Did the District Court err by denying Plaintiffs' motion for leave to amend the complaint and holding that a good cause standard applied despite controlling law that a leave freely given standard applies?

7. Did the District Court err in dismissing all of Plaintiffs' claims?

STATEMENT OF THE CASE

I. Statement of Facts

A. The Doelgers

Peter is 87 years old; Yoon is 78. JA2814 ¶¶198, 200. Peter attended Middlebury College studying English literature, while Yoon escaped North Korea as a child, obtaining a fine arts degree in South Korea. JA987-88 ¶¶2, 4-6, 11.

Yoon and Peter met in 1984 and married in 2000. JA2814 ¶201. Yoon was primarily a homemaker. JA2814 ¶202. Peter co-founded a home energy usage audit service which he sold in the 1990s. JA2815 ¶203. Neither Peter nor Yoon have an educational or professional background in finance or investing and always relied on the guidance of investment advisers. JA987-91 ¶¶4, 15, 32-34; JA2147:12-19; JA2815 ¶204. Peter has never been able to use text messages, computers, or email, instead relying on Yoon to navigate technology. JA989 ¶19; JA2817 ¶207. During his retirement, in the mid-2000s, Peter began investing in MLPs to obtain a steady income. JA993 ¶44; JA1543; JA2828 ¶236.

Peter's MLP investments were initially managed by Rachlin Group Neuberger Berman, and from 2012 to 2015 by Atlantic Trust. JA993 ¶44; JA1543-44; JA2828

¶236. Peter's early investments in MLPs were only one third of a diversified portfolio. JA2210; JA2828-29 ¶236.

Starting in or around 2014, Peter became increasingly forgetful, eventually showing signs of significant cognitive decline. JA975-76 ¶¶8-11; JA990 ¶¶28-29; JA1013; JA1016; JA1019; ADD127 (JA1034); JA2817-18 ¶¶209-10, 213. That year, Peter's declining health led to his hospitalization, and tests were performed to address signs of confused altered mental status, cognitive defects, and rapidly progressive dementia. JA990 ¶27; JA1013; JA1016; JA2818 ¶¶210-11. On September 3, 2015, Peter suffered a psychotic episode confronting a young man he believed was attacking him with radio waves. JA1032-34; JA2817-20 ¶¶208, 214-15. Peter was nearly committed to in-patient psychiatric care, and the supervising doctor confirmed diagnoses of paranoia, cognitive defects, and dementia. ADD127 (JA1034); JA977-83 ¶¶16, 47; JA2548; JA2820 ¶¶215-16.

The District Court ignored this vital episode and diagnosis. The Magistrate's report and recommendation ("R&R") concluded that Peter was not impaired in part because he "rowed" from "2015 through 2020" (ADD18, 57), misreading the 2018 medical record that states "[Peter] says his mood if anything is tending towards depression, **as he faces giving up his lifelong passion of rowing."** JA673 (emphasis added). The District Court embraced this incorrect reading. ADD94; JA3113.

B. Plaintiffs' Relationship with JPMC

Since at least the 1990s, Plaintiffs banked with JPMC. In or around 2009, Doug Moon became Peter's adviser at JPMC. JA1993:3-94:10; JA2829 ¶238. Moon saw Peter as a profit center for JPMC and himself, in line with the culture and expectations of JPMC. JA2214; JA2830 ¶240; *see generally* JA2821-27 ¶¶220-233; JA2012:24-13:18. That year, Peter opened a line of credit at JPMC's urging, secured against his MLP holdings ("MLP Investments"). JA991-92 ¶¶35, 38; JA2830-2904 ¶¶239, 241, 403. Moon considered Peter's non-JPMC held assets, particularly his MLP Investments, as "key opportunities" for JPMC. JA2214; JA2830 ¶240. In 2013, some of Peter's MLP Investments were moved into a brokerage account at JPMC (the "Brokerage Account"), but the majority remained managed by Atlantic Trust (the "AT Assets"), custodied with JPMC, and for which JPMC issued monthly statements. JA2473; JA2831 ¶¶242-43.

In or around 2013, Plaintiffs were introduced to JPMC investor associate Baker. JA2831-32 ¶¶244-45. Moon and Baker continued to foster a personal relationship with Peter and provide expansive investment recommendations. JA991-92 ¶¶36-37, 39; JA2832-35 ¶¶245, 247-49.

In September 2014, Peter sought advice from Moon and Baker, explaining he "would like to diversify [his MLP investments], but ha[d] questions about tax-efficient ways to do so." JA1209; *see also* JA1212; JA2833-34 ¶¶247, 250. Moon

asked JPMC Market Manager Daniel Curtin for assistance with this request. Instead of helping, Curtin responded sarcastically that "**Death is the best tax planning for MLPs.**" JA1212 (emphasis added). Inexplicably, the District Court found this statement was not "glib", despite acknowledging the record "does not indicate whether the [JPMC] advisers followed up with Peter or if they advised him on what to do." ADD70.

C. Chickasaw and Further Targeting of Peter for Increased Revenue

In December 2014, JPMC, partnered with registered investment adviser ("RIA") Chickasaw and began to offer an MLP investment strategy called "J.P. Morgan Opportunistic Advisory Program: Master Limited Partnerships & Energy Infrastructure 'OAP MLPEI'" ("MLP Program"). JA2836-2957 ¶¶252, 509. JPMC, through Baker, pushed Peter to meet with representatives from Chickasaw and move management of his $33 million AT Assets to them. JA993 ¶¶47-48; JA2838-41 ¶¶256-64; *see, e.g.,* JA507, JA1226.

Acquiring Peter's $33 million AT Assets would be a huge "win" for Defendants as the account would be in the top 3 to 5% of clients in terms of asset size for Chickasaw, and the single largest individual account referred to it from an intermediary, and it would generate fees for JPMC within the top 0.5% of clients. JA1231; JA1609:3-7; JA1676:18-79:5; JA2231-35 (Peter's account, redacted on JA2231 but matched to substance on JA2235, ranked 132/33,061 for annual fees);

JA232-2907 ¶¶72(Resp.), 261, 263, 409-10. Ignoring these motives, the District Court concluded, "the record does not support Plaintiffs' claim that Baker encouraged Peter to invest in MLPs with Chickasaw," all while ignoring, among other things: (i) Baker admitted he had made "key selling points" about Chickasaw's team to Peter (JA1357; JA2840 ¶262); (ii) Chickasaw employee Ed Kelly's impression was that Baker was trying to land the account and that it was important to him (JA1355; JA1680:25-82:18; JA2846 ¶276); (iii) Baker admitted he would be willing to discount JPMC's fee to get the account open (JA1357); and (iv) Baker's statements that Plaintiffs "relationship gave [JPMC] the opportunity to ***pitch*** to manage a $30 MM MLP portfolio that he currently has managed by Atlantic Trust" and that he "coordinated directly with Chickasaw Capital, arranging a meeting with the PM and Peter in New York to discuss moving his portfolio" (JA3236; JA2731 ¶69(Resp.)) (emphasis added).

D. Defendants Pitched the MLP Program to Peter at the August 2015 Meeting and Did Not Advise Him Against It

The lunch meeting Baker arranged to pitch the transition of the AT Assets to Defendants was scheduled to be held at JPMC's offices on August 10, 2015 (the "August 2015 Meeting"). JA1358; JA2844 ¶269. On August 5, 2015, Dylan Dittrich, an analyst on Moon and Baker's team, requested a set of "prefill" account opening documents for Peter for the new MLP Program (the "Advisory Account"), with an investment size of $1 million, making no reference to Peter's liquid net

worth. JA511; JA2842 ¶265. On August 7, 2015, Dittrich received a reply email attaching the requested documents (the "Account Opening Documents"), and listing **Peter's liquid net worth as $50 million**. JA511; JA525; JA2843 ¶268.

It is undisputed that Peter, Yoon, Baker, Ed Kelly and Geoffrey Mavar of Chickasaw attended the August 2015 Meeting. JA2844 ¶269. During that meeting, Baker never stated that Plaintiffs should diversify their investments or refrain from investing in MLPs, and he never presented them with alternative suitable investment strategies. JA993-99 ¶¶49, 77, 86; JA1332:22-33:24; JA1687:6-88:24; JA1693:4-25; JA2844-51 ¶¶272-74, 284. Nonetheless, the District Court stated "[t]he record does not support Plaintiffs' assertion that Baker did not tell Peter at the meeting that he should diversify" pointing to a supposedly unaccounted for thirty minutes (though Yoon was present during that time and unequivocally maintains those statements were not made (JA993-94 ¶¶49-51; *see also* JA541)). ADD71-72.

When asked "[i]sn't it true that Mr. Baker was encouraging Mr. Doelger to invest in MLPs at Chickasaw?" Ed Kelly responded "**Yes**," and then provided what he believed to be Baker's reasoning for doing so. JA1687:16-23. Regrettably, in quoting Ed Kelly's answer the District Court replaced the vital "Yes" with ellipses and wrongfully accused Plaintiffs of "mischaracterization" of his testimony, when Plaintiffs did no such thing. ADD72.

After Ed Kelly and Mavar left the August 2015 Meeting, Baker had Peter sign the Account Opening Documents but did not provide executed copies to Plaintiffs. JA541; JA994 ¶51; JA1292:1-4; JA1310:18-11:2; JA2846-49 ¶¶277, 280.

E. Moon and Baker Faced Suitability Obstacles

Baker and JPMC understood that, even after Peter signed the Account Opening Documents, they had suitability obligations to fulfill to open the Advisory Account. The day after the August 2015 Meeting, Baker told Ed Kelly that he still needed to "clear some operational hurdles (taxes, timing and our ***internal suitability***) to determine the size of the account." JA541; JA2854 ¶292 (emphasis added). More than two weeks later, Baker said he still needed to "clear some internal compliance/risk/***suitability***/bite size hurdles." JA1416; JA2855 ¶293 (emphasis added).

Pursuant to the JPMC Advisory Program schedule (the "Advisory Schedule"), the MLP Program was subject to two suitability limits: (1) for the MLP Program specifically, an investment limit equal to 5% of the client's liquid net worth; and (2) for all of the Advisory Program strategies, a hard investment limit equal to 50% of the client's liquid net worth. JA3230; JA3232; JA2851-53 ¶¶285, 288. Whenever an adviser opened a new account, JPMC would run a "suitability check" to see if the proposed investment exceeded 5%. JA2221; JA2852 ¶286. Clients could only

exceed the 5% suitability restriction if an exception were granted; clients could never exceed the 50% limit. JA1051; JA3230; JA2853 ¶288.

Whether Peter's liquid net worth was $50 million or $100 million, a proposed $33 million investment would far exceed the 5% suitability restriction and would require specific approval procedures. ADD108-09 (JA1418-19); JA1025; JA1493-94. When Baker sought to obtain an exception to the 5% limit, multiple JPMC personnel, including compliance and risk, raised objections:

- An Executive Director inquired, "were you aware or any body [sic] else aware of this exception to LNW percentage?" to which a Vice President of US Fiduciary Risk responded, "I was not aware of this request, and I have a hard time understanding how they're getting comfortable with 33pct in MLP, which has a 5pct limit." JA1047; JA2874-75 ¶¶334-35.
- A Supervisory Manager stated, "when doing the account review, I've noticed that the account is coming up as 'exceeding the Suitability % of 5%' and is out of ratio (Invest. Amount to LNW). Based on this, I cannot approve the COB ticket with this funding amount… ***I am not aware of any exceptions that can be made to this ratio. Please let me know if you want to discuss***." JA1051; JA2875 ¶336.
- A business management team member said that he was "not sure [the exception] was ever escalated appropriately." JA1490; JA2875 ¶337.

The District Court ignored all of the above.

Regardless, if Peter's liquid net worth were $50 million, the investment would exceed the 50% hard suitability cap and would not be allowed. JA3230.

F. Baker Falsely Told His Superiors Peter was Worth $100 Million to Get Past Suitability

The day after the August 2015 Meeting, Moon sent Baker Peter's 2012 personal financial statement showing a total net worth of $33.8 million, over $16 million lower than what was shown on the Account Opening Documents. JA1371; JA1023; JA2855 ¶294. Both valuations were in line with the documentation JPMC possessed concerning Peter's liquid net worth, which included at least 6 other documents from 2009 to 2014 showing a liquid net worth ranging from $20 to $50 million. JA475 (2014, $50M); JA1162 (2013, $35.4M); JA2464 (2012, $30M); JA2462 (2012, $30M); JA2458 (2010, $25M); JA2163 (2009, $20M); JA2856 ¶295. Not one of JPMC's records supported the assertion that Peter's liquid net worth was $80-$100 million, but Baker made this unsubstantiated claim to his colleagues. *See, e.g.,* ADD108-09 (JA1418-19); ADD112 (JA543); JA1025; JA2856-58 ¶¶296-99.

Peter's actual liquid net worth as of August/September 2015 is, at best, in dispute, but was no more than $50 million, and nowhere near $100 million. JPMC's own records from the year before showed Peter had a $50 million liquid net worth (JA475-78), the record also includes:

- Baker's admission that ***"[Peter] didn't provide a concrete number because I honestly don't think he knows an exact number.*** He asked us to touch base with his accountant about it, which we will." JA543; JA2857 ¶297.
- Sworn statements from Peter's accountant that (i) ***Peter was never worth close to $100 million***, and (ii) Baker never asked the accountant about Peter's net worth in 2015. ADD115-16 (JA972-73 ¶¶ 4-6); JA2077:23-78:8; JA2081:14-

22; JA2858 ¶299.

- Testimony from Moon that ***he never heard Peter say he was worth $80 or $100 million***. ADD113-14 (JA2001:19-04:4); JA2857 ¶298.
- A detailed breakdown of Peter's actual assets at the end of 2015 reflecting ***a total net worth of $35.5 million***, which Plaintiffs provided in their interrogatory response. JA801-02; JA2859 ¶301.

The District Court ignored all this material evidence and accepted the Magistrate's finding of fact that "Peter represented to Baker that his net worth was in the range of $100 million, and ***nothing in the record appears to contradict this statement of fact, such as evidence produced by Plaintiffs that Peter's net worth was something other than that amount***." ADD75 (emphasis added). The District Court additionally stated that "the record does not support" that "[JPMC] knew Peter's liquid net worth was not approximately $100 million." ADD78. Even the evidence the District Court did acknowledge undermines this position as:

- The accountant told Moon (who then told Baker) just days after the Advisory Account was opened that **JPMC *held "all the material assets outside of personal use real estate" for Plaintiffs***. JA1496; JA2858-59 ¶300.
- Even if JPMC held approximately $62.5 million in assets for Peter around the time the Advisory Account was opened (JA1047), Peter also had ***over $16 million in liabilities*** that JPMC was aware of (JA2489). JA2868 ¶¶318-19.

G. Baker Modified Internal JPMC Communications in His Continued Attempts to Get the Advisory Account Approved

On August 27, 2015, Baker emailed Curtin that the opening of Peter's account "seem[ed] to be stuck in risk no man's land" and that he was worried they "could lose this opportunity." JA543; JA2864 ¶311. The following day, August 28, 2015,

Baker emailed Supervisory Manager Jeff Lee, a compliance officer (JA1498, JA1501, JA1166:18-24), stating that "[Peter] currently holds a portfolio of ***$33 MM of MLPS. These MLPS are managed by Atlantic Trust*** and custodied at J.P. Morgan…. He wants to move ***his entire $33 MM portfolio*** to our OAP:MLPEI (Chickasaw) strategy." ADD108-09 (JA1418-19) (emphasis added) ("August 28th Email"); JA2864 ¶312. Baker and Curtin subsequently discussed ways to get around compliance and get the Advisory Account approved with pressure from the "business side" of JPMC. ADD108 (JA1418); JA2865 ¶313.

Hours after his email to Lee, Baker had a phone call with Jeff Burke (East Region head of investment practice) to discuss getting the Advisory Account approved. JA2865-66 ¶314. Shortly after that call, Baker forwarded the August 28th Email to him, only after making multiple undisclosed material modifications, including ***changing it to falsely say that the AT Assets, the MLPs managed by Atlantic Trust, were worth $45 million*** and Peter would only be moving $33 million of them to Chickasaw, which Baker knew was untrue. ADD107 (JA1422); ADD108-09 (JA1418-19); ADD110-11 (JA1420-21); JA2865-66 ¶314.

Just two days prior, on August 26, 2015, Baker had received MLP worksheets from Peter's accountant which stated that, per current statements issued by JPMC as custodian, ***the total value of AT Assets, the only MLP investments managed by Atlantic Trust, was $32.6 million***. JA1374; JA1383; JA2863-64 ¶310. Similar

values were reflected in the AT Asset account statements issued by JPMC just days later. JA2471-75; JA2867 ¶315. Given that JPMC was the custodian, Baker could have (and likely did) pull up the real time values with the click of a button. Thus, the original statement in the August 28th Email that Peter had $33 million MLP investments managed by Atlantic Trust was correct and known to both Baker individually and JPMC generally, and ***the changed numbers in the email to Burke were false and fabricated***. Furthermore, Baker's manipulation misled Burke as to what facts had been communicated to compliance. The District Court ignored this.

The falsely inflated value of the AT Assets, and the lie that only a portion of them would be transferred to the MLP Program (thereby dividing the assets across two managers (Atlantic Trust and JPMC/Chickasaw)), helped get the Advisory Account approved on the fraudulent basis that Peter would receive a "manager diversification benefit." JA1027; JA2867-68 ¶317. According to the District Court, the peddling of Baker's lies by others somehow made them true. ADD76.

In applying the wrong standard, the District Court concluded that while "the redline does suggest that Baker may have changed the email he forwarded to Burke… it is not ***incontrovertible proof*** that Baker falsely represented the size of the proposed investment to get around suitability limits." ADD75-76 (emphasis added). The District Court then blessed Baker's fraud by *sua sponte* pulling from the record an undated, unverified document that: (i) had no total amount; (ii) was

from three months prior; (iii) contained combined values in two accounts (not just AT Assets); and (iv) Defendants did not even cite to for these purposes. ADD76; JA1228.

H. The Big Boy Letter, A Pack of Lies

By September 3, 2015, JPMC wanted Peter to sign a "big boy letter" to get around the 5% suitability cap. JA1027; *see also* [Dkt. 301-128]. Baker's supervisor John Beggans bragged to Burke that "Peter Doelger will sign any letter that we draw up". JA1028; JA2870 ¶322. Contrary to the District Court's conclusion (ADD77), this statement supports Plaintiffs' position that JPMC knew Peter placed his trust in them and would take whatever action they suggested.

For the next three weeks, at least seven people within JPMC worked on drafting a letter ("Big Boy Letter") to push through opening the Advisory Account. JA1047-49, JA1193:17-94:22; JA2869-70 ¶¶320-323. That letter contained a variety of representations communicated by Baker and Moon, including information Baker not only knew was untrue, but which he had personally fabricated: (i) that the AT Assets, the only MLPs at Atlantic Trust, were worth $45 million; (ii) that Peter would only be transferring $33 million of these assets and leaving $12 million with Atlantic Trust which would "diversify the 'manager concentration risk'"; and (iii) that Peter's liquid net worth was approximately $100 million (which it states is "given"). JA594.

On October 1, 2015, four weeks after he visited the hospital for a psychotic episode, was diagnosed with dementia, and was nearly committed, Peter signed the Big Boy Letter. JA594-96; JA2766 ¶117; *supra* at 8.

JPMC hailed the opening of the Advisory Account and signing of the Big Boy Letter as a big "win" at JPMC, it also vastly increased Baker's performance metrics and likely resulted in Baker receiving a promotion and raise. JA2882-85 ¶¶353-64; JA3229; JA1056; JA3241. Baker's supervisors touted Baker's "win." JA3240; *see also* JA1497 (Moon pushing for Baker to teach others and noting "Jimmy spins a great yarn").

I. Whether Baker Modified the Account Opening Documents After Peter Signed Them to Support the $100 Million Lie is a Disputed Fact

On August 6, 2015, the day after Dittrich requested a set of "prefill" account opening documents, JPMC employee Jesse Martinez Jr. initiated the account opening process, creating an internal detailed log maintained in an account opening summary ("AOS"). JA2182. "[A]ll parties agree the [AOS] was updated" from that point on. JA2848 ¶279(Resp.). JPMC has never argued the AOS showed Peter's net worth was $100 million on August 6, 2015, August 7, 2015, nor any other specific date, let alone any date prior to September 10, 2015, because it knows the AOS shows no such thing. However, the District Court, *sua sponte*, stated that the Account Opening Documents were generated on August 5, 2015, the day *before* the

AOS was initiated, and that the AOS stated Peter's liquid net worth was $100 million on the day it was initiated. ADD73. The District Court's improper fact finding is wrong.

The accurate facts:

- The day after Martinez initiated the AOS, August 7, 2016, he emailed Dittrich the prefilled Account Opening Documents, which listed Peter's liquid net worth as $50 million. JA2843 ¶268; JA511; JA525.
- As an existing JPMC client, Peter's liquid net worth was pulled from internal JPMC systems like the account application Peter signed with JPMC just the year before stating his liquid net worth was $50 million. JA2842 ¶266; JA1285:5-17, JA1184:19-85:10.
- The AOS shows no record of any changes to the Account Opening Documents between Friday, August 7 (when Martinez sent them showing Peter's liquid net worth as $50 million) and Monday, August 10, 2015 (when the August 2015 Meeting was held). JA2848 ¶279; JA2166-JA2184.
- **Baker, Moon, and Dittrich all testified that they made no changes to the Account Opening Documents between their generation and when Peter signed them**. JA2847 ¶278; JA1301:25-02:21; JA1997:23-JA2000:5; JA1475:10-77:15.
- On August 27, 2015, Baker told his boss that Peter did not know his net worth. Baker never asked the accountant even though he said he would. ADD112 (JA543); ADD115 (JA972 ¶5); JA2847-2857 ¶¶278, 297.
- On September 10, 2015 – one month after Peter signed the Account Opening Documents – Dittrich sent what he represented to be "the completed documents for Peter Doelger's MLPEI account" (the "Modified Account Opening Documents") listing Peter's liquid net worth as $100 million. JA2860 ¶303; JA550; JA552 at 565.
- **There is no record of the Account Opening Documents, in any form, being loaded into any JPMC systems prior to September 10, 2015, and JPMC has not put forth a single document or witness reflecting when, or by whom, any changes were made to the Account Opening Documents.**

JA2861 ¶305.

- Baker **does not outright deny** altering the Account Opening Documents after Peter signed them. JA927 ¶20 ("I have no recollection of myself, nor anyone else at JPMC, switching out any pages from Mr. Doelger's signed 2015 Advisory Agreement").

J. The 2016 PFS – Proof of Baker's Cover Up

In November 2016, a year after Peter signed the Big Boy Letter, Peter signed a new personal financial statement ("2016 PFS") in connection with a swap transaction JPMC recommended to Peter. ADD117 (JA1064-65); JA2914 ¶425. Baker likely handwrote the 2016 PFS. JA2914-15 ¶425. The accurate 2016 PFS showed Peter's total net worth as of November 2016 to be $39.4 million and his liquid net worth to be $20.9 million. ADD117 (JA1065); JA2914 ¶426.

Baker never updated JPMC's records to reflect Peter's accurate liquid net worth, leading to JPMC maintaining false records for years, never informing Plaintiffs that the Advisory Account was not suitable as it was ***well outside of the 50% hard limit***. JA801-02; JA997 ¶77; JA1065; JA1343 ¶¶1-25; JA2197; JA2854 ¶291; JA2915-16 ¶427; JA2996-97 ¶¶589-91. The 2016 PFS shows Baker confirmed what he knew all along – ***Peter was not worth anywhere close to $100 million*** (JA1065) – and still he did nothing but bury the information. The District Court failed to discuss this key document and Baker's inaction.

K. Yoon Joined the Advisory Account

In 2019, Yoon joined the Advisory Account and became an advisory client of both JPMC and Chickasaw. JA746; JA999 ¶88; JA2960 ¶515. It is undisputed that Yoon never signed or saw an executed copy of the Big Boy Letter, and Yoon was never advised that investments in the Advisory Account were unsuitable. JA995-96 ¶¶64-65; JA997 ¶77; JA1335:8-23; JA2889 ¶ 373.

L. JPMC Gave Investment Advice to Plaintiffs to Maintain the Same Concentration in MLPs, Engage in Other Transactions that Benefitted JPMC, and Encouraged Usage of the LOC, to Maximize JPMC's Revenue

1. JPMC Wanted to Keep Peter in the LOC to Maintain Its Revenue Stream

Peter's line of credit ("LOC") with JPMC was comprised of interest-only loans that matured every year, which JPMC regularly renewed in order to keep them active and collect interest. JA1083-84; JA1553; JA1563-64; JA2757-58 ¶108(Resp.); JA2909 ¶415. Around the same time JPMC targeted Peter for the Advisory Account, it also saw an "opportunity… to gain additional draws" on the LOC. JA2909 ¶414; JA2470 (identifying Peter as a target to "increase line"). In 2019, JPMC was still looking for ways to increase revenue from Peter's LOC. JA2236-39; JA2947 ¶490. JPMC affirmatively stated that it did not want Peter to pay down the LOC or "discourage usage". ADD121 (JA2467); ADD119-20 (JA1532-33): JA1083-84; JA2757-58 ¶108(Resp.). JPMC collected $1.5 million in interest on the LOC. JA1919.

2. JPMC Recommended Other Unsuitable Transactions Where Peter's Loss Would Directly Profit JPMC

In January 2017, JPMC advised Peter to engage in a cross-currency swap ("Swap"), wherein Peter would swap his LOC in dollars for debt in Euros. JA2913-16 ¶¶423-29. JPMC sold the Swap to Peter as a way to hedge debt and interest rates. JA2913 ¶¶423. It is undisputed that JPMC was the counterparty to the Swap. JA2916 ¶¶428. JPMC did not explain the risks of the Swap, including the potential for unlimited losses to Peter, (JA1445:2-47:4), or that JPMC as a counterparty **would profit directly from any losses Plaintiffs incurred**. (JA1436:18-37:18). It is undisputed that six months after entering into the Swap, Plaintiffs ***had to pay JPMC, their fiduciary investment adviser, $1.2 million*** to get out of the tanking transaction (drawn from the LOC). JA2922-24 ¶¶444, 448. In March 2018, JPMC recommended Peter engaged in an interest cap ("Rate Cap," together with the Swap, "Transactions") and again pitched the product as a way to hedge debts and interest rates. JA2925 ¶452. Again, JPMC failed to provide any meaningful disclosures regarding its role. JA2926 ¶¶453-54. Peter entered into the Rate Cap and ultimately lost $114,000. JA2927 ¶456.

3. JPMC Never Recommended That Plaintiffs Divest from MLPs Down to a Suitable Level, and Pushed Plaintiffs to Mortgage Their Home Instead

At a 2017 meeting with Baker, Moon and others ("2017 Meeting"), Plaintiffs expressed concern about the underperformance of the MLPs and their high amount

of debt. JA998-99 ¶¶83-84; JA 1542; JA2927-28 ¶¶457-58. Plaintiffs were open to investment alternatives to MLPs and were looking to JPMC for guidance and advice. JA998-99 ¶¶83-84; JA1001 ¶100; JA1008 ¶138; JA2927-28 ¶¶457-58. Moon's contemporaneous notes stated that "after recent underperformance (relative to S&P for example) it may be a good time to evaluate their position, the tax picture, and the strategic leverage associated," and that Plaintiffs' "key goals" included ensuring that they "each have plenty to live on comfortably through their lives." ADD125 (JA1542). Overall, the record reflects multiple instances in which Plaintiffs expressed interest in other avenues for achieving their investment goals. *See, e.g.*, *id.*; ADD126 (JA1085); JA998-99 ¶¶83-84; JA1008 ¶138; JA1209; JA1212; JA1337:23-38:3. Yet, Defendants never provided appropriate advice to Plaintiffs regarding these concerns. JA993 ¶49; JA999 ¶¶85-86; JA1212; JA2850-JA2851 ¶¶283-84; JA1333: 4-24; JA1413:6-14:6; JA2757-2761 ¶108(Resp.). The District Court ignored this key evidence.

As Peter's cognitive decline worsened, Yoon began communicating with Baker more frequently. JA604; JA990 ¶28; JA993 ¶45; JA996 ¶67; JA997 ¶73; JA1000 ¶¶92-93; JA2941 ¶481; JA3161. Yoon told Baker on many occasions that Peter was having memory problems, ***a fact Defendants conceded in their briefing***. JA3148 n.122; JA1000 ¶93.

In October 2018, Baker told Plaintiffs that despite years of significant losses, JPMC thought "MLPs are still an attractive investment for the long-term," and discouraged them from divesting because of unspecified "tax consequences." JA679. Baker's solution was for Plaintiffs to use the equity in their home to prop up their investments by way of a mortgage or a home equity line of credit ("HELOC"). JA1003 ¶113; JA1581-82; JA2938-39 ¶477. Baker repeatedly recommended this option while discouraging selling MLPs, which he misrepresented were producing significant "income" despite year-over-year losses in the millions (most of the supposed "income" being returned capital). JA679; JA1004 ¶120; JA1581-82; JA1628-29; JA1697; JA1701; JA2241-42 ¶¶10, 12, 22-23; JA2936 ¶473; JA2938-46 ¶¶477-489. Plaintiffs decided against the HELOC, and instead sold off more MLPs to pay down the LOC. JA1000-01 ¶ 95; JA2945 ¶¶486-487. By August 2019, the MLP Investments had declined still further, leading Baker to again recommend Plaintiffs take out a HELOC (rather than divest tanking MLPs). JA1697; JA2945 ¶488. Baker continued to tout MLPs in December 2019, even as JPMC considered how to coax Peter into using more of the LOC. JA1701; JA2238; JA2946-47 ¶¶489-90.

Both before and after Yoon joined the Advisory Account, she specifically inquired about selling MLPs and reducing exposure. *See, e.g.,* ADD126 (JA1085); JA1630-31; JA1713; JA2774-76 ¶131(Resp.); JA2942-56 ¶¶482, JA3207-09 ¶¶118-

125. On the few occasions JPMC advised Plaintiffs to sell a small amount of MLPs, Plaintiffs did so. JA777; JA781-82; JA2760 ¶108(Resp.); JA2930-51 ¶¶461, 496. In 2019, Plaintiffs met with Moon (who was no longer with JPMC). According to Moon's notes, they were worried and "interested in lowering their exposure" and "very open to alternative means of future returns and income to supplement or replace" MLPs. ADD126 (JA1085); JA2942 ¶482. Moon also said they told him their "key goals" – which they had previously shared with JPMC – were "to lower their debt, keep high income, lower their burn rate, and to organize their administration better." ADD126 (JA1085); JA994-1008 ¶¶56-84, 100-138; JA1337:17-38:3; JA2942-43 ¶¶482-83. According to Moon, Plaintiffs "could use more peace of mind." ADD126 (JA1085); JA2942 ¶482.

M. Defendants' House of Cards Falls Apart

In March 2020, as the MLP Investments continued to decline, Baker told colleagues he had no real solution for Plaintiffs, yet he continued to reassure Yoon. JA1006 ¶125; JA1704; JA2125:6-21; JA2140:6-14; JA2948-49 ¶¶492-93. The District Court ignored Baker's internal admissions. On March 8, 2020, Baker told Plaintiffs a margin call was imminent and "we should be discussing making sales of MLPs tomorrow." JA1706; JA2949 ¶494. The next day, even after finally recommending Plaintiffs sell some (but not all) of their MLPs, Baker equivocated, stating that selling was "going to be a difficult decision in retrospect" if "MLPs

bounce back." JA777; JA2950 ¶495. The District Court ignored these facts. After these sales, the portfolio reduced to $4.1 million (the "Remaining MLPs") and the balance on the LOC to $2.7 million. JA781; JA1711; JA1720; JA2950-51 ¶496. On March 13, 2020, less than a week later, the Remaining MLPs lost nearly another $1 million in value, declining to $3.4 million. JA2955 ¶504. However, Baker was still encouraging Plaintiffs to hold their Remaining MLPs. JA1711; JA1713-14; JA2109:21-12:8; JA2956 ¶507. On March 17, 2020, Plaintiffs sold the Remaining MLPs and used the proceeds ($3.1 million) to pay off the balance of the LOC ($2.7 million), leaving only $400,000 of Peter's 2015 investment of $33 million. JA1713-14; JA1715; JA1720; JA2956 ¶508.

II. Procedural Background

On June 23, 2021, Plaintiffs commenced this action. JA67. On August 2, 2023, Plaintiffs filed a motion for leave to amend their complaint. [Dkt. 230]. The Magistrate denied the motion (ADD1) and the District Court affirmed her decision. ADD10.

On September 27, 2024 the District Court adopted the Magistrate's R&R (ADD14) and granted Defendants' summary judgment motion in full, denied Plaintiffs' motion to strike, and granted in part and denied in part Defendants' motion to strike. ADD59. This appeal ensued.

SUMMARY OF THE ARGUMENT

In *Robinhood*, the SJC made clear that investment advisers have broad fiduciary duties. The District Court ignored this controlling case and applicable law that such duties cannot be limited by contract. Even if such contractual limitations were permissible, the District Court failed to establish how the contract at issue, to which only JPMC and Plaintiffs were parties (the "Advisory Agreements"), limited both Defendants' fiduciary duties, and in what specific ways.

The District Court acknowledged that Defendants had fiduciary duties, but did not address the requisite components of such duties, the duty of loyalty and the duty of care, which in the investment adviser context encompasses a suitability obligation. In doing so, the District Court erred by failing to analyze whether Defendants' shocking and self-interested behavior raised triable issues of material fact as to whether Defendants beached their obligations, misapplying the summary judgment standard by requiring "incontrovertible proof."

The District Court also engaged in extreme fact finding, ignored key evidence, and failed to draw inferences in favor of the non-movant. The District Court erred in dismissing Plaintiffs' additional claims by: misreading the Advisory Agreements to primarily impose duties on Plaintiffs; dismissing claims against Chickasaw as duplicative of contractual claims arising from a contract to which it was not a party, misapplying incorrect and inapposite New York state law in dismissing Plaintiffs'

tort claims as duplicative; enforcing a misleading hedge clause contrary to SEC precedent and relying on such clause to dismiss Plaintiffs' negligence and negligent misrepresentation claims; failing to conduct an independent analysis of Plaintiffs' 93A claims; and ignoring relevant case law on vulnerability and dementia on the Florida Elder Exploitation claims.

The District Court also erred in failing to apply the sham affidavit standard in granting in part Defendants' motion to strike portions of Yoon's declaration, and improperly denied Plaintiffs' motion to strike Baker's declaration.

The District Court erred in denying Plaintiffs' motion to amend the complaint, incorrectly applying a heightened "good cause" standard instead of "leave freely given," a *per se* abuse of discretion mandating reversal. Subsequent litigation has revealed that JPMC made fraudulent misrepresentations to the court, which the court relied on in denying the motion to amend.

STANDARD OF REVIEW

This Court reviews the District Court's award of summary judgment *de novo*. *Performance Trans., Inc. v. General Star Indem. Co.*, 983 F.3d 20, 24 (1st Cir. 2020). A District Court's denial of a motion to amend is reviewed *de novo* where the denial turns on pure questions of law, and it is a *per se* abuse of discretion, mandating reversal, where the District Court applies the wrong legal standard. *See Torres-*

Estrada v. Cases, 88 F.4th 14, 23 (1st Cir. 2023); *United States ex rel. D'Agostino v. EV3, Inc.*, 802 F.3d 188, 191-96 (1st Cir. 2015).

ARGUMENT

I. The District Court Erred in Completely Ignoring Controlling Law Concerning Investment Advisers and Their Fiduciary Duties (Count I)

The District Court correctly concluded that Massachusetts law governs the tort claims. ADD88 n.11; ADD98; ADD42, 54.

The District Court acknowledged Defendants are investment advisers with fiduciary duties. ADD70; ADD85 n.8; ADD98. Defendants admitted as part of those duties they had duties of loyalty and care (including a suitability obligation to Plaintiffs). JA1936; JA2276-77 ¶¶72-73 and n.88; JA2415:17-16:22, JA2441:24-42:13; JA2896-902 ¶¶388, 399. Yet neither judge mentioned nor discussed controlling law, nor a single case, concerning the broad obligations of fiduciaries and how they cannot be limited by contract; this alone mandates reversal.

A. The District Court Ignored Controlling Law Concerning Obligations of Investment Advisers, Which Cannot Be Limited by Contract

Under Massachusetts law, "[f]iduciary duties may arise in two ways: (a) as a matter of law, where parties to the subject relationship are cast in archetypal roles, such as trustee and [beneficiary], guardian and ward, attorney and client; or (b) as determined by the facts established, upon evidence indicating that one person is in fact dependent on another's judgment in business affairs or property matters." *UBS*

Fin. Servs., Inc. v. Aliberti, 483 Mass. 396, 404, 133N.E.3d 277, 287 (2019) (citations and internal quotations omitted); *see also Doe v. Harbor Sch., Inc.*, 446 Mass. 245, 252 (2006). The SJC has made clear that investment advisers, like JPMC, are "by law" fiduciaries. *See Robinhood*, 492 Mass. at 700 (**"Investment advisers, because of their trusted advisory role, generally must comply with the full complement of fiduciary duties of utmost good faith, and full and fair disclosure of all material facts**, and shoulder an affirmative obligation to employ reasonable care to avoid misleading clients."). (emphasis added) (internal quotation omitted).

Although the SJC acknowledged investment advisers' broad fiduciary obligations, it did not, and has never, opined on whether such obligations can in any way be limited by contract. However, federal courts have determined that such limitations are impermissible. *SEC v. Cutter Fin. Group, LLC*, 2023 U.S. Dist. LEXIS 222580 at *12; *Lifespan Corp. v. New England Med. Ctr., Inc.*, 731 F. Supp. 2d 232, 241 (D.R.I. 2010) ("under Massachusetts law, the fact that [the parties] entered into an . . . agreement . . . does not relieve [Lifespan] of the high fiduciary duty imposed by tort law") (internal quotation omitted). The District Court ignored all these cases.

Similarly, under New York law, "**Professionals such as investment advisors, who owe fiduciary duties to their clients**, may be subject to tort liability for failure to exercise reasonable care, **irrespective of their contractual duties**,

since in these instances, **it is policy, not the parties' contract, that gives rise to a duty of due care.**" *Bullmore v. Ernst & Young Cayman Is.*, 45 A.D.3d 461, 464 (2007) ("*Bullmore I*") (emphasis added and internal quotation marks omitted); *Bullmore v. Banc of Am. Sec. LLC*, 485 F. Supp. 2d 464, 470-71 (S.D.N.Y. 2007) ("*Bullmore II*"); *AmTrust N. Am., Inc. v. KF&B, Inc.*, No. 17-cv-5340, 2020 U.S. Dist. LEXIS 167624, *5 (S.D.N.Y. Sept. 14, 2020) ("the relationship of an investment advisor with one to whom she provides advice is fiduciary in nature independent of contract."); *PRCM Advisers LLC v. Two Harbors Inv. Corp.*, 2023 U.S. Dist. LEXIS 140700, at *31-32 (S.D.N.Y. Aug. 10, 2023) (fiduciary relationship pursuant to contract imposes on the adviser "a duty to act with care and loyalty independent of the terms of the contract."). And the Supreme Court has held the Investment Advisers Act of 1940 ("Advisers Act") imposes fiduciary duties on RIAs like Chickasaw. *See Transamerica Mortg. Advisors (TAMA) v. Lewis*, 444 U.S. 11, 17 (1979).

The sole authority Defendants rely on to limit an investment adviser's fiduciary duties by contract, the SEC's statements in the 2019 Release ([Dkt. 277] at 51; [Dkt. 321] at 21-22; ADD87), provides for no such thing and instead explicitly states that "an adviser's federal fiduciary duty may not be waived." JA1113. Further, Judge Casper, prior to the issuance of the Order, rejected the exact same argument in another case:

> The Court is skeptical that the advisory agreement actually purports to limit the scope of the adviser-client relationship or of Defendants' fiduciary duties to their clients…. Putting that aside, the only legal support Defendants cite for the proposition that the scope of their fiduciary obligations should be limited by the terms of the investment advisory agreements is [the 2019 Release]. That very guidance, however, indicates that "the adviser and its client may shape [their] relationship by agreement, *provided that there is full and fair disclosure and informed consent*." 84 Fed. Reg. 33671 [emphasis in original]. **Courts do not allow investment advisers to contract around their fiduciary obligations to their clients.**

Cutter, 2023 U.S. Dist. LEXIS 222580 at *11-12 (emphasis added). The District Court ignored *Cutter* and wrongly adopted Defendants' position that they can eliminate their duty of care and loyalty by either not mentioning (or worse, removing) such duties in written agreements.

B. Defendants Admitted Their Fiduciary Duties Included a Duty of Loyalty and Duty of Care to Plaintiffs, Which Included Suitability, the "Key Issue" in the Case

Courts and the SEC have explicitly held fiduciary duties include duties of loyalty and care. *Norlin Corp. v. Rooney, Pace, Inc.*, 744 F.2d 255, 264 (2d Cir. 1984); *Bullmore II* at 471 (S.D.N.Y. 2007); JA1105.

Duty of loyalty means that client interests must be put first, and duty of care means an adviser must act in their client's best interest, including through ongoing monitoring and suitability obligations. JA1118; JA1816-18; JA2415:21-18:1; JA3168-69 ¶¶9-10. Defendants admitted they owed these duties to Plaintiffs. ADD98. JPMC's Rule 30(b)(6) witness, Baker, testified that, JPMC "had a duty of

loyalty and a duty of care specifically regarding the investments that were contracted, which was very specifically an MLP portfolio." JA1168:1-22; JA2896 ¶388. ***This testimony is binding on JPMC***. *See In Spite Telecom LLC v. Rosciti Constr. Co. LLC*, No. 22-cv-12089-IT, 2024 U.S. Dist. LEXIS 158093, at *33-34 (D. Mass. Sep. 3, 2024). The District Court ignored **all** these admissions.

According to Keith Palzer (JPMC's expert), the duty of care requires a fiduciary to "ensure that investment advice 'is ***suitable to the client's objectives, needs and circumstances***.'" JA3384-85 ¶73 (emphasis added); JA2902 ¶399; *see also* JA1095-96. Meanwhile, Gillespie (Chickasaw's expert), opined that "[a] foundational element of an adviser's duty of care is the duty to provide investment advice that is ***'suitable'*** for the client." JA1936 (emphasis added); *see also* JA2386:11-13, JA2415:21-16:22; JA2441:22-42:15. JPMC conceded ***that "suitability" is the "key issue" to be decided in this "Federal Case."*** JA3076:14-19. Yet, nowhere in the Order does the District Court discuss the duty of loyalty or the issue of suitability.

C. The Advisory Agreements Did Not Limit Defendants' Fiduciary Obligations to Plaintiffs

Assuming Defendants could limit their fiduciary duties by contract, the Advisory Agreements do no such thing; they expressly acknowledge that JPMC owed fiduciary duties to Plaintiffs: "Portfolio investments will be as determined by the Bank with considerations of availability and ***applicable fiduciary standards***."

JA517 § 1.D(i) (emphasis added); JA2895 ¶387; *see also* JA2441:18-42:5. Additionally, the Advisory Agreements do not limit the duties of loyalty or care or the suitability obligations that JPMC owed to Plaintiffs.

Chickasaw was not a party to the Advisory Agreements thus their terms do not apply to it. The Agreement for Investment Management Services ("AIMS") between JPMC and Chickasaw stated Chickasaw "is a fiduciary of the Client." JA491 §2.08(a); JA2967-68 ¶¶531-32; *see also* JA1594:10-23, JA3271 (Chickasaw's manual: "As a ***fiduciary***, [Chickasaw] owes its clients more than honesty and good faith alone).

II. There Are Genuine Issues of Material Fact as to Whether Defendants Breached Their Fiduciary Duties (Count I)

A. A Reasonable Factfinder Could Determine That Defendants Breached Their Duty of Loyalty to Plaintiffs

The duty of loyalty in the investment industry means that an investment adviser must put its clients' interests ahead of its own and avoid conflicts of interest. *See SEC v. Duncan,* 2021 U.S. Dist. LEXIS 175237, *2 (D. Mass. Sep. 15, 2021); *GPIF-I Equity Co., Ltd. v. HDG Mansur Inv. Servs.*, Inc., 2014 U.S. Dist. LEXIS 55193, at *17 (S.D.N.Y. Apr. 21, 2014); *see also* OCC, Comptroller's Handbook on Personal Fiduciary Activities, 31 (2015), https://www.occ.gov/publications-and-resources/publications/comptrollers-handbook/files/personal-fiduciary-activities/pub-ch-personal-fiduciary.pdf.

JPMC's greed and self-motivated intent is on display in the various celebrations, back pats, and "rah whoos" that followed opening the Advisory Account (*see, e.g.*, JA2488; JA1497; JA2882-84 ¶¶ 353-58). Defendants repeatedly advised Plaintiffs against selling their MLPs, while making millions of dollars in interest on the LOC, as evidenced by JPMC's own statements and actions:

> "At minimum, it would be good if Peter would be amenable to at least at 5-10bps increase, but **we of course do not want to discourage usage**."
>
> ADD121 (JA2467) (3/12/2014).

> "The client currently has over $16MM outstanding and **we do not want to change pricing and risk the client paying down the entirety of the line** as a result."
>
> ADD120 (JA1533) (4/17/2017); JA1084 (5/7/2018).

JPMC regularly listed Peter on internal documents as a potential target to either increase his LOC, encourage additional borrowing on the LOC, or otherwise use him to generate more profits. *See, e.g.,* JA2238; JA2470; JA2909 ¶414; JA2947 ¶490. Peter was constantly in a margin call (more than most other clients in the Boston office) (JA1430-31), but JPMC consistently granted Peter lending exceptions, such as increasing the loan to value ratio, all to keep him in the LOC. JA2524-35, JA2491-94. The District Court ignored *all* this evidence.

In 2017, seeing an opportunity to continue to profit at the expense of Peter, as his MLPs dropped in value and his loan debt grew, JPMC advised Peter to enter into the Swap, and in 2018, the Rate Cap. JPMC drew on the line of credit to cover the

$1.2 million Peter owed on the Swap to which it was the counterparty (JA1075-80), profiting from those losses in a brazen breach of its duty of loyalty. JA1436:25-37:18; JA1450:14-51:9, JA1452:8-53:2. JPMC made no disclosures to Peter concerning this conflict nor that the Swap exposed him to potentially limitless losses. JA1530-31; JA1445; JA2918-19 ¶¶431, 438. The letter the District Court relied on ([Dkt. 276-83]; JA613) does not meaningfully describe what it means to be a counterparty and says nothing at all about a conflict of interest. ADD79. This certainly does not constitute "full and fair disclosure and informed consent" where there is a pre-existing fiduciary duty applicable to the entire relationship. JA1112; JA1126-28.

From 2018 through 2020, Baker consistently recommended either a mortgage or a HELOC to prop up Plaintiffs' failing MLPs. JA997-1003 ¶¶95, 113; JA1581-82; JA1628-29; JA2938-JA2955 ¶¶477, 479, 488; *see also* ADD124 (JA1697):

> "I like the HELOC option…. It can provide an effective emergency backstop in the event of a significant decline in MLP prices with little upfront costs."

The District Court failed to address the fact that Baker's recommendation for Plaintiffs to risk their home rather than sell toxic MLPs would only benefit Defendants. JA3314; JA3331; ADD79-80. This recommendation to use a HELOC to maintain investments in securities constitutes use for "investment purposes," **a clear violation of JPMC's own policies**, especially for elder investors. JA3314;

JA3331. Without explanation, the District Court declared the conduct did not violate JPMC policy. ADD80.

JPMC's regular exchange of Plaintiffs' material nonpublic information between fiduciaries (Baker, Moon and others) and non-fiduciaries (Katherine Post (lending adviser), Catherine Lynch (foreign exchange sales) and others) (*see, e.g.,* JA1075-82; JA1208; JA1536-39; JA1562; JA2229-35; JA2469; JA2986 ¶571) is a violation of OCC regulations and JPMC's policies and a "violation of securities laws and regulations, as well as fiduciary standards" concerning conflicts of interest. ADD123 (JA1101); JA2985 ¶180; JA3253-54; JA3326-28, JA3345.

Baker was well aware that JPMC's dual role as banker and adviser was confusing Plaintiffs, stating as much in an internal communication. ADD122 (JA1571). Yet he never discussed this confusion nor the obvious conflict with Plaintiffs. JA1354:1-6; JA1008 ¶¶139-140; JA2934 ¶470. Chickasaw's expert testified that investment advisers have to follow their policies and procedures and that a lender and adviser conflict should be disclosed in a "clear and understandable" way. JA2371:9-20; JA2393:4-99:21; JA2902 ¶399.

JPMC also withheld from Plaintiffs a vital warning about Chickasaw "lagg[ing] the benchmarkon a 1 and 3 year basis" and a specialist's recommendation to substantially "pair[] back the [MLP] strategy and rotat[e] the proceeds into brent crude [oil]" in order for Plaintiffs to reduce their MLP exposure. JA2521;

JA1353:14-17; JA2943 ¶484; JA3208 ¶123. The District Court disregarded the clear inference from this document, specifically concerning Peter and proposals to reduce his risk. ADD80.

Chickasaw failed in its obligations; it recklessly relied on JPMC to perform all required tasks without ever confirming JPMC acted properly. *See, e.g.,* JA1599:18-JA1600:3; JA2964-65 ¶¶525, 528; JA3275-77. When Chickasaw became aware that Peter had substantial "leverage" on the MLPs, Chickasaw did nothing even though Chickasaw was against using leverage, as it is "like dynamite." JA2539; JA 2953¶501; *see also* JA1577; JA1659:5-JA1661:4, JA1672:7-23.

Plaintiffs' expert Tilkin opined that Defendants' actions did not come close to comporting with industry standards. *See generally* JA3166-67 ¶¶5-9; JA1826-86; JA1890-95; JA1914-17; JA1982-87.

B. A Reasonable Factfinder Could Determine that JPMC Breached Its Duty of Care and Suitability Obligations to Plaintiffs

An investment adviser must evaluate all recommendations made to a client to ensure they are "suitable" in order to comply with their obligation to act in the clients' best interest or duty of care. JA1095-96; JA1115 n. 33-34; JA1790-91; JA2276-77; JA3281; JA3285; JA2409:12-24; JA3271; JA2902 ¶399; JA3168-69 ¶10. The adviser must consider their clients' individual financial situation (including net worth), as well as their needs, goals, investment objectives, investment experience, time horizon, liquidity requirements and risk tolerance. JA3214;

JA2409:12-24; JA2436:17-37:1; JA3018 ¶660; *see also* JA556 at §1(A). Suitability requires that an investment adviser monitor a client's circumstances and adjust investment recommendations as they change. JA2415:2-16:22, JA2417:13-19:17; JA3168-69 ¶10.

1. JPMC's Fraud is a Violation of its Duty of Care

JPMC failed to act in Plaintiffs' best interest through Baker's forging his own emails and lying about Peter's assets, which raise triable issues of fact. The District Court's conclusion that Baker's forgery "is not incontrovertible proof" of fraudulent intent is not only nonsensical, but an improper inference in favor of Defendants. *See Friends of Merrymeeting Bay v. Hydro Kennebec*, LLC, 759 F.3d 30, 34 (1st Cir. 2014) ("intent is often proved by inference [because] all reasonable inferences must be drawn in favor of the nonmoving party.").

As for the Modified Account Opening Document, there is undoubtedly a material issue of fact as to whether JPMC forged the document after Peter signed it. In concluding otherwise, the District Court admittedly, and improperly, accepted the "findings of fact" of the Magistrate, and then *sua sponte* engaged in her own fact finding. *See Sellers v. Trs. of Bos. Coll.*, 729 F. Supp. 3d 136, 192 (D. Mass. 2024) ("Summary judgment is **not** fact finding….[i]n the summary judgment analysis, the trial judge must lean **against** the movant and draw all reasonable inferences **against** that party[,] [f]act finding is entirely different… fact-finding is

difficult[,] [e]xacting and time consuming [and] inevitably falls short of absolute certainty.") (emphasis in original).

2. JPMC's Failure to Conduct a Proper Suitability Evaluation, Properly Reassess Suitability, and Give Suitable Advice is a Breach of the Duty of Care

At the very least there are disputed issues of material fact as to whether JPMC adhered to its fundamental suitability obligations, including:

- *Investment objectives*: Plaintiffs consistently stated their investment objective was income. JA994-98 ¶¶55-56, 61, 70, 84; JA2942 ¶482. In his affidavit and testimony, Baker contradicted himself, giving three different answers as to what Plaintiffs' investment objectives were. JA1330:23-31:19, JA1337:17-38:3; JA927 ¶25.

- *Financial condition*: Plaintiffs gave JPMC accurate information concerning their finances; JPMC failed to maintain accurate information or react accordingly. JA2771 ¶127(Resp.); JA2996-98 ¶¶589-597.

- *Time horizon*: Plaintiffs were elderly and should have been in stable investments with consistent returns and real income; JPMC never took this into account and instead recommended a HELOC, an elder sales practice prohibited by JPMC. JA2995 ¶587; JA3331.

- *Investment Experience*: Yoon had limited to no experience and Peter was not up to speed with technology or advancements in investments, and both relied exclusively on JPMC. JA988-91 ¶¶ 9, 11, 19, 31-34; JA1580.

- *Risk Tolerance*: Moon's notes demonstrate Plaintiffs were concerned about the volatility of MLPs and were ready to move on from them likely by 2017, and certainly by 2019. ADD125 (JA1542); ADD126 (JA1085).

Based on all of this, JPMC was supposed to present Plaintiffs with suitable investment options, which it never did. JA999 ¶85, JA1333:4-24; JA1413:23-14:6;

JA1688:9-24; JA1693:4-25; JA2850-51 ¶¶ 283-84. Instead, JPMC encouraged Plaintiffs to stay in the failing MLPs and mortgage their home as a backstop (all of which would profit JPMC), with Baker making clear it was his preferred option. *See* ADD124 (JA1697); JA2945 ¶488.

Chickasaw's expert Gillespie testified that the 2016 PFS "should have triggered a suitability analysis, a subsequent suitability analysis." ADD118 (JA2435:10-12); JA2418:8-JA2428:6. JPMC failed to take any action. JA2996 ¶¶589-591. Notably, when Yoon joined the account, Plaintiffs signed account opening documents stating their liquid net worth was $26 million. JA742; JA2998 ¶595.

Yet each year, Baker certified the account was suitable on annual account reviews ("AAR") even though he knew the investments were not suitable. *See, e.g.,* JA2992 ¶¶572-583; JA599-602; JA623-26; JA659-62; JA692-95; JA767-770. JPMC's own policies and procedures require adherence to ongoing suitability obligations in compliance with OCC regulation 12 CFR 9 through completion of AARs. JA3293-95; JA3214-15, JA2987 ¶572. In the AARs, Baker falsely stated the investment objective as "OAP MLP & ENERGY INFRASTRUCTURE," which is an investment strategy and not a valid investment objective. *See, e.g.*, JA2991-93 ¶¶581, 583; JA599-602; JA767-770; JA1605:22-1607:2. At deposition, Baker admitted neither Peter nor Yoon said that was their investment objective.

JA1175:17-76:5; JA1330:23-31:19; JA1337:17-38:3. Beggans (Baker's boss) failed to sign off on the AARs, as he was required to do. JA2989-JA2994 ¶¶578-579, 584, 586.

Even as the MLP Investments were tanking, JPMC was still reluctant to give Plaintiffs suitable investment advice. On March 17, 2020, Yoon's daughter joined Plaintiffs on a call with Baker during which he described selling the MLP Investments as " 'aggressive'… he used that word like a handful of times…. And he said, selling everything off is aggressive. And he also used the word 'extreme.' He said it would be an extreme measure, an extreme action, extreme something to do. So [her] impression from what Jimmy Baker was saying was that he was encouraging them not to sell…." JA2110:2-24; JA2956 ¶507. Baker contemporaneously admitted he told Plaintiffs that "selling all the positions was an aggressive but suitable decision." JA1713; JA2956 ¶507. In disregarding the daughter's impression that Baker was encouraging them not to sell, the District Court, and not Plaintiffs, engaged in selective quoting and mischaracterization. ADD80-81.

Plaintiffs' expert Tilkin opined that none of these actions were in line with industry standards. *See, e.g.*, JA1854-55; JA3168-78 ¶¶10-13, 16-18, 26-33.

3. JPMC's Failure to Follow Its Policies and Procedures Is Evidence of Breaches

Baker admitted, "J.P. Morgan has various policies and procedures on different topics that we follow." JA1170:9-18. Gillespie confirmed that investment advisers must have written policies which they are expected to follow. JA2902 ¶399; JA2371:9-20. Tilkin also opined that JPMC's policies were "in line with industry practice, SEC regulations and OCC regulations, especially with regard to suitability." JA1819. Thus, JPMC's various policy violations (*see generally* JA2957-JA3018 ¶¶509-660) are material to evaluating whether it adhered to its duties to Plaintiffs.

4. JPMC's Failure to Follow Its Elder Escalation Policy is Evidence of a Duty of Care Violation

JPMC's elder escalation policy ("Elder Escalation Policy") requires advisers like Baker to report observed "red flags" of diminished capacity, including "memory loss," to their supervisors so JPMC can take steps to protect its client. ADD131 (JA3160-63); JA2975-76 ¶¶551-554; JA3318. JPMC ***admitted that Yoon told Baker on several occasions that Peter had memory problems***. JA3148 n.122. The District Court disregarded evidence that a reasonable factfinder could use to determine that Baker was close enough to Plaintiffs to notice changes in Peter's energy levels, and he observed Peter engaging in repetitive conversations, holding illogical beliefs, behaving unusually, and communicating less. *See, e.g.,* JA604;

JA1000 ¶¶92-93; JA1222 (Baker annoyed by repetitive conversations), JA1075 (illogical beliefs), [Dkt. 301-220] (burner phones); JA2126:23-29:20 (repetitive conversations); JA2790 ¶158(Resp.); JA2977-82 ¶¶556-565; JA3161 (no contact with Peter). All of these are red flags under the Elder Escalation Policy. ADD131 (JA3160-63). When presented with a similar hypothetical scenario, Chickasaw's expert, Gillespie, agreed that these were "all potentially a red flag." JA2378:9-JA2381:20. The District Court incorrectly ignored Gillespie's answer because it was too hypothetical. *But see Almonte v. Nat'l Union Fire Ins. Co.*, 787 F.2d 763, 770 (1st Cir. 1986) (recognizing that a hypothetical question is proper for an expert); ADD69.

The District Court also erred in focusing on whether JPMC knew of Peter's actual diagnosis, a contention Plaintiffs never asserted and is immaterial for purposes of the policy.

C. A Reasonable Factfinder Could Find that Chickasaw Breached Its Duty of Care to Plaintiffs

Chickasaw also had extensive fiduciary obligations to Plaintiffs, which it repeatedly acknowledged. JA2957-JA2962 ¶¶509-19; JA2964-JA2968 ¶¶526-33. Recent decisions have confirmed that an RIA must adhere to suitability obligations and that SEC guidance regarding these obligations is persuasive on state law issues. *See Anderson v. Edward D. Jones & Co., L.P.*, 2024 U.S. Dist. LEXIS 161783, at *4 (E.D. Cal. Sep. 6, 2024).

Additionally, RIAs like Chickasaw must have written policies to prevent violations of the Advisers Act. 17 C.F.R §275.206(4)-7(a); *SEC v. Commonwealth Equity Servs., LLC*, 2023 U.S. Dist. LEXIS 61489, at *43 (D. Mass. Apr. 7, 2023). Chickasaw's expert, Gillespie, confirmed investment advisers are expected to follow these policies, and Chickasaw's manuals acknowledged it "adopted the procedures [] to ensure that the Company and its employees fulfill its fiduciary obligations to its clients." JA3270; JA2371:9-20; JA2958 ¶¶510-11. Nowhere in its procedures did Chickasaw differentiate between clients acquired directly versus through another entity (like JPMC); rather "client" was defined as "any person or entity for which the Company provides investment advisory services." JA2959 ¶513; JA3279. This broad definition includes Plaintiffs.

Chickasaw made no effort to comply with its obligations to Plaintiffs, relying on JPMC to perform all required tasks without confirming that they did so. JA1616:2-18:12; JA1625:23-26:8; JA1673:8-74:6; JA2966 ¶¶528-530. Chickasaw failed to make any effort to learn about Plaintiffs' general financial picture or their investment objectives, and it took no steps to determine if Plaintiffs' large, highly concentrated investment in MLPs was suitable for them, either at the beginning of their relationship or throughout it. JA1607:3-08:21; JA1659:8-JA1661:16; JA2845-2970 ¶¶275, 520-550.

Chickasaw's only defense was put forth by Gillespie, but Chickasaw did not proffer his opinion to support its summary judgment motion; for that reason alone the District Court erred in granting the motion. In any event, Gillespie's claim that it was "reasonable and consistent with industry practice for Chickasaw to rely on [JPMC] to determine the suitability of the MLP portfolio for the Doelgers," JA1939, is rebutted by Tilkin who opined it was not. JA3167 ¶7; *see also* JA1861-67; JA1912-15. This battle of the experts prohibits granting summary judgment. *See Tracey v. Mass. Inst. of Tech.*, 404 F. Supp. 3d 356, 363 (D. Mass. 2019); *Harris v. Provident Life & Accident Ins. Co.*, 310 F.3d 73, 79 (2d Cir. 2002).

D. Defendants' Failure to Follow Regulatory Rules and Guidance is Evidence of Their Breach of Their Fiduciary Duties

Courts regularly consider regulatory rules and guidance to be relevant to the standard of care for financial advisers. *See Short v. Conn. Cmty. Bank, N.A.*, No. 3:09-cv-1955, 2012 U.S. Dist. LEXIS 42617, at *38-39 (D. Conn. Mar. 28, 2012); *United States SEC v. Spartan Sec. Grp., Ltd.*, No. 8:19-cv-448, 2021 U.S. Dist. LEXIS 99534, at *22-23 (M.D. Fla. May 26, 2021); *Ben-Dor v. Alchemy Consultant LLC*, 229 A.D.3d 405, 407 (1st Dep't 2024); *Ginzkey v. Nat'l Sec. Corp.*, No. C18-1773RSM, 2022 U.S. Dist. LEXIS 42985, at *11 (W.D. Wash. Mar. 10, 2022). Here, JPMC failed to follow several OCC regulations and guidance concerning conflicts and suitability and Chickasaw completely disregarded its duty under SEC

rules and guidance. The District Court erred in not considering these failures as part of the standard of care.

E. The District Court Erred in Not Considering Expert Gillespie's Testimony Against JPMC

JPMC never moved to strike any portion of Gillespie's deposition testimony; for this reason alone the District Court erred in excluding it. Defendants merely made a passing reference about Gillespie in a footnote ([Dkt. 321] at 27 n.65), which is not a motion to strike pursuant to D. Mass. L.R. 7.1. *See Schuster v. Wynn Resorts Holdings, LLC*, No. 19-cv-11679-ADB, 2023 U.S. Dist. LEXIS 31708, at *12 (D. Mass. Feb. 27, 2023); *see also Nasir v. Town of Foxborough*, No. 19-cv-11196, 2022 U.S. Dist. LEXIS 22102 at *1 (D. Mass. Feb. 7, 2022).

Regardless, it is well established that a party can use testimony from an opponent's expert in its case in chief without designating that expert under FRCP 26(b)(4). *See also AMTRAK. v. Certain Temp. Easements Above R.R. Right of Way in Providence, Rhode Island*, 357 F.3d 36, 42 (1st Cir. 2004); *SEC v. Koenig,* 557 F.3d 736, 744 (7th Cir. 2009); *González-Arroyo v. Doctors' Ctr. Hosp. Bayamon, Inc.*, No. 17-1136(RAM), 2021 U.S. Dist. LEXIS 138001, 16 (D.P.R. July 23, 2021); *N. Shore Med. Ctr., Inc. v. CIGNA Health*, 68 F.4th 1241, 1247 (11th Cir. 2023) (Jordan, J. concurring) (collecting cases); *Kerns v. Pro-Foam of S. Alabama, Inc.*, 572 F. Supp. 2d 1303, 1311 (S.D. Ala. 2007); *accord 6 Moore's Federal Practice Civil* § 26.80.

Moreover, Gillespie's opinions concerning JPMC's failure to adhere to its suitability obligations are relevant. Gillespie opined that "[t]he AIMS clearly stated that [JPMC] would make suitability determination for each MLP strategy client." JA1939; *see also* JA2385:19-86:13; JA2966 ¶528. Gillespie also opined that Chickasaw could rely on JPMC's representations concerning compliance with its suitability obligations, thereby making his view of such compliance fair game. JA1945.

F. The District Court Improperly Disregarded Plaintiffs' Expert Affidavits

This Circuit has recognized that, "[e]xpert testimony on industry standards is common fare in civil litigation." *Levin v. Dalva Bros.*, 459 F.3d 68, 79 (1st Cir. 2006); *see also Keller v. United States*, 38 F.3d 16, 27 (1st Cir. 1994). Moreover, "[t]estimony concerning the ordinary practices of those engaged in the securities business is admissible…." *Marx & Co., Inc. v. Diners' Club Inc.*, 550 F.2d 505, 509 (2d Cir. 1977)); *see also Marshall v. Northrop Grunman Corp.*, No. 16-cv-06794-AB-JCx, 2019 U.S. Dist. LEXIS 208413, at *6 (C.D. Cal. Oct. 16, 2019) (ERISA fiduciary standard of care expert testimony); *Metcalf v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, No. 4:11-CV-00127, 2021 U.S. Dist. LEXIS 198446, at *7 (M.D. Pa. Oct. 14, 2021) (banking industry standards of care expert testimony); *Remington v. Newbridge Sec. Corp.*, No. 13-60384-CIV, 2014 U.S. Dist. LEXIS 15867, at *20 (S.D. Fla. Feb. 7, 2014) (broker-dealers industry standards).

The District Court concluded that "Tilkin's affidavit is inadmissible for proving a breach, as an expert witness cannot testify to a legal conclusion." ADD100. However, the District Court did not identify which parts of Tilkin's affidavit, if any, are legal conclusions and thus it erred in failing to consider any of Tilkin's opinions concerning industry standards. *See Snead v. Wright*, 625 F. Supp. 3d 936, 940 (D. Alaska 2022); *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 803 F.2d 454, 461 (9th Cir. 1986).

III. The Court Erred in Dismissing Claims for Breach of Contract (Count II) and the Covenant of Good Faithand Fair Dealing (Count V)

The Advisory Agreements memorialize JPMC's suitability obligations by requiring it to collect and maintain accurate financial information about Plaintiffs and Plaintiffs' investment objective and risk tolerance, and the 2016 PFS information should have triggered a suitability reassessment. JA557 §1(A). Gillespie, former General Counsel for State Street (JA1925), agrees with Plaintiffs' interpretation. ADD118 (JA2435:3-15). The District Court ignored JPMC's contractual obligations and focused instead on Plaintiffs' rights and obligations, but did not explain how such rights and obligations in any way diminish JPMC's obligations, because they do not. The main obligation of Plaintiffs under the Advisory Agreements was to pay an advisory fee, while nearly every other contractual obligation fell upon JPMC, the service provider. JA518 § 3; JA558 § 3.

The District Court ignored evidence showing there are issues of fact as to whether JPMC adhered to these obligations. JA2740-41 ¶¶80(Resp.)-81(Resp.); JA3108-110.

Equally mistaken is Defendants' argument that "Defendants were not free to employ a… diversified investment strategy" for Plaintiffs because JPMC unilaterally included a Portfolio Schedule for MLP investments. [Dkt. 277] at 21. First, the Advisory Agreement required JPMC to consider "applicable fiduciary standards." JA557 §1(D)(i). Such standards include loyalty and care which JPMC acknowledged. JA1179:4-20. Second, that schedule can be changed at any time, and had JPMC adhered to its suitability obligations, it would have presented alternative schedules to Plaintiffs throughout the relevant time period, of which JPMC had many. JA2438:21-39:17; JA3230; JA2850-51 ¶¶282-83.

The District Court also erred in dismissing Plaintiffs' claim for breach of good faith and fair dealing as Defendants' conduct evinced "a dishonest purpose, conscious doing of wrong, or breach of duty through motive of self-interest or ill will." *Clinical Tech., Inc. v. Covidien Sales, LLC*, 192 F. Supp. 3d 223, 237 (D. Mass. 2016) (quotation omitted); *see also Brooks v. Key Trust Co. Nat'l Ass'n*, 26 A.D.3d 628, 630 (N.Y App. Div. 2006) (fiduciary duty claims against a financial adviser may be "encompassed within the contractual relationship by the requirement implicit in all contracts of fair dealings and good faith.")

IV. There is a Genuine Issue of Material Fact as to Whether Defendants Had Fiduciary Duties to Plaintiffs Independent of the Advisory Agreements (Count I)

Even if Defendants were not "by law" fiduciaries, there are issues of fact as to whether Defendants were fiduciaries to Plaintiffs "from the nature of the parties' interactions." *Doe*, 446 Mass. at 252. "The circumstances which may create a fiduciary relationship are so varied that it would be unwise to attempt the formulation of any comprehensive definition that could be uniformly applied in every case. It is for this reason that the determination of whether a fiduciary duty exists is largely fact specific." *Shedd v. Sturdy Mem. Hosp.*, 2022 Mass. Super. LEXIS 7, at *24 (Mass. Super. Ct. Apr. 5, 2022) (internal quotation marks omitted).

Plaintiffs proffered substantial evidence showing a fiduciary relationship with JPMC outside of any agreement. *See generally* JA2890-96 ¶¶375-389. JPMC acknowledged Peter was not a "professional investor," frequently sought JPMC's advice, and Baker cultivated an intimate relationship, first with Peter and then Yoon. JA1514; JA1508. For years, Baker spoke with Plaintiffs on the phone frequently, emailed Plaintiffs, met them in person on multiple occasions for lunches in Boston, and even flew down to Florida to have a discussion with Plaintiffs in their kitchen about all their finances. JA604; JA692; JA991-JA1002 ¶¶37, 39, 43, 74, 82, 109.

Baker repeatedly told his colleagues that Plaintiffs relied on JPMC's advice when making investment decisions. JA3235-36; JA1580; JA1707. Moon

acknowledged Peter made investment decisions "contingent on [JPMC's] counsel." JA1164. Peter's "Lending Adviser" Katherine Post touted JPMC's investment advice as early as 2014. JA1009-12; JA1583-90. JPMC even described Baker as an "investment specialist" "[r]esponsible for developing [Plaintiffs'] investment plan and working with [them] to implement [their] investment strategy" as their "dedicated investment professional, a member of [their] JPMorgan team." JA2890 ¶375; JA1265:21-24; JA1584; JA2212.

In 2015, Baker bragged that he "initiated a weekly macroeconomic and market dialogue with Peter in late 2014 that **has led him to view [JPMC] as his primary investment advisor**." JA2892 ¶ 380; JA3236. According to Baker, JPMC was not only "his primary investment advisor" but his "sole investment advisor." JA1580. In 2018, Baker informed his superiors that "Peter had "[n]o accounts anywhere else – **we're his sole investment advisor.**" *Id.* By 2020, Baker confirmed that JPMC was Plaintiffs' "primary financial advisors, bank and investment advisor." JA1707. The District Court ignored this evidence and erroneously stated the only evidence in the record was the subjective beliefs of Plaintiffs. ADD98-99; ADD49.

V. The District Court Erred in Holding the Tort Claims were Duplicative of the Breach of Contract Claim

A. As to Chickasaw, Duplicative Claims Finding is Impossible

Chickasaw was not a party to the Advisory Agreements, never saw them, admittedly was not bound by, nor sought to benefit from them, and therefore is not

governed by their terms. J2748 ¶93; JA2785 ¶145; JA2848-49 ¶280; JA537; JA746; JA2580:2-7. In addition, the Court's discussion of the AIMS in the context of duplicative claims is meritless. ADD86. Plaintiffs were not a party to the AIMS and, in any event, it does not limit Chickasaw's duties in any way; it affirms them. JA487; JA2751 ¶98(Resp.); JA1665:4-18; JA1937.

B. *Zorbas* Did Not Apply Massachusetts Law and Is Inapposite

In determining the tort claims are duplicative of the contract claim, the District Court relied on an Eastern District of New York case, *Zorbas v. United States Trust Co., N.A.*, 48 F. Supp. 3d 464 (E.D.N.Y. 2014), which applied New York law, and for that reason is inapplicable. The issue of duplicative claims does not appear to have arisen under Massachusetts law.

Regardless, *Zorbas* is inapposite. There, unlike here, the plaintiff conceded that the defendant was *not* acting as an investment adviser and thus, it did not have fiduciary duties. *Id*. at 487-88. *Zorbas* also acknowledged cases in New York holding that investment advisers have fiduciary duties independent of contract (*id.*), cases discussed *supra* at 32-33, which the District Court ignored.

VI. The District Court Erred in Enforcing Hedge Clauses, Including the Limitation Provision and the Big Boy Letter

Chickasaw is not a party to the Advisory Agreements and therefore a provision in the J.P. Morgan General Terms for Accounts and Services incorporated

by reference therein, purportedly limiting JPMC's liability to gross negligence ("Limitation Provision") cannot insulate Chickasaw. JA588 §11.

Nonetheless, the SEC's position is that hedge clauses, like the Limitation Provision, are rarely, if ever, permissible. *See, e.g.,* JA1114 n.31; *In the Matter of ClearPath Capital Partners, LLC*, Advisers Act Release No. 6672, at 4-7 (Sep. 3, 2024); *In the Matter of Global Predications, Inc.*, Advisers Act Release No. 6574, at 4 (March 18, 2024); *In the Matter of Titan Global Capital Management USA LLC*, Advisers Act Release No. 6380, at 7-8 (Aug. 21, 2023); *Comprehensive Cap. Mgmt., Inc.*, Advisers Act Release No. 5943, at 4-5 (Jan. 11, 2022). In *CCM* and *ClearPath*, the SEC determined that the adviser's attempt to limit liability to acts of gross negligence, willful misconduct or fraud amounted to an impermissible hedge clause and could not be saved by a so-called "savings clause." *CCM* at 4 (JA1149), *ClearPath* at 4. In this case, the Limitation Provision is very similar to the clauses in *CCM* and *ClearPath*. JA588 §11.

The District Court's holding that the Limitation Provision is enforceable disregarded this precedent and *Cutter*. The District Court's only support for its holding is the Documentation of Registered Inv. Adviser Compliance Revs., Advisers Act Release No. 6383, at 256-57 (Aug. 23, 2023) ("Fund Release")—which was not briefed or cited to by any party in their papers. The language quoted by the District Court is wholly inapplicable as it concerns advisers to private funds

(institutional clients, not retail clients like Plaintiffs).[1] *Id.* at 255. Additionally, the rules promulgated under the Fund Release were vacated by the Fifth Circuit. *Id.* at 1.

VII. The District Court Erred in Dismissing Plaintiffs' Claims for Rescission (Count VII) and Declaratory Judgment as to the Big Boy Letter (Count VI)

The District Court treated the Big Boy Letter as a hedge clause while ignoring the fact that hedge clauses are impermissible. ADD81-83. In addition, whether the Big Boy Letter is unconscionable is an issue of fact because JPMC made the false statements in the letter and, even if it did not, JPMC cannot rely on the representations it knew were untrue. *See JP Morgan Chase Bank v. Winnick*, 350 F. Supp. 2d 393, 406 (S.D.N.Y. 2004); *O'Hara v. Diageo-Guinness, USA*, 306 F. Supp. 3d 441, 452 (D. Mass. 2018). The District Court also failed to meaningfully consider Plaintiffs' argument that 15 U.S.C. § 80b-15 of the Advisers Act applies to the Big Boy Letter due to the fact that JPMC affiliate RIA JP Morgan Securities, LLC ("JPMS") was a party, thereby triggering rescission.

[1] According to the SEC, OCC and Defendants own policies, "Retail Clients" are natural persons investing on their own behalf. 17 C.F.R. §275.204-5(d)(2); 17 CFR §240.15*l*-1(b)(1); JA1790-91; JA3336.

VIII. The District Court Erred in Dismissing the Claims for Negligence, Gross Negligence (Count III), and Negligent Misrepresentation (Count IV)

Summary judgment on negligence claims is rare. *Patriot Ins. Co. v. Ingham*, 2021 U.S. Dist. LEXIS 49037, *3 (D. Mass. Mar. 15, 2021); *Marantz Co. v. Clarendon Industries, Inc.,* 670 F. Supp. 1068, 1074 (D. Mass. 1987). There is a genuine issue of material fact as to whether Defendants adhered to the standard of care of investment advisers. Even if the standard were that of gross negligence, Plaintiffs' claims should not have been dismissed, considering the egregious, fraudulent, self-interested and/or reckless behavior of Defendants.

Similarly, the District Court erred in dismissing the negligent misrepresentation claim, considering there are genuine issues of fact as to whether Defendants made knowing misrepresentations and omissions, including misstatements JPMC made in the Big Boy Letter, misstatements that Plaintiffs were earning $2 million a year in income (when JPMC's own expert admits they were not (JA2243)), withholding vital recommendations about reducing MLPs and Chickasaw's performance, and intentionally omitting comparative information concerning Plaintiffs' portfolio strength in relation to the S&P 500 (JA1551; JA1552; JA1558; JA2931-32 ¶¶464-66).

IX. The District Court Erred in Dismissing the 93A Claim (Count VIII)

Here, reinstatement of other claims by this Court would also require reinstatement of this claim. *Primarque Prods. Co. v. Williams W. & Witts Prods. Co.*, 988 F.3d 26, 46 (1st Cir. 2021). However, a 93A violation is not itself dependent on the existence of other claims. *Mass. Eye & Ear Infirmary v. QLT Phototherapeutics, Inc.*, 552 F.3d 47, 69 (1st Cir. 2009) *Linkage Corp. v. Trustees of Boston Univ.*, 425 Mass. 1, 27, 679 N.E.2d 191, 209 (1997). The District Court was thus required to conduct an independent analysis of Plaintiffs' 93A claim.

Whether such acts or practices violate 93A is a fact-specific determination best left for a factfinder and not appropriate for summary judgment. *See Arthur D. Little, Inc. v. Dooyang Corp.*, 147 F.3d 47, 54 (1st Cir. 1998).

Contrary to the District Court's holding, (ADD97), the record is replete with examples of Defendants' deceptive practices, including, without limitation, not only the misrepresentations, but also the inclusion of hedge clauses, and JPMC's failure to disclose its various conflicts of interest in connection with the LOC and the Transactions.

Chickasaw engaged in deceptive practices by recklessly abandoning its duties and willfully turning a blind eye to Plaintiffs' overleveraged portfolio so that it could avoid advising Plaintiffs to divest their MLPS. JA1659:21-JA1661:24. Chickasaw

even acknowledged using leverage on investments is "like [handling] dynamite, handle with great care." JA2539.

X. The District Court Order Misinterpreted the Florida Adult Protective Services Act (Count IX) and Ignored the Relevant Case Law

Florida courts hold the episodic nature of dementia, with periods of clarity and functioning daily activity, does not mean an individual is not vulnerable for the entire period. *Hanson v. Teti,* No. 09-65 15-CA, 2011 Fla. Cir. LEXIS 4090, at *12, 20 (Fla. 20th Cir. Ct. June 29, 2011). The District Court's sole focus on whether JPMC knew about Peter's diagnosis is not an element of the Florida statute. *See* Fla. Stat. § 415.101-113.

Peter was a "vulnerable adult" under the Florida Adult Protective Services Act (Fla. Stat. §415), as evidenced by his ER visit in September 2015 where, a doctor memorialized: "**Diagnosis: paranoid ideation; cognitive deficits; dementia**". ADD127 (JA1034) (emphasis added); JA2820 ¶215; *see also* JA1013, JA1016. Defendants' medical expert confirmed a person with dementia cannot make financial decisions without complication. JA2022:7-16. Plaintiffs' medical expert opined that Peter's symptoms should have been apparent to JPMC by mid-2019 at the latest. JA975 ¶5. The District Court ignored this key evidence and instead, improperly accepted Defendants' expert's opinion, which also ignored the key diagnosis, over Plaintiffs' expert. *See Cortes-Irizarry v. Corporacion Insular De Seguros*, 111 F.3d

184, 191 (1st Cir. 1997); *Den Norske Bank AS v. First Nat'l Bank*, 75 F.3d 49, 58 (1st Cir. 1996); *Harris,* 310 F.3d at 79.

In addition, the 2020 doctor's note which the District Court relied on in ruling that Peter was able to engage in daily activities, actually stated Peter could not recall things like the month or town he lived in. JA1090-91; ADD94. Contrary to the District Court's conclusion that Peter had "lucid" conversations about current events, the very medical records the District Court cited reveal Peter displayed paranoia about such current events. JA1090. In cognitive testing, Peter was unable to recall words after a delay, rendering his reading the newspaper meaningless. JA1090-91.

XI. Causation is a Material Issue of Fact and the District Court Erred in Holding Otherwise

To prevail on a breach of fiduciary duty claim, a plaintiff must show a "causal relationship between the breach and the damages." *Cold Spring Harbor Lab. v. Ropes & Gray LLP*, 840 F. Supp. 2d 473, 479 (D. Mass. 2012) (internal quotations omitted). For years, Defendants engaged in objectionable behavior and consistently provided Plaintiffs with terrible investment advice, leading to millions of dollars in losses.

Nonetheless, in a footnote, the District Court appeared to conclude that Plaintiffs could not prove causation at trial because of supposed "contractual limitations…." ADD85 n. 8. The District Court's conclusion is not even an analysis

of causation but on liability. In any event, as discussed above, this conclusion is a misapplication of the law and a misreading of the Advisory Agreements. *Supra* at 31-36.

Further, the District Court's acceptance of Defendants' argument that "there is no reason to believe Peter would have abandoned his MLP investment strategy even if the Defendants had not made the MLPEI program available" is not only a misapplication of the causation element, but a misapplication of the summary judgment standard. Of course, "no reason to believe" is not the standard and "intent is often proved by inference, after all, and on a motion for summary judgment, all reasonable inferences must be drawn in favor of the nonmoving party." *Friends of Merrymeeting Bay*, 759 F.3d at 34 (1st Cir. 2014) (internal quotations omitted). In making this bald conclusion, the District Court also ignored a wealth of evidence that Peter, and Yoon (whom the District Court ignores entirely), intended to follow their advisers' recommendations and were open to selling MLPs. *See, e.g.,* ADD125 (JA1542); ADD126 (JA1085); JA2942-2957 ¶¶482-87, 506-08.

XII. The District Court Erred in Its Rulings on the Motions to Strike

The District Court erred striking Yoon's declaration statement that she attended the August 2015 Meeting (even though *all* parties agree she did). JA2844 ¶269; ADD61-63. For the sham affidavit rule to apply, the Court must find that supposed inconsistent testimony was provided in response to "clear answers to

unambiguous questions" and a party failed to provide a "satisfactory explanation" for the inconsistency. *Colantuoni v. Alfred Calcagni & Sons, Inc.*, 44 F.3d 1, 4-5 (1st Cir. 1994); *Armstrong v. White Winston Select Asset Funds,* 647 F. Supp. 3d 36, 40 (D. Mass. 2022). Neither judge *addressed these standards at all in relation to the facts*. *See* ADD62-63; ADD17-18. JPMC's counsel did not even ask Yoon if she attended the August 2015 Meeting and instead asked about a document, which confused her. [Dkt. 344] at 8-9, 12-13; JA993 ¶47; JA3058 ¶6. In any event, Yoon provided a satisfactory explanation in a declaration that the District Court ignored. JA3058 ¶6. Remarkably, Defendants admit Yoon was at the meeting. JA2844 ¶269.

Instead, the District Court devoted a whole page of its opinion discussing how it read much of Yoon's testimony (ADD89-90) and came to the conclusion that "Yoon does not have a memory that the Court can rely upon." The District Court overstepped its role; determining the credibility or reliability of a witness is "the province of the jury." *Taite v. Bridgewater State Univ., Bd. of Trs.*, 999 F.3d 86, 97 (1st Cir. 2021); *Ahmed v. Johnson*, 752 F.3d 490, 495 (1st Cir. 2014).

Conversely, the District Court erred in failing to strike Baker's belated self-serving statements of his "understanding" of JPMC policies concerning the 50% hard suitability limit (JA923 ¶3); statements that are contradicted by the language of the policy itself and by concerned employee discussions about circumventing even the far more generous 5% suitability requirement (*supra* at 14).

XIII. The District Court Erred in Denying Plaintiffs' Motion to Amend the Complaint

A. The District Court Applied the Wrong Legal Standard on the Motion to Amend, Which Mandates Reversal

Fed. R. Civ. P. 15(a) provides that leave to amend "shall be freely given when justice so requires." "[T]the leave sought should, as the rules require, be 'freely given,'" and the reason for such amendment "is not a high hurdle." *Amyndas Pharm., S.A. v. Zealand Pharma A/S*, 48 F.4th 18, 36-37 (1st Cir. 2022) (quoting *Foman v. Davis*, 371 U.S. 178, 182 (1962)).

All parties acknowledged that the Rule 15(a) leave freely given standard applied as the scheduling order did not set a deadline for motions to amend. [Dkt. 230-1] at 10-11, and n.1; [Dkt. 234] at 15. The Magistrate agreed. ADD3-4. However, the District Court improperly applied Rule 16's good cause standard. *See* ADD11-12 citing cases applying the good cause standard (*e.g. Somascan*, *Trans-Spec Truck*, and *Comite Fiestas* cases) and concluding that "the Doelgers lack good cause for the amendment." The District Court's application of the incorrect legal standard on a motion to amend is a *per se* abuse of discretion, mandating reversal. *See D'Agostino*, 802 F.3d at 191-92, 194-96.

B. Defendants Intentionally Delayed This Case and Not Plaintiffs

Defendants stalled the case for nearly a year by baselessly challenging the *pro hac vice* motion of Plaintiffs' lead counsel ([Dkt. 35]), intentionally delayed providing Plaintiffs with crucial information necessary for amending their

complaint; the full extent of Defendants' delay tactics is detailed in counsel's declaration. JA935; JA415; *see also* [Dkt. 230-1] at 4-8. Plaintiffs acted in good faith and amended the complaint as soon as they possibly could. The District Court should have allowed the amendments. *See Amyndas*, 48 F.4th at 42.

Additionally, Defendants' and JPMS's bald assertions that additional discovery might be needed is not sufficient to show prejudice. *See, e.g., Woods Hole Oceanographic Inst. v. ATS Specialized, Inc.*, 2020 U.S. Dist. LEXIS 250073, at *8 (D. Mass. Dec. 22, 2020).

C. JPMC's and JPMS's Fraud on the Court

The District Court decision should also be reversed because of JPMC's and JPMS's blatant fraud on the District Court. *See Chambers v. Nasco, Inc.*, 501 U.S. 32, 44 (1991). In opposing the motion to amend, JPMC and JPMS explicitly told the District Court they intended to invoke arbitration if the motion were granted. ADD128; ADD129; JA394 ¶4; [Dkt. 234] at 21, 25, and n.49; [Dkt. 286] at 20:2-3, 46:15-19. The Magistrate relied on these representations, concluding "[t]he claims against JPMS may well be subject to an arbitration clause." ADD8. After Plaintiffs filed an arbitration against JPMS, astonishingly, JPMC moved the District Court to enjoin the arbitration on the grounds that JPMS ***never*** agreed to arbitrate, the exact opposite of what it told the Magistrate months earlier. ADD130; [Dkt. 375] at 9, 17, 20, 24; [Dkt. 406] at 32:3-12. JPMS made the same arguments in the arbitration.

JA3076; JA3159. Such misrepresentations and misconduct constitute a fraud on the court. *See Aoude v. Mobil Oil Corp*., 892 F.2d 1115, 1117-18 (1st Cir. 1989). At the very least, the Court should reverse on estoppel grounds to protect the integrity of the court system. *See Alternative Sys. Concepts, Inc. v. Synopsys, Inc.*, 347 F.3d 23, 32-34 (1st Cir. 2004).

CONCLUSION

For these reasons, this Court should reverse the District Court's decisions, and remand for further proceedings.

Dated: June 11, 2025

Respectfully submitted,

APPELLANTS YOON DOELGER
and PETER DOELGER

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), the undersigned hereby certifies as follows:

This document complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B)(i), as enlarged by Order of this Court entered January 29, 2025 permitting an oversized brief containing up to 15,000 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f), the brief contains 14,978 words.

This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman, 14-point type. As permitted by Fed. R. App. P. 32(g)(1), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Date: June 11, 2025

/s/ James R. Serritella
James R. Serritella

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2025, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that all participants in the case are registered ECF users and that service on Appellees will be accomplished by the CM/ECF system.

Date: June 11, 2025

/s/ James R. Serritella
James R. Serritella

ADDENDUM

ADDENDUM TABLE OF CONTENTS

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

PETER DOELGER and YOON DOELGER, Plaintiffs, v. JPMORGAN CHASE BANK, N.A. et al., Defendants.	Civil No. 21-11042-AK

ORDER ON PLAINTIFFS' MOTION TO AMEND
[Docket No. 230]

September 21, 2023

Boal, M.J.

Plaintiffs Peter and Yoon Doelger have moved for leave to amend their complaint to add both JPMorgan Securities LLC ("JPMS") as a defendant and also new claims for breach of contract/third party beneficiary, alter ego liability, aiding and abetting breach of fiduciary duty, and civil conspiracy. Docket No. 230.[1] For the following reasons, I deny the Doelgers' motion.[2]

I. FACTUAL AND PROCEDURAL BACKGROUND

A. Original Complaint

On June 23, 2021, the Doelgers filed a nine-count complaint against JPMorgan Chase Bank, N.A ("JPMC") and Chickasaw Capital Management, LLC (collectively referred to as

[1] On February 9, 2023, Judge Kelley referred the case to the undersigned for full pretrial proceedings and report and recommendation on dispositive motions. Docket No. 170.
[2] In this district, courts have found that a motion to amend is a non-dispositive matter under Rule 72(a) of the Federal Rules of Civil Procedure. See Trustees of Bos. Univ. v. Everlight Elecs. Co., C.A. No. 12-11935-PBS, Docket No. 883 (D. Mass. Oct. 10, 2014); see also Pagano v. Frank, 983 F.2d 343, 346 (1st Cir. 1993).

"Defendants"). Docket No. 1. The Doelgers allege an investment advisory relationship with Defendants since 2015. Id. ¶ 20. Based on this relationship, they invested tens of millions of dollars with Defendants. See id. ¶ 47. Defendants, the Doelgers assert, failed to use a reasonable and diversified investment strategy to meet their needs. See id. ¶ 2. Instead, the Doelgers contend that, inter alia, Defendants breached their fiduciary duty by maintaining the Doelgers' money primarily in volatile master limited partnerships ("MLPs"). Id. In particular, the Doelgers allege that James Baker, their key JPMC contact and investment advisor, was inexperienced which contributed to Defendants' decision to place the Doelgers' money in irresponsibly risky portfolios. Id. ¶¶ 45, 205-14.

The investments resulted in a loss of more than $20 million. Id. ¶ 2. In addition, the Doelgers aver that JPMC lent the Doelgers money for which the MLP investments served as collateral, but never disclosed to the Doelgers the alleged conflict of interest in its serving as both a lender and an investment advisor. Id. Furthermore, the Doelgers contend that Defendants worked to dissuade the Doelgers from paying off those loans, including by making misrepresentations about the income generated by the MLPs, because Defendants would lose money if the Doelgers paid off the loans. Id. Defendants allegedly breached a contract governing the investor-advisor relationship between the parties and made material misrepresentations in a 2015 letter concerning the Doelgers' investments. Id. ¶¶ 95-104, 261-67.

B. Proposed Amended Complaint

The proposed amended complaint asserts thirteen claims against JPMS, the proposed new defendant. Specifically, the Doelgers seek to add JPMS to their original claims of breach of fiduciary duty, negligence/gross negligence, negligent misrepresentation, breach of the covenant of good faith and fair dealing, violation of Chapter 93A, and elder financial exploitation, as well as their claims for declaratory judgment and recission regarding the enforceability of a 2015

contract. See Docket No. 230-4 at 66-86. The Doelgers also seek to assert against JPMS claims of breach of contract/third party-beneficiary, alter ego liability, aiding and abetting JPMC's breach of fiduciary duties, aiding and abetting Chickasaw's breach of fiduciary duty, and civil conspiracy. Id. at 73-82.

The proposed amended complaint also adds the following six new claims against the existing defendants: breach of contract/third party-beneficiary against JPMC, breach of contract/third party-beneficiary against Chickasaw, alter ego liability against JPMC, aiding and abetting JPMC's breach of fiduciary duties against Chickasaw, aiding and abetting Chickasaw's breach of fiduciary duty against JPMC, and civil conspiracy against JPMC. Id. The proposed amended complaint contains hundreds of new allegations.

C. Procedural History

Fact discovery ended on June 27, 2023. See Docket Nos. 215, 216, 217. Expert discovery ended on August 17, 2023. Id. Dispositive motions were due on September 15, 2023[3]. Docket Nos. 216, 217. Judge Kelley scheduled a bench trial for April 1, 2024. Docket No. 68.

On August 2, 2023, over two years after filing the original complaint, the Doelgers moved to amend. Docket No. 230. JPMC and Chickasaw filed a joint opposition on August 16, 2023, and the Doelgers filed a reply on August 31, 2023. Docket Nos. 234, 247. This Court heard oral argument on September 13, 2023. On September 14, 2023, the Doelgers filed a declaration and further exhibits. Docket No. 263.

II. STANDARD OF REVIEW

Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that a "court should freely

[3] Given the potential impact of the instant motion, this Court, on September 13, 2023, extended the deadline for dispositive motions to one week after a decision on the motion to amend. Docket No. 260.

give leave [to amend a pleading] when justice so requires." Fed. R. Civ. P. 15(a)(2). A court "enjoys significant latitude in deciding whether to grant leave to amend." U.S. ex rel. Gagne v. City of Worcester, 565 F.3d 40, 48 (1st Cir. 2009) (citations omitted). "In the early stages of litigation, grounds for denial are generally limited to 'undue delay, bad faith or dilatory motive . . . , undue prejudice to the opposing party . . . , [and] futility of amendment.'" Viscito v. Nat'l Plan. Corp., No. CV 3:18-30132-MGM, 2019 WL 7578462, at *2 (D. Mass. July 5, 2019) (alterations in original) (quoting ACA Fin. Guaranty Corp. v. Advest, Inc., 512 F.3d 46, 55-56 (1st Cir. 2008)).

"However, the longer a party waits before filing its motion to amend, the more exacting the standard becomes. Certain milestones, such as a scheduling order, close of discovery, or a timely-filed motion for summary judgment, may change a court's hospitality towards a motion to amend." Viscito, 2019 WL 7578462, at *2. "[P]rotracted delay, with its attendant burdens on the opponent and the court, is itself a sufficient reason for the court to withhold permission to amend." Steir v. Girl Scouts of the USA, 383 F.3d 7, 12 (1st Cir. 2004). "Particularly disfavored are motions to amend whose timing prejudices the opposing party by 'requiring a re-opening of discovery with additional costs, a significant postponement of the trial, and a likely major alteration in trial tactics and strategy . . . .'" Id. (quoting Acosta–Mestre v. Hilton Int'l of P.R., Inc., 156 F.3d 49, 52 (1st Cir. 1998)).

In addition, pursuant to Local Rule 15.1(a), "[a]mendments adding parties shall be sought as soon as an attorney reasonably can be expected to have become aware of the identity of the proposed new party." L.R. 15.1(a). "Undeniably, a violation of . . . L.R. 15.1(a) . . . provides a basis to deny a motion to amend to add a new party . . . ." Washington Tr. Advisors, Inc. v. Arnold, No. 22-CV-11847-PBS, 2023 WL 3958400, at *3 (D. Mass. June 12, 2023).

III. DISCUSSION

A. Adding A New Party

The Doelgers seek to add JPMS as a new party. However, as evidenced by the approximately forty references to the company in their original complaint, the Doelgers were aware of JPMS from at least the outset of this case. See, e.g., Docket No. 1 ¶¶ 49, 96-101, 103, 120, 230, 234-37, 239-44. Indeed, they made very specific allegations about JPMS. For example, the Doelgers alleged that, in a September 24, 2015 letter, JPMS made false statements regarding Mr. Doelger's income. Id. ¶¶ 96-98. They further alleged that:

- More than a month after Mr. Doelger and JP Morgan signed the 2015 Advisory Agreements, and the Advisers[4] agreed to become Mr. Doelger's investment adviser, JP Morgan and JP Morgan Securities sent Mr. Doelger a letter dated September 24, 2015 (the "2015 Hedge Letter") requesting that he make certain acknowledgements that JP Morgan knew were untrue.

- In the 2015 Hedge Letter, JP Morgan and JP Morgan Securities made the following false statements regarding Mr. Doelger's income and financial acumen: that as of September 24, 2015, Mr. Doelger had "a liquid net worth of approximately $100,000,000" and "total assets of at least $50 million"; and that Mr. Doelger had "concluded that the investment, including with respect to the size of the investment objectives and [his] financial capabilities, that [he had] such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of the investment . . . ." They also pressured Mr. Doelger to acknowledge that he was capable of making investment decisions in connection with JP Morgan's proprietary investment program entirely on his own.

- At the time of execution of the 2015 Advisory Agreements, Mr. Doelgers' net worth was in fact substantially less than $100 million. JP Morgan and JP Morgan Securities made these misrepresentations with knowledge that they were false given that JP Morgan had ready access to the Doelgers' financial records, which included information regarding most of the Doelgers' financial accounts and periodically prepared financial statements listing all the Doelgers' assets and liabilities.

- The 2015 Hedge Letter runs afoul of the Anti-Fraud Provisions for multiple reasons, including, without limitation, because JP Morgan and JP Morgan Securities (i) failed to provide Mr. Doelger with an explanation of the exculpatory clauses in the letter, (ii) failed to disclose or explain to Mr. Doelger the conflict of interest resulting from the use of such clauses and (iii) induced Mr. Doelger to sign the letter through their misrepresentations.

[4] As defined in the original complaint, "the Advisers" comprise JPMC and Chickasaw. Docket No. 1 at 1.

Id. ¶¶ 96-98. In addition, the Doelgers alleged that JPMS:

- played a role in managing the Doelgers' Advisory Account;
- owed fiduciary duties to the Doelgers;
- was required to avoid conflicts of interest with the Doelgers, act in the Doelgers' best interests and provide disinterested advice to the Doelgers;
- had disclosure obligations, including an affirmative obligation to avoid misleading the Doelgers; and
- violated the Advisers Act and the Rules.

Id. ¶¶ 230, 240-42, 244.

Moreover, the Doelgers specifically included JPMS in Count VI (seeking declaratory judgment that the 2015 letter is unenforceable) and Count VII (seeking recission of the 2015 letter) of their original complaint.

Count VI alleges as follows:

- JP Morgan and JP Morgan Securities did not provide consideration in exchange for Mr. Doelgers' undertakings in the 2015 Hedge Letter. JP Morgan executed the 2015 Advisory Agreement more than a month before sending the 2015 Hedge Letter and never informed Mr. Doelger that he would need to agree to any of the statements in the 2015 Hedge Letter in order to perform their obligations under the 2015 Advisory Agreement. Accordingly, the 2015 Hedge Letter is not a validly formed contract.
- JP Morgan and JP Morgan Securities fraudulently induced Mr. Doelger to sign the letter through their misrepresentations and therefore the 2015 Hedge Letter must be rescinded. JP Morgan and JP Morgan Securities requested Mr. Doelger make certain acknowledgements that they knew were untrue and misled Mr. Doelger into believing that by signing the 2015 Hedge Letter, he waived non-waivable rights of actions against JP Morgan and JP Morgan Securities. Mr. Doelger justifiably relied on the misrepresentations made by JP Morgan and JP Morgan Securities as his fiduciaries. JP Morgan and JP Morgan Securities made these misrepresentations with knowledge that they were false, given that they had ready access to the Doelgers' financial records.

Id. ¶¶ 301, 303.

Count VII alleges as follows:

- The 2015 Hedge Letter runs afoul of the Anti-Fraud Provisions [of the Advisors Act] for

> multiple reasons, including, without limitation, because JP Morgan and JP Morgan Securities (i) failed to provide Mr. Doelger with an explanation of the exculpatory clauses in the letter, (ii) failed to disclose or explain to Mr. Doelger the conflict of interest resulting from the use of such clauses and (iii) induced Mr. Doelger to sign the letter through their misrepresentations.

Id. ¶ 312.

Any attempt at this point in the litigation, more than two years after the complaint was filed, to argue that the Doelgers were not aware until recently of JPMS's role with respect to the Doelgers rings hollow. Regardless of any additional information the Doelgers learned about JPMS through discovery, they were plainly aware of, and indeed, made allegations against, JPMS from the very outset of this case. Accordingly, their eleventh-hour attempt to add JPMS fails.

B. New Claims

"Undue delay, on its own, may be enough to justify denying a motion for leave to amend.'" Nat'l Fed'n of the Blind v. Container Store, No. CV 15-12984-NMG, 2020 WL 533022, at *3 (D. Mass. Feb. 3, 2020) (quoting Hagerty ex rel. U.S. v. Cyberonics, Inc., 844 F.3d 26, 34 (1st Cir. 2016)). The plaintiff has a burden, at minimum, to show a valid reason for delay and neglect. Nat'l Fed'n of the Blind, 2020 WL 533022, at *3. In assessing whether the plaintiff has carried her burden, a court may examine what the plaintiff knew or should have known and what she did or should have done. Id.

With respect to the new allegations, much of the information was available to the Doelgers prior to filing the complaint. For example, the original complaint stated that "JP Morgan, which selected Chickasaw as a 'third-party investment advisor', had an obligation to ensure that Chickasaw complied with the Advisers Act and the Rules. In failing to ensure Chickasaw's compliance, JP Morgan breached its fiduciary duties to the Doelgers and acted in bad faith." Docket No. 1 ¶ 227. Based on these allegations, the Doelgers were, or should have

been, on notice from the outset of this case that a claim for aiding and abetting might exist. They have not provided a viable explanation as to why they did not include such a claim in their initial complaint.

Should the Doelgers be allowed to amend the complaint, Defendants and JPMS would need discovery on the new claims and allegations. Defendants credibly argue that they might need new experts and would certainly need new expert reports. Docket No. 234 at 21. They further suggest, as one example, that if JPMS is added as a party, it will need to conduct discovery focused on the 2009-2014 time period, including on the agreement for the account ending in x1000 and any contemporary exchanges with the Doelgers. Id. at 20. In addition, Defendants contend that JPMS is regulated under a separate framework[5], so a new expert on that topic would be required. All of this new discovery would come at an additional burden and cost to Defendants, and exponentially add to the time needed to bring this case to a conclusion.

The new claims also implicate complex and tangential legal questions. For example, in Counts VI and VII of the proposed amended complaint, the Doelgers seek to add claims of breach of contract against JPMC and Chickasaw relating to an agreement for investment management services ("AIMS") to which the Doelgers allege they were third-party beneficiaries. Docket No. 230-3 at 68-70. The AIMS contains a forum selection clause which designates New York courts (federal and state) as the exclusive jurisdiction "for purposes of all legal proceedings arising out of or relating to this Agreement or the transactions contemplated hereby." Id. at 179-80. Accordingly, there will, in all likelihood, be litigation over whether such claims belong in an action filed in the District of Massachusetts.

In addition, the claims against JPMS may well be subject to an arbitration clause. See

[5] Defendants contend that JPMS is regulated by the SEC and FINRA and that JPMC is regulated by the OCC. Docket No. 234 at 20.

Docket No. 234 at 25. Defendants have provided a pertinent JPMS account application signed by Mr. Doelger that states: "By signing below, I acknowledge agreement to arbitrate any controversies arising out of the Margin or Brokerage Agreements with J.P. Morgan Securities Inc." Docket No. 234-2 at 3. Accordingly, litigation over whether claims involving JPMS belong in an action filed in the District of Massachusetts appears likely.

The Doelgers' dilatory effort to amend their complaint would lead to further discovery, dispositive motions, and legal contentions which would otherwise be outside of the scope of the current litigation. It would inevitably and unjustifiably delay this proceeding.[6]

IV. ORDER

For all of these reasons, this Court denies the Doelgers' motion to amend.

/s/ Jennifer C. Boal
JENNIFER C. BOAL
United States Magistrate Judge

[6] Defendants raise futility of amendment and dilatory motive as additional reasons for this Court to deny the motion to amend. Because this Court finds that undue delay is a sufficient basis for denying the motion, it does not reach Defendants' other arguments.

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United States District Court

District of Massachusetts

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Docket Text:
District Judge Angel Kelley: ELECTRONIC ORDER entered.

On September 21, 2023, the Magistrate Judge issued an [271] Order denying Plaintiffs Peter and Yoon Doelgers' Motion for Leave to Amend the Complaint [Dkt. 230], filed August 2, 2023. On October 5, 2023, pursuant to Fed. R. Civ. P. 72, the Doelgers timely filed Objections to Order on Motion for Leave to Amend Complaint [Dkt. 284], requesting that this Court set aside the Magistrate Judge's order. The Court shall modify or set aside a magistrate judge's order on a nondispositive motion "if found to be clearly erroneous or contrary to law." ML-CFC 2007-6 P.R. Props., LLC v. BPP Retail Props., LLC, 951 F.3d 41, 46 (1st Cir. 2020) (internal quotations omitted). Having considered the Doelgers' Objections, Defendants' response, the Doelgers' Reply, the underlying pleadings, and the Magistrate Judge's Order, the Court finds the Order to be consistent with the First Circuit jurisprudence and accordingly ADOPTS the Magistrate Judge's Order denying the Doelgers' Motion for Leave to Amend the Complaint.

The Motion to Amend at issue, filed two years after commencement of litigation, attempts to add six new claims against existing Defendants, thirteen claims against a new defendant, and "hundreds" of new allegations. The Doelgers moved for these amendments after the close of discovery, just weeks prior to the deadline for filing dispositive motions. In sum, the Doelgers object

to the denial of these amendments due to the alleged failure to consider the timing of the "newly discovered evidence" and failure to "specify what discovery Defendants might need" that would be prejudicial. [Dkt. 284 at 1]. They further argue denying their Motion would reward Defendants conduct to stifle and delay discovery. [Dkt. 284-1 at 7]. The Court disagrees.

The Magistrate Judge does not ignore the timing of the "newly discovered evidence" in finding the Doelgers acted with unjustifiable delay. It disagrees that the evidence is in fact "new" for the reasons stated in the Order. [See Dkt. 271 at 5-8]. "[A] court will take account of what the movant 'knew or should have known and what he did or should have done'" to determine whether such alterations could have been requested earlier, perhaps even at the original time of filing. In re Lombardo, 755 F.3d 1, 3-4 (1st Cir. 2014) (quoting Invest Almaz v. Temple–Inland Forest Prods. Corp., 243 F.3d 57, 72 (1st Cir. 2001)). "[L]ate amendments to assert new theories are not reviewed favorably when the facts and the theory have been known to the party seeking amendment since the inception of the cause of action." Mogel v. UNUM Life Ins. Co. of Am., 677 F. Supp. 2d 362, 365 (D. Mass. 2009). In Comite Fiestas de la Calle San Sebastian, Inc. v. Cruz, the plaintiff argued that it was delayed in amending the complaint because the information it sought to add was not previously available. 314 F.R.D. 23, 25 (D.P.R. 2016). The court denied the motion, finding that the plaintiff failed to establish good cause for delay, as the information simply provided further detail, which, the plaintiff previously knew or should have known at the outset of the complaint, particularly with naming a new defendant that was referenced numerous times in the complaint. Id. Similarly, in the instant matter, because the Doelgers seek to supplement their Complaint with information previously known (or should have known), Defendants' alleged delay tactics to produce such information are immaterial.

The focus of the undue delay now becomes the timeframe between filing the initial complaint and the motion for leave to amend the pleading. In the instance where more than one year has elapsed from the initial complaint to the motion to amend, the First Circuit has affirmed the denial of an amendment—without hesitation. See, e.g., Badillo–Santiago v. Naveira–Merly, 378 F.3d 1, 7–8 (1st Cir.2004) (thirteen-to-fourteen months); Acosta–Mestre v. Hilton Int'l of P.R., Inc., 156 F.3d 49, 51–52 (1st Cir. 1998) (fifteen months); Grant v. News Grp. Bos., Inc., 55 F.3d 1, 6 (1st Cir. 1995) (fourteen months). "[W]hen a motion to amend comes late in the case" the "freely given standard" is elevated to the need to show "good cause" for the amendment. Trans-Spec Truck Serv., Inc. v. Caterpillar Inc., 524 F.3d 315, 327 (1st Cir. 2008). Since the proposed amendments include information that the Doelgers previously knew or should have known, they lack good cause for the amendment, especially in light of procedural posture of the case.

Lastly, the Magistrate Judge's consideration of the amendments' "burden[] on the opponent and the court" was lockstep with the First Circuit. Somascan, Inc. v. Philips Med. Sys. Nederland, B.V., 714 F.3d 62, 64 (1st Cir. 2013) (per curiam); see, e.g., Frappier v. Countrywide Home Loans, Inc., 750 F.3d 91, 96(1st Cir.

2014) (discussing concern that the proposed amendment likely required additional discovery); ACA Fin. Guar. Corp. v. Advest, Inc., 512 F.3d 46, 57 (1st Cir. 2008) (explaining that the plaintiffs' wait-and-see approach to filing complaints "would impose unnecessary costs and inefficiencies on both the courts and party opponents"). The Magistrate Judge provided specific examples of how Defendants would be prejudiced and the potential burden of extended litigation. [See Dkt. 271 at 8] (discussing the new party would result in entirely new discovery, discovery motions, and new experts). This suffices to support the denial of the untimely amendment.

For the reasons stated in the September 21, 2023 Order [Dkt. 271] in its entirety, the Court agrees with the Magistrate Judge's determination that the Doelgers' undue delay in amending the Complaint is cause to deny their Motion. Accordingly, Magistrate Judge Boal's decision is AFFIRMED and the Doelgers' Motion for Leave to Amend is DENIED.

(Pacho, Arnold)

1:21-cv-11042-AK Notice has been electronically mailed to:

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1:21-cv-11042-AK Notice will not be electronically mailed to:

UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF MASSACHUSETTS

PETER DOELGER and YOON DOELGER, Plaintiffs, v. JPMORGAN CHASE BANK, N.A. et al., Defendants.	**Filed under seal.** Civil No. 21-11042-AK

REPORT AND RECOMMENDATION ON THE PARTIES' MOTIONS TO STRIKE AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT[1]
[Docket Nos. 273, 323, 335]

March 25, 2024

Boal, M.J.

This action arises from an investment relationship between Plaintiffs Peter and Yoon Doelger and Defendants JPMorgan Chase Bank, N.A. ("JPMC") and Chickasaw Capital Management, LLC. The Doelgers initially made and then lost money. They seek to hold Defendants legally liable for their losses. Defendants have jointly moved for summary judgment on all counts. Docket No. 273.[2] As discussed in greater detail below, the Doelgers have failed to address properly and meaningfully Defendants' arguments. Indeed, with respect to many of the claims, they fail to put forth a legally sound claim, let alone meet their burden to show a genuine issue of material fact. Accordingly, and for the additional reasons discussed below, I recommend that Judge Kelley grant Defendants' motion in its entirety.

[1] On February 9, 2023, Judge Kelley referred the case to the undersigned for full pretrial proceedings and report and recommendation on dispositive motions. Docket No. 170.
[2] Citations to "Docket No. ___" are to documents appearing on the Court's electronic docket. They reference the docket number assigned by CM/ECF and include pincites to the page numbers appearing in the top right corner of each page within the header appended by CM/ECF.

I. PROCEDURAL BACKGROUND

On June 23, 2021, the Doelgers filed a nine-count complaint against JPMC and Chickasaw. Docket No. 1. Those claims, based on conduct dating back to 2015, are: (1) breach of fiduciary duty; (2) breach of contract; (3) negligence/gross negligence; (4) negligent misrepresentation; (5) breach of the covenant of good faith and fair dealing; (6) declaratory judgment; (7) rescission pursuant to 15 U.S.C. § 80b-15; (8) Chapter 93A violations; and (9) elder financial exploitation in violation of Florida Statute § 415. Id. at 42-51. On October 1, 2021, JPMC filed counterclaims against the Doelgers for breach of contract and indemnification. Docket No. 25 at 94-96.

On September 28, 2023, Defendants filed a consolidated motion for summary judgment on all of the Doelgers' claims. Docket No. 273. The Doelgers filed an opposition on October 31, 2023. Docket No. 300. On November 28, 2023, Defendants filed a reply, Docket No. 321, and on December 13, 2023, the Doelgers filed a sur-reply. Docket No. 338.

On November 28, 2023, Defendants filed a motion to strike various portions of Yoon Doelger's declaration. Docket No. 323. On December 12, 2023, the Doelgers filed an opposition to Defendants' motion to strike and their own motion to strike the declarations of James Baker and Daniel Jacobs. Docket No. 335. Defendants filed an opposition to the Doelgers' motion to strike on December 26, 2023, and the Doelgers filed a reply on January 13, 2024. Docket Nos. 349, 355. This Court heard oral argument on the above motions on January 10, 2024.[3]

[3] On March 18, 2024, the Doelgers filed a notice of supplemental authority based on a news release from various federal agencies regarding consent orders with JPMC and affiliated entities pertaining to "a pattern of unsafe or unsound practices related to trade surveillance." Docket No. 380 at 2. However, there is no indication that the consent orders are linked to the specific facts and legal claims in this case. In addition, such evidence, to the extent it is relevant to the instant case, is inadmissible and therefore cannot be considered in the summary judgment context.

II. FACTS[4]

A. Scope Of The Record

As a preliminary matter, this Court addresses the parties' motions to strike.

1. The Doelgers' Motion To Strike

The Doelgers move to strike the declarations of JPMC employees James Baker (Docket No. 321-15) and Daniel Jacobs (Docket No. 321-16). Docket No. 335. The Doelgers argue that Baker's four paragraph declaration should be struck because it is not based on personal knowledge. In support, the Doelgers point to Baker's statement that he submits the declaration "based on my personal knowledge, except as to those matters that are stated upon information and belief." Docket No. 321-15 ¶ 2. The following two paragraphs contain substantive information. In those paragraphs, Baker explains that his understanding is "based on my experience at JPMC." Id. ¶¶ 3, 4. The text of these paragraphs alone rebuts the Doelgers' arguments that Baker lacked personal knowledge. The Doelgers' other arguments go to the weight, not the admissibility of the evidence contained in the declaration.[5] See Docket No. 355 at 5. For example, they maintain that Baker's statements are "contradicted by the record." Id. Accordingly, the Doelgers' motion to strike the Baker declaration is denied.[6]

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[4] This Court construes the record in the light most favorable to the Doelgers, the non-moving parties, and resolves all reasonable inferences in their favor. See Ahern v. Shinseki, 629 F.3d 49, 53-54 (1st Cir. 2010) (citing Cox v. Hainey, 391 F.3d 25, 29 (1st Cir. 2004)). The facts are taken from Defendants' statement of material facts ("Def. SOF"), which incorporates the Doelgers' responses ("Pl. Resp.") and the Doelgers' statement of additional material facts ("Pl. SOF"), which incorporates Defendants' responses ("Def. Resp."). This Court cites to these various statements of fact as contained in the parties' unified statement of material facts. See Docket No. 331.

[5] For example, they do not dispute that Baker had personal knowledge as to his own beliefs about the subject investment limits, rather they dispute that he followed the policy. Docket No. 355 at 5. In addition, Defendants correctly challenge the factual basis on which the Doelgers make these assertions. Docket No. 349 at 12-13.

[6] It is unclear whether the Doelgers intended to move to strike the Baker declaration under the sham affidavit rule. For example, the motion asserts that Baker makes "what are effectively sham

The Doelgers move to strike the Jacobs declaration on the basis that it is made upon information and belief and because Jacobs was not disclosed during the course of discovery.[7] The Doelgers' arguments are misplaced. Jacobs makes his declaration as a custodian of records. Neither the cases cited by the Doelgers (Docket No. 335-1 at 10)[8] nor the Federal Rules of Civil Procedure require the automatic disclosure of such persons. See Fed. R. Civ. Pro. 26(a)(1)(A)(i).

The Doelgers also seek to strike the Jacobs declaration because he authenticates the documents based on information and belief. However, the cases cited by the Doelgers fail to show that custodial affidavits may not be made on information and belief. In any event, Defendants have submitted a revised Jacobs declaration (Docket No. 349-4) and also a declaration from Jesse Martinez (Docket No. 351-1) that authenticate the same documents. Accordingly, this Court denies the Doelgers' motion to strike the Jacobs (and Martinez) declarations. To the extent necessary, it will rely on the second Jacobs declaration and/or the Martinez declaration to avoid any confusion.

2. Defendants' Motion To Strike

Defendants move to strike in whole or in part the declaration of Yoon Doelger. Docket No. 323. Defendants argue that certain statements should be struck because they are: (1) precluded by the Massachusetts spousal immunity statute, M.G.L. c. 233 § 20 or Fed. R. Evid. 802; (2) not made on the basis of personal knowledge; (3) otherwise hearsay; (4) inconsistent

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statements." Docket No. 335-1 at 7. However, there is no analysis comparing Baker's statements to, for example, prior sworn testimony, nor any legal authority supporting the assertions. Accordingly, because the Doelgers did not develop a sham affidavit argument, it is waived.

[7] In their reply, the Doelgers make the same arguments with respect to the Martinez declaration discussed below. Docket No. 355 at 6. The arguments are similarly without merit with respect to that declaration.

[8] Rather, most of the cases cited by the Doelgers involve expert disclosures. The Doelgers also cite to Burnett v. Ocean Properties, Ltd., 987 F.3d 57, 74 (1st Cir. 2021) which involves a decision to preclude a non-expert testifying about some undisclosed tests. That decision does not involve a custodian of records.

statements that trigger the sham affidavit rule; and/or (5) impermissible argument and not fact. Id. at 1-2. In many instances, however, Mrs. Doelger's declaration is not germane to resolving the summary judgment arguments presented by the parties. For that reason, many of Defendants' requests are moot. To the extent that this Court needs to resolve any of the issues raised by the motion to strike in order to reach a decision, this Court rules on the specific request at that time.

B. The Doelgers

Peter Doelger is currently eighty-six years old.[9] His wife, Yoon Doelger is currently seventy-seven years old.[10] Mrs. Doelger was born in Korea, and Korean is her native language.[11] While she has taken English classes, she asserts that is not comfortable speaking the language.[12] Mrs. Doelger earned a master's degree in fine arts from Boston University.[13] From August 2015 through March 2020, the Doelgers were residents of Florida, where they received mailings from JPMC.[14] They also had homes in Boston, Massachusetts, and Paris, France, in which they lived during that time period.[15] From 2015 through 2020, Mr. Doelger swam and rowed.[16] He kept up to date with geopolitics during that same time period.[17]

Along with two other partners, Mr. Doelger founded DMC Services, a company that performed energy audits for homeowners.[18] DMC Services was sold to the Honeywell company in 1995.[19] From that sale, Mr. Doelger netted approximately $12 million.[20] Mr. Doelger retired

[9] Pl. SOF ¶ 200; Def. Resp. ¶ 200.
[10] Pl. SOF ¶ 198; Def. Resp. ¶ 198.
[11] Id.; Pl. SOF ¶ 199; Def. Resp. ¶ 199.
[12] Pl. SOF ¶ 198; Def. Resp. ¶ 198.
[13] Def. SOF ¶ 12; Pl. Resp. ¶ 12.
[14] Def. SOF ¶ 8; Pl. Resp. ¶ 8.
[15] Def. SOF ¶ 7; Pl. Resp. ¶ 7.
[16] Def. SOF ¶ 9; Pl. Resp. ¶ 9.
[17] Def. SOF ¶ 14; Pl. Resp. ¶ 14.
[18] Pl. SOF ¶ 203; Def. Resp. ¶ 203.
[19] Def. SOF ¶ 4; Pl. Resp. ¶ 4.
[20] Def. SOF ¶ 5; Pl. Resp. ¶ 5.

after the sale of DMC Services, but took an active interest in his investments, which included master limited partnerships ("MLPs").[21] He started investing in MLPs beginning in at least the 2000s.[22]

C. Peter Doelger's Initial Master Limited Partnership Investments

In 2005, Mr. Doelger opened an account with Neuberger Berman, LLC which primarily held MLP assets.[23] In 2008, after Neuberger's parent company collapsed, Mr. Doelger began using JPMC to hold MLP assets previously managed by Neuberger.[24] In March 2012, Mr. Doelger transitioned those MLP assets to an Atlantic Trust account.[25] The value of the transferred assets was more than $27 million.[26]

Mr. Doelger held assets in the Atlantic Trust account from 2012 until 2015.[27] In September 2014, the Atlantic Trust account reached its highest value of over $47 million.[28]

D. Peter Doelger's Line Of Credit

In October 2009, Mr. Doelger opened a line of credit ("LOC") with JPMC which was secured by, inter alia, Mr. Doelger's MLPs held with Neuberger.[29] The LOC was comprised of interest-only loans that would mature every year, but JPMC regularly renewed the loans for successive one-year periods to keep them active.[30] In connection with opening the LOC and renewing it from time to time between 2009 and 2020, Mr. Doelger signed certain loan

[21] Def. SOF ¶ 6; Pl. Resp. ¶ 6.
[22] Def. SOF ¶ 17; Pl. Resp. ¶ 17.
[23] Def. SOF ¶¶ 35, 36; Pl. Resp. ¶¶ 35, 36.
[24] Def. SOF ¶ 37; Pl. Resp. ¶ 37.
[25] Def. SOF ¶ 38; Pl. Resp. ¶ 38.
[26] Def. SOF ¶ 40; Pl. Resp. ¶ 40.
[27] Def. SOF ¶ 41; Pl. Resp. ¶ 41; Pl. SOF ¶ 242; Def. Resp. ¶ 242.
[28] Def. SOF ¶ 42; Pl. Resp. ¶ 42.
[29] Def. SOF ¶ 56; Pl. Resp. ¶ 56; see also Pl. SOF ¶ 403; Def. Resp. ¶ 403.
[30] Pl. SOF ¶ 402; Def. Resp. ¶ 402.

documents, including a November 2016 collateral agreement and a May 2017 LOC renewal.[31] Mr. Doelger initially borrowed $2 million.[32] Between 2009 and 2014, Mr. Doelger made additional draws on the LOC, and his peak balance was almost $18 million in mid-2014.[33]

Mr. Doelger signed loan documents that disclosed a potential conflict of interest from JPMC's action as a lender and holding collateral that consisted of assets in the account managed by JPMC or an affiliate.[34] Specifically, the documents stated that "[i]f any Collateral is held in an investment management account or investment advisory account which the Bank (or an affiliate of the Bank) acts as investment manager or investment advisor, then the Bank's . . . duties . . . may conflict with its rights as a secured party" and JPMC "does not assume any duty with respect to the Collateral," and JPMC had "no obligation to act in accordance with any fiduciary duty it (or its affiliates) may owe . . . as investment manager" in the event of a collateral liquidation.[35]

E. Peter Doelger's Initial Relationship With JPMC

Mr. Doelger banked with JPMC since at least the 1990s.[36] His long-time advisor at JPMC was Bob Devens.[37] When Devens retired around 2009, Douglas Moon became the relationship manager for Mr. Doelger.[38]

In April 2009, to open a brokerage account (the "Brokerage Account") with JPMorgan Securities ("JPMS"), Mr. Doelger signed an application indicating, inter alia, that his personal trading experience was as follows: 20+ years' experience trading stocks and bonds, 15+ years'

[31] Def. SOF ¶ 61; Pl. Resp. ¶ 61.
[32] Def. SOF ¶ 57; Pl. Resp. ¶ 57.
[33] Def. SOF ¶¶ 58, 59; Pl. Resp. ¶¶ 58, 59.
[34] Def. SOF ¶ 62; Pl. Resp. ¶ 62; Docket Nos. 276-84 at 5; 276-93 at 17-18.
[35] Id.
[36] Pl. SOF ¶ 234; Def. Resp. ¶ 234.
[37] Pl. SOF ¶ 235; Def. Resp. ¶ 235.
[38] Pl. SOF ¶ 238; Def. Resp. ¶ 238.

experience trading options, and 10+ years' experience trading structured products, emerging markets, and hedge funds/private placements."[39] The Brokerage Account was used, in part, to hold MLPs outside of the Doelgers' managed accounts for tax reasons.[40]

F. Peter Doelger's Master Limited Partnership Investments With Defendants

Over the five-year period beginning when Mr. Doelger first opened his LOC in October 2009 and ending in October 2014, Mr. Doelger's MLP investments increased in value by over $25 million.[41] During that period, the MLP sector outperformed the S&P 500.[42] Over that five-year period, Mr. Doelger's MLP investments generated an average of $1,500,000 in annual distributions.[43] During the same time period, those MLP investments generated approximately $32,500,000 in total gain to Mr. Doelger.[44]

In late 2014, MLPs began to decline.[45] In December 2014, James Baker, a JPMC investment specialist, had a phone call with Mr. Doelger during which they discussed recent volatility in MLP prices.[46] Following the conversation, Baker wrote an email to Douglas Moon in which he stated:

> Peter mentioned he believed the fall in oil prices and MLPs would correct itself in the medium term as it would lead to a pickup in demand and a fall in supply. He explained he thought the recent weakness was being exasperated [sic] by hedge

[39] Def. SOF ¶ 16; The Doelgers do not dispute the contents of the document. However, they dispute that the information goes to Mr. Doelger's investment knowledge. Yet, Mr. Doelger's signature indicates his agreement to the content of the document. Mrs. Doelger lacks personal knowledge to dispute the contents of the document. Pl. Resp. ¶ 16. Docket No. 276-6 at 3.
[40] Def. SOF ¶¶ 31, 32; Pl. Resp. ¶ 31, 32.
[41] Def. SOF ¶ 63; The Doelgers do not dispute that there were gains, but dispute the value identified. In support, they assert that the account performance report is inadmissible. However, this court finds unpersuasive the Doelgers' arguments on admissibility. Because they have provided no facts or evidence of record to dispute Defendants' facts, Defendants' facts are deemed admitted for purposes of this motion. Pl. Resp. ¶ 63.
[42] Def. SOF ¶ 67; Pl. Resp. ¶ 67.
[43] Def. SOF ¶ 64; Pl. Resp. ¶ 64; see supra note 41.
[44] Def. SOF ¶ 65; Pl. Resp. ¶ 65 ; see supra note 41.
[45] Def. SOF ¶ 68; Pl. Resp. ¶ 68.
[46] Def. SOF ¶ 66; Pl. Resp. ¶ 66.

> funds and fast money momentum traders just leaning on the current trend. He noted he had been through several similar drawdowns in the past and from his experience once the market turns it often moves higher as sharply as it moves down and he is concerned that if he reduced his position here he will miss a rebound in prices.
>
> He explained he had help [sic] on to all of his investments in 2008 during the Lehman collapse and it was his general philosophy to not react to short term volatility. We reviewed his current excess margin and that it would take a $10 MM drop in the value of his collateral to cause a margin call, which he said made him feel more comfortable.
>
> I mentioned our view is that while we remain positive long-term on energy and MLPs, it is our belief that oil could continue to drift lower from here and we expected a lot of volatility in the space in the next 6-9 months. Peter disagreed and thought the recovery in price (of both Oil and MLPs) would likely happen much faster than that. He asked if I thought there was the possibility of another 10% downside in MLPs from here and I said that was definitely a possibility and it could certainly even be a worse drawdown than that.
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> He mentioned that the last 24 hours was the first time he became nervous about these positions and I told him that regardless of what happens from here he has made an exceptional amount of profits in these positions and if it would give him piece of mind he should reduce risk in this portfolio. He then responded he was not THAT concerned.
>
> He also mentioned he is going to have a significant tax bill from the Kinder Morgan mergers and as a result his accountant has advised he take some losses from his BIND position. He asked us to call Bruce together tomorrow to determine the magnitude of the gain that he was facing to help determine how much BIND should be sold. I warned him that due to low volume it could take a very long time to exit his 500k+ share position in the stock, so we would need to move very quickly if he wanted to make these transactions in 2014.[47]

In the spring of 2015, Mr. Doelger and JPMC discussed the idea of switching MLP managers, specifically to JPMC's Master Limited Partnership & Energy Infrastructure ("MLPEI") portfolio strategy[48] which was managed by Chickasaw.[49] Chickasaw is a registered

[47] Docket No. 276-32 at 2.

[48] JPMC had a variety of advisory programs presented in the form of twenty-two different Portfolios Schedules that it offered to clients. Pl. SOF ¶ 283; Def. Resp. ¶ 283. The MLP Program was one of the Portfolio Schedules. Id.

[49] Def. SOF ¶ 71. The Doelgers dispute whether Mr. Doelger initiated the conversation, but they do not dispute that discussions occurred. Pl. Resp. ¶ 71.

investment advisor under the Investment Advisors Act ("the Advisors Act").[50]

On August 10, 2015, both Doelgers met with Baker and Chickasaw representatives Ed Kelly and Geoffrey Mavar in New York.[51] Chickasaw gave a presentation at the beginning of the meeting concerning MLPs.[52] The August 10, 2015, meeting was the only in-person meeting between Chickasaw and the Doelgers during which the Doelgers' new account (the "Advisory Account") was discussed.[53] Mr. Doelger indicated to Baker that he wanted to work with Defendants to begin transitioning his MLP investments to the MLPEI portfolio.[54]

1. Master Limited Partnership Investments

a. The 2015 Advisory Agreement

During the August 10, 2015, meeting, Mr. Doelger signed a personal account application (the "2015 Advisory Agreement") to open the Advisory Account.[55] The 2015 Advisory Agreement attached to the Doelgers' complaint indicates that Mr. Doelger's liquid and total net worth was $100 million, and the investment amount was $30 million.[56] Docket No. 1-2 at 15. As a general matter, the advisory fees that Defendants received from the Advisory Account were based on the assets under management in that account.[57]

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[50] Pl. SOF ¶ 509; Def. Resp. ¶ 509.
[51] Def. SOF ¶ 73; Pl. Resp. ¶ 73; Pl. SOF ¶ 269; Def. Resp. ¶ 269.
[52] Pl. SOF ¶ 271; Def. Resp. ¶ 271.
[53] Def. SOF ¶ 74; Pl. Resp. ¶ 74.
[54] Def. SOF ¶ 77. Although the Doelgers dispute this statement, the document to which they cite does not provide contradictory evidence. Pl. Resp. ¶ 77.
[55] Def. SOF ¶ 79. While the Doelgers dispute the substance of the document that Mr. Doelger signed on August 10, 2015, they do not dispute that he signed a document to open a new account. Pl. Resp. ¶ 79; see also Docket No. 1-2.
[56] Def. SOF ¶ 79. The Doelgers dispute that the document cited (Docket No. 1-2), is the document that Mr. Doelger signed. Pl. Resp. ¶ 79. Specifically, the Doelgers assert that JPMC switched out pages in the 2015 Advisory Agreement after Peter Doelger signed it. Id. They point to various emails and account documents that contain net worth and investment amount numbers that do not match the numbers in the personal account application. Id. They have not, however, provided any evidence supporting their assertion that Defendants swapped out pages.
[57] Pl. SOF ¶ 405; Def. Resp. ¶ 405.

Prior to signing the 2015 Advisory Agreement, Mr. Doelger represented to Baker that his net worth was in the range of $100 million.[58] In addition to the Doelgers' assets held with JPMC, JPMC understood that Mr. Doelger held assets with other financial institutions.[59] Under the 2015 Advisory Agreement, JPMC agreed to collect information about Mr. Doelger's "financial circumstances, investment objectives, risk tolerance, and requirements for the Account."[60] Under that agreement, Mr. Doelger selected the MLPEI strategy, which the Portfolio Schedule specified was "to invest in publicly traded partnerships, limited liability companies and corporations [i.e., MLPs], predominantly in the energy sector," and was managed by Chickasaw.[61] With respect to ongoing services, the 2015 Advisory Agreement provided:

> On an ongoing basis, the Bank will respond to Client inquiries, periodically consult with Client to update Client's financial information and investment objectives, periodically review the activity in and investment results of each Portfolio with Client, and assist Client in determining whether to make any changes to Client's selection of Portfolios. Client may modify the selection of Portfolios at any time.[62]

The Advisory Agreement specifically incorporated JPMC's General Terms for Accounts and Services ("the General Terms").[63] The General Terms state, inter alia:

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[58] Def. SOF ¶ 103. The Doelgers dispute this statement. However, the admissible evidence they cite to does not contradict this statement of fact. Pl. Resp. ¶ 103. For example, in paragraph 64 of the Yoon Declaration, Mrs. Doelger states that Mr. Doelger told her that it "was never true" that there was "a letter that said that he had $100 million." Docket No. 300-9 ¶ 64. It is unclear if "never true" refers to the letter, the $100 million, or both. In any event, the statement is hearsay and may not be considered. The document itself states Mr. Doelger's net worth was $100,000,000. He signed the document on August 15, 2015, and explicitly certified its accuracy. Docket No. 276-43 at 15, 18.

[59] Def. SOF ¶ 104; Pl. Resp. ¶ 104.

[60] Def. SOF ¶ 80; Pl. Resp. ¶ 80.

[61] Def. SOF ¶ 82. The Doelgers dispute this statement, but they do not dispute that, under the agreement, Mr. Doelger chose the MLPEI strategy (regardless of whether other strategies were offered). Pl. Resp. ¶ 82.

[62] Def. SOF ¶ 84; Pl. Resp. ¶ 84.

[63] Def. SOF ¶ 85. The Doelgers dispute this statement on the basis that it contains improper legal argument. Pl. Resp. ¶ 85. However, the Advisory Agreement states "[t]his Agreement is subject to and incorporates the J.P. Morgan General Terms for Accounts and Services." Docket No. 276-55 at 10 ¶ 8.

> [T]his Agreement shall be governed by the law of the State of New York without giving effect to its choice of law or conflict of laws provisions (other than Section 5-1401 of the New York General Obligations Law) and JPMC's legal liability shall be limited to acts of "gross negligence and willful misconduct.[64]

Chickasaw is not a signatory to the 2015 Advisory Agreement.[65] JPMC and Chickasaw signed an Agreement for Investment Management Services ("AIMS") on November 18 and 19, 2014.[66] They also signed a term sheet associated with the Advisory Account on September 10 and 11, 2015 (the "2015 Term Sheet").[67] These documents set forth Chickasaw's duties with respect to its provision of investment management services to the Doelgers.[68]

After Mr. Doelger signed the 2015 Advisory Agreement, JPMC took steps to collect information from him, including financial information and investment objectives.[69]

In an August 28, 2015, email, Baker conveyed his understanding that Mr. Doelger had extensive investing experience with MLPs.[70] Specifically, Baker stated that Mr. Doelger "worked in the utility/energy business for 30 years before selling his business to Honeywell in the late 1990s" and "has extensive experience investing in MLPs" which started in the late 1990s. He further stated that Mr. Doelger "understands the sector and the industry very well and is comfortable holding a large portion of his portfolio in these type of assets." Mr. Doelger also

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[64] Def. SOF ¶ 86; Docket No. 276-62 at 9-10 ¶¶ 11, 18. The Doelgers claim this statement contains improper legal argument. They do not dispute that the General Terms contain the quoted language. Pl. Resp. ¶ 86.
[65] Def. SOF ¶ 93; Pl. Resp. ¶ 93.
[66] Def. SOF ¶ 94; Pl. Resp. ¶ 94.
[67] Def. SOF ¶ 96; Pl. Resp. ¶ 96.
[68] Def. SOF ¶ 98; Pl. Resp. ¶ 98.
[69] Def. SOF ¶ 99. The Doelgers take issue with the extent to which JPMC collected information, but they do not actually dispute that JPMC took steps to gather the same. Pl. Resp. ¶ 99.
[70] Def. SOF ¶ 100; Pl. Resp. ¶ 100. The Doelgers do not dispute that Baker made the statements in the email. Rather they dispute that this email describes conversations between Mr. Doelger and Baker. In support, they rely on Yoon Doelger's declaration. The cited paragraphs, however, do not actually dispute the contents of the email. Even if they did, the paragraphs contain impermissible hearsay which this Court may not consider.

"had a large allocation to MLPS throughout the last decade, never reducing his position in 2008 or in the recent Oil market downturn."[71] Baker further stated that "we have told [Mr. Doelger] on multiple occasions that we believe his allocation to the asset class is too high" and that Mr. Doelger responded that "he is comfortable with the risks and believes in the opportunity in the [MLP] space long term."[72]

The Doelgers maintain that the MLP program was subject to, at least as of December 2014, two suitability limits: (1) for the MLP program, an investment limit equal to five per cent of the client's liquid net worth; and (2) across all Advisor program strategies, an investment limit of fifty per cent of the client's net worth.[73] JPMC would allow clients to exceed the five per cent suitability restriction.[74] Defendants dispute that a fifty per cent limit with respect to a client's net worth was universally applied.[75] Whether Mr. Doelger's net worth was $50 million or $100 million, his $33 million investment in MLPs exceed the five per cent suitability limit.[76]

b. The MLPEI Letter

Before accepting the transfer of Mr. Doelger's MLP account from Atlantic Trust, JPMC requested that Mr. Doelger sign a letter confirming the representations he had made to JPMC and acknowledging that his requested investment amount was larger and more concentrated than what JPMC recommended for someone with his net worth (the "MLPEI Letter").[77] On September 30, 2015, Baker emailed a copy of the MLPEI Letter to Mr. Doelger's lawyer, Paul Roberts, which he received, printed, and filed in chronological order in his file folder.[78]

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[71] Id.; Docket No. 276-50 at 2.
[72] Id.
[73] Pl. SOF ¶¶ 285, 288; Def. Resp. ¶¶ 285, 288.
[74] Pl. SOF ¶ 288.
[75] Def. Resp. ¶ 288.
[76] Pl. SOF ¶ 290; Def. Resp. ¶ 290.
[77] Def. SOF ¶ 110; Pl. Resp. ¶ 110.
[78] Def. SOF ¶¶ 114, 115; Pl. Resp. ¶¶ 114, 115.

On October 1, 2015, during an in-person meeting at JPMC's Boston office, Mr. Doelger signed the MLPEI Letter.[79] The MLPEI Letter states as follows:

> Dear Mr. Doelger,
>
> You have informed us that you currently hold approximately $45,000,000 in Master Limited Partnerships (''MLPs") managed by Atlantic Trust Group LLC ("Atlantic Trust"), and that you would like to diversify the "manager concentration risk'' present in your existing MLP portfolio by transferring approximately $33,000,000 of your existing Atlantic Trust MLP holdings for an approximate $33,000,000 investment in a JPMorgan Chase Banking N.A. ("JPMCB") Opportunistic Advisory Program ("OAP") - specifically, the Master Limited Partnership & Energy Infrastructure (''MLPEI") offering managed by Chickasaw Capital Management LLC ("Chickasaw Capital').
>
> As we have previously explained to you, while we generally recommend an investment in the MLPEI offering, we only do so to suitable clients, in suitable proportions. The size of your proposed investment, relative to your overall net worth is not recommended and raises concerns which we wish to share with you. Specifically, and given that you have a liquid net worth or approximately $100,000,000, we cannot recommend that you make a $33,000,000 investment in the MLPEI offering. For reference, when advising a client with a $l00,000,000 net worth, we would generally recommend an investment no larger than 5% of such client's net worth in the MLPEI offering. Your proposed investment in MLPEI offering would result in an investment greater than 30% of your net worth. Instead of your suggested approach, we would recommend that you diversify your portfolio with asset allocations commensurate with your investment objectives. As we have done so in the past, we urge you to reduce your overall exposure to the MLP structures, and remind you that while we do not expect material liquidity issues to arise with the proposed investment you may have little to no ability to sell or transfer these assets to limit losses in a severe correction, as has occurred with this sector in the past.
>
> Notwithstanding the foregoing, we note that you have represented to us that you (a) were a professional in the utility/energy industry, (b) are financially knowledgeable and sophisticated, and capable of making your own assessment of the investment risks associated with an investment in the MLPEI offering without relying on us, and (c) understand the unique liquidity profiles and risk considerations of the proposed MLPEI offering. Furthermore, you have informed us that you are fully aware of the concentration risk created by your existing investment in MLPs and by your proposed investment in the MLPEI offering. As such, and in consideration of JPMCB making the MLPEI offering available to you, you agree as follows:
>
> 1. You confirm that you are an "institutional account" as defined by FINRA Rule

[79] Def. SOF ¶ 117; Pl. Resp. ¶ 117.

4512(c) in that you have total assets of at least $50 million as of the date hereof and that you are (a) capable of evaluating investment risks independently both in general and with regard to all transactions and investment strategies involving a security or securities; and (b) will exercise independent judgment in evaluating the recommendations of any broker-dealer or its associated persons.

2. You confirm that prior to investing in the MLPEI offering you have received the applicable offering documentation and have made your own analysis and investigation and consulted such investment, legal, tax, accounting and other advisers as you have deemed necessary. You have concluded that the investment, including with respect to the size of the investment when compared to your overall net worth, is suitable for you in light of your investment objectives and your financial capabilities, that you have such knowledge and experience in financial and business matters as to be capable of evaluating the merits and risks of the investment and you are making the investment with a full understanding of all of the terms, conditions and risks and are willing to assume those terms, conditions and risks.

To the fullest extent permitted by applicable law, you agree to indemnify and hold harmless JPMorgan Chase Bank, N.A., J.P. Morgan Securities LLC, and their affiliates (collectively "JPMorgan") from and against any and all liabilities, obligations, losses, damages. fines, penalties, claims, demands, actions, suits or proceedings, costs, expenses and disbursements (including legal and accounting fees and expenses, costs of investigation and sums paid in settlement) of any kind or nature whatsoever which may be imposed on, incurred by or asserted at any time against JPMorgan in the event that any of the confirmations, statements or agreements made by you as reflected in this letter are incomplete or incorrect in any respect. To the fullest extent permitted by applicable law, you agree to pay the expenses (including legal fees and expenses and costs of investigation) covered by this indemnity and incurred by JPMorgan as such expenses are incurred.[80]

Chickasaw was not a signatory to the MLPEI Letter.[81] After Mr. Doelger signed the MLPEI Letter, JPMC agreed to open the Advisory Account.[82] Following Mr. Doelger's signing of the letter, JPMC employees exchanged congratulatory emails.[83]

c. Investments Between 2014 and 2019

From 2014 to 2019, MLPs generally declined in value and underperformed versus the

[80] Docket No. 276-67 at 3-5.
[81] Def. SOF ¶ 122; Pl. Resp. ¶ 122.
[82] Def. SOF ¶ 124; Pl. Resp. ¶ 124.
[83] See, e.g., Pl. SOF ¶¶ 355, 357, 358; Def. Resp. ¶¶ 355, 357, 358.

broader stock market.[84] At various times between 2015 and 2019, the Doelgers came within a 10% decline in MLP prices from a margin call on their LOC secured by the assets in, inter alia, the Advisory Account.[85] During that time, JPMC repeatedly suggested that the Doelgers consider reducing their exposure to MLPs and pay down their LOC. For example, during a two-hour meeting at their Palm Beach home in February 2016, the Doelgers and Baker discussed selling MLPs and paying down the LOC.[86] In August 2017, October 2018, and April 2019 emails, Baker encouraged the Doelgers to sell MLPs and/or pay down the LOC.[87] Nevertheless, on a number of occasions, including in the face of a potential margin call, the Doelgers declined to sell MLPs and reduce debt.[88]

While the complaint and Defendants' opposition memorandum largely focus on the LOC and MLPs, Mr. Doelger also engaged in non-MLP transactions with JPMC during the 2014-2019 time period. In late 2014, Mr. Doelger executed a transaction with JPMC in which he converted his dollar-denominated LOC to euros.[89] Mr. Doelger would profit from this transaction if the dollar rose against the euro.[90] Mr. Doelger exited that transaction in late 2015 by converting the LOC back to dollars, realizing a gain of approximately $1.9 million.[91]

In late 2016, Mr. Doelger entered into a cross-currency swap with JPMC that would functionally convert his U.S. dollar-denominated debt into euros, which would reduce his loan interest payments and, if the value of the euro dropped against the dollar, would generate profit.[92]

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[84] Def. SOF ¶ 130; Pl. Resp. ¶ 130.
[85] Def. SOF ¶ 132. The Doelgers dispute the use of the word "various", but they do not cite to any evidence contradicting it. Pl. Resp. ¶ 132.
[86] Docket No. 276-74 at 2.
[87] Docket No. 304 at 28; Docket Nos. 276-100; 276-109; 276-114.
[88] Def. SOF ¶ 66; Pl. Resp. ¶ 66. See, e.g., Docket Nos. 276-32 at 2; 276-135 at 2-3.
[89] Def. SOF ¶ 170; Pl. Resp. ¶ 170.
[90] Id.
[91] Def. SOF ¶¶ 171, 172; Pl. Resp. ¶¶ 171, 172.
[92] Def. SOF ¶ 165; Pl. Resp. ¶ 165.

JPMC was the counterparty to the swap.[93] Mr. Doelger signed several agreements in connection with this transaction, including a December 8, 2016 agreement (the "ISDA Agreement") which explicitly stated that "[t]he other party is not acting as a fiduciary for or an advisor to it in respect of that Transaction."[94] Ultimately, the euro rose against the dollar while the cross-currency swap was in place, and Mr. Doelger lost approximately $1.18 million on the trade when he closed out the position in July 2017.[95]

Mr. Doelger also entered into a rate cap transaction with JPMC in March 2018 in which he purchased an option relating to the interest rate on his LOC.[96] In connection with that rate cap transaction, Mr. Doelger signed an agreement with JPMC which stated that JPMC was "not acting as a fiduciary for or an adviser to" Mr. Doelger in connection with that transaction.[97]

G. Yoon Doelger Is Added As Joint Owner Of The Advisory Account

In June 2019, Mrs. Doelger was added to the Advisory Account. As a result, both Doelgers signed a June 21, 2019, Advisory Account Agreement ("2019 Advisory Agreement").[98] Like the 2015 Advisory Agreement, the 2019 Advisory Agreement incorporated the General Terms by reference.[99] As with the 2015 Advisory Agreement, Chickasaw was not a signatory to the 2019 Advisory Agreement.[100] JPMC and Chickasaw signed the term sheet associated with the 2019 Advisory Agreement on June 20, 2019 (the "2019 Term Sheet").[101]

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[93] Pl. SOF ¶ 428; Def. Resp. ¶ 428.
[94] Def. SOF ¶ 166; Pl. Resp. ¶ 166.
[95] Def. SOF ¶ 167; Pl. Resp. ¶ 167.
[96] Def. SOF ¶ 173. The Doelgers dispute this statement, but they do not dispute that Mr. Doelger entered into the rate cap transaction. Pl. Resp. ¶ 173.
[97] Def. SOF ¶ 174; Pl. Resp. ¶ 174.
[98] Def. SOF ¶ 141; Pl. Resp. ¶ 141.
[99] Def. SOF¶ 144; Pl. Resp. ¶ 144; Docket Nos. 276-55; 276-126 at 11.
[100] Def. SOF ¶ 145; Pl. Resp. ¶ 145.
[101] Def. SOF ¶ 146; Pl. Resp. ¶ 146.

H. Master Limited Partnership Sales

In February and March 2020, as the COVID-19 outbreak spread, the Doelgers MLP holdings declined along with the broader stock market.[102] The Doelgers sold off a portion of their MLP holdings on March 9, 2020.[103] On March 13, 2020, the MLPs declined to $3.4 million.[104] On March 17, 2020, the Doelgers sold the remaining portion of their MLPs.[105] The Doelgers thereafter paid off their LOC.[106]

I. Peter Doelger's Mental Health

Mr. Doelger's mental health declined during the time he held investments with Defendants. For example, starting sometime between 2012 and 2014, Mr. Doelger became concerned that people were using radio frequencies or radiation to attack him.[107] A medical record with a result date of May 5, 2014, states that Mr. Doelger had a history of confusion, vertigo, and cognitive defects."[108] A June 10, 2014, MRI report for Mr. Doelger states that he had experienced recent and rapidly progressive dementia with an altered mental status.[109] On September 28, 2020, Dr. Angela Scicutella, M.D., Ph.D, examined Mr. Doelger and assessed him as having major depression with psychotic features and a suspected cognitive problem.[110] However, none of the doctors who evaluated Mr. Doelger from August 2015 through March 2020 recorded in his medical files any concerns about his ability to manage his own finances.[111]

[102] Def. SOF ¶ 150; Pl. Resp. ¶ 150.
[103] Def. SOF ¶ 151; Pl. Resp. ¶ 151.
[104] Pl. SOF ¶ 504; Def. Resp. ¶ 504.
[105] Def. SOF ¶ 155; Pl. Resp. ¶ 155.
[106] Def. SOF ¶ 156; Pl. Resp. ¶ 156; Pl. SOF ¶ 508; Def. Resp. ¶ 508.
[107] Pl. SOF ¶ 208; Def. Resp.¶ 208.
[108] Pl. SOF ¶ 210; Docket No. 301-2 at 2.
[109] Pl. SOF ¶ 211; Docket No. 301-4 at 2.
[110] Pl. SOF ¶ 218; Def. Resp.¶ 218; Docket No. 301-33 at 3.
[111] Def. SOF ¶ 162. The Doelgers dispute this statement, however they provide no contradictory evidence. Pl. Resp. ¶ 162.

Moreover, according to Mrs. Doelger's sworn testimony and the Doelgers' responses to JPMC's requests for admission, Mr. Doelger reviewed and understood the complaint in the instant case before approving its filing in 2021.[112]

Mrs. Doelger stated that on several occasions she told Baker that Mr. Doelger had memory problems.[113] However, prior to February 2021, neither the Doelgers nor their family or representatives told JPMC that Mr. Doelger was: (1) suffering from dementia or depression; (2) diagnosed with any mental health condition; or (3) receiving treatment for any mental health condition.[114]

III. STANDARD OF REVIEW

Summary judgment is appropriate "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is "genuine" when a rational factfinder could resolve it in either direction. Borges ex rel. S.M.B.W. v. Serrano-Isern, 605 F.3d 1, 4 (1st Cir. 2010) (citation omitted). A fact is "material" when its (non) existence could change a case's outcome. Id. (citation omitted). This Court takes the facts from the parties' summary judgment filings and from the record at large where appropriate. See Evergreen Partnering Grp., Inc. v. Pactiv Corp., 832 F.3d 1, 4 n.2 (1st Cir. 2016).

The moving party bears the initial burden of establishing that there is no genuine issue of material fact. See Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If that burden is met, the opposing party can avoid summary judgment only by providing properly supported evidence of disputed material facts that would require trial. See id. at 324. "[T]he non-moving party 'may not

[112] Def. SOF ¶ 197; Pl. Resp. ¶ 197.
[113] Def. SOF ¶ 164; Pl. Resp. ¶ 164.
[114] Def. SOF ¶¶ 158-61; Pl. Resp. ¶¶ 158-61.

rest upon mere allegation or denials of his pleading,'" but must set forth specific facts showing that there is a genuine issue for trial. LeBlanc v. Great Am. Ins. Co., 6 F.3d 836, 841 (1st Cir. 1993) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986)). The non-moving party must produce evidence that is "significant[ly] probative." Borges, 605 F.3d at 5 (citing Anderson, 477 U.S. at 249).

The Court "must scrutinize the evidence in the light most agreeable to the nonmovants, who are entitled to the benefit of all reasonable inferences therefrom." Ahern v. Shinseki, 629 F.3d 49, 53-54 (1st Cir. 2010) (citing Cox v. Hainey, 391 F.3d 25, 29 (1st Cir. 2004). "A properly supported summary judgment motion cannot be defeated by relying upon conclusory allegations, improbable inferences, acrimonious invective, or rank speculation." Ahern, 629 F.3d at 54 (citations omitted). Indeed, "[a]s to any essential factual element of its claim on which the nonmovant would bear the burden of proof at trial, its failure to come forward with sufficient evidence to generate a trialworthy issue warrants summary judgment to the moving party." McRory v. Spigel (In re Spigel), 260 F.3d 27, 31 (1st Cir. 2001) (citation omitted). "If, after viewing the record in the non-moving party's favor, the Court determines that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law, summary judgment is appropriate." Walsh v. Town of Lakeville, 431 F. Supp. 2d 134, 143 (D. Mass. 2006).

IV. ANALYSIS

A. Choice-Of-Law

The parties disagree about whether Massachusetts, New York, or Florida law applies to the Doelgers' claims. Defendants assert that the 2015 and 2019 Advisory Agreements incorporate the General Terms, which include a New York choice-of-law provision. Docket No. 304 at 36, 60. Defendants argue that New York law therefore applies to the Doelgers' contract-

based claims, as well as any other claims arising out of a duty from those contracts. Id. at 36, 44 n.62, 53 n.88, 56 n.101, 60. Defendants further assert that to the extent that New York law does not apply, Florida law does. Id. at 60. The Doelgers contend that they did not see or agree to the General Terms and therefore Massachusetts law applies to both the contract-based claims and the remaining claims as well. Docket No. 309 at 34.

A federal court sitting in diversity applies the choice-of-law framework of the forum state. Hansen v. R.I.'s Only 24 Hour Truck & Auto Plaza, Inc., No. 12-10477-NMG, 2013 WL 2491054, *3 (D. Mass. June 7, 2013) (citing Klaxon Co. v. Stentor Elec. Mfg. Co., 313 U.S. 487, 496 (1941)). In Massachusetts, a contract's choice-of-law provision is generally honored, provided that it does not conflict with public policy. NPS, LLC v. Ambac Assurance Corp., 706 F. Supp. 2d 162, 168 (D. Mass. 2010) (citing Feeney v. Dell Inc., 454 Mass. 192 (2009)).

However, under Massachusetts law, choice-of-law clauses are construed narrowly. Comp. Sales Int'l, Inc. v. Lycos, Inc., Civ. Act. No. 05-10017-RWZ, 2006 WL 1896192 (D. Mass. July 11, 2006). Massachusetts courts interpret even broad language encompassing "all matters of construction, validity, performance and enforcement" as "limit[ing] the scope of a choice of law provision to disputes arising out of the agreement[ ]." Id. at *2. Fraud claims, particularly those concerning the formation of the contract, "cannot be categorized as . . . involving the rights or obligations under the contract." Id.; see also Realty Finance Holdings, LLC v. KS Shiraz Manager, LLC, 86 Mass. App. Ct. 242, 247 (2014) (noting in dicta that "where the validity of the contract's formation is challenged, as with a claim of precontract misrepresentation or fraud in the inducement, . . . it is less likely that the contract's choice of law provision will be honored"). "Massachusetts courts have found that claims for fraudulent inducement fall outside the scope of [choice-of-law] provisions." Comp. Sales, 2006 WL 1896192 at *5.

When a choice-of-law provision does not apply, this Court's analysis defaults to Massachusetts' choice-of-law rules to determine which state's law should apply. Comp. Sales Int'l, Inc. v. Lycos, Inc., No. CIV.A.05-10017 RWZ, 2005 WL 3307507 (D. Mass. Dec. 6, 2005). "Massachusetts generally follows a functional approach to resolving choice of law questions on substantive matters[.]" Lou v. Otis Elevator Co., 77 Mass. App. Ct. 571, 583 (2010). Massachusetts's choice-of-law inquiry is guided by "choice-influencing considerations" in the Restatement (Second) of Conflict of Laws. Longtin v. Organon USA, Inc., 363 F. Supp. 3d 186, 191 (D. Mass. 2018). The Restatement in turn looks to the state with "the most significant relationship to the occurrence and the parties[.]" Restatement 2d of Conflict of Laws § 145(1) (2nd 1988).

As a final note, "[i]t is a well-established—and prudential—principle that when the result in a case will not be affected by the choice of law, an inquiring court, in its discretion, may simply bypass the choice." Lexington Ins. Co. v. Gen. Accident Ins. Co. of Am., 338 F.3d 42, 46 (1st Cir. 2003) (internal punctuation and citation omitted).

This Court will analyze the choice-of-law issue with respect to individual claims in the corresponding sections below.

B. Declaratory Judgment - Count VI And Rescission Pursuant To 15 U.S.C. § 80b-15 - Count VII

The Doelgers seek a declaratory judgment that the MLPEI Letter is an invalid contract and/or is unenforceable. Docket No. 1 at 47. If the MLPEI Letter is a contract, then they seek rescission pursuant to 15 U.S.C. § 80b-15. Id. at 49.

1. Declaratory Judgment

Under the Declaratory Judgment Act, a court has substantial discretion in deciding whether to declare the rights of litigants. Penney v. Deutsche Bank Nat'l Trust Co., No. 16-cv-

10482-ADB, 2017 WL 1015002, at *9 (D. Mass. Mar. 15, 2017) (citation and internal quotation marks omitted). "The Act does not itself confer subject matter jurisdiction, but, rather, makes available an added anodyne for disputes that come within the federal courts' jurisdiction on some other basis." Ernst & Young v. Depositors Econ. Prot. Corp., 45 F.3d 530, 534 (1st Cir. 1995) (citing Franchise Tax Bd. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 15-16 (1983)). Indeed, a declaratory judgment is not a cause of action, but instead, a form of relief. Buck v. Am. Airlines, 476 F.3d 29, 33 n.3 (1st Cir. 2007). "It is designed to enable litigants to clarify legal rights and obligations before acting upon them." Ernst & Young, 45 F.3d at 534.

a. Choice-Of-Law

Both the analysis of the claim under Declaratory Judgment Act, 28 U.S.C. § 2201, and the 15 U.S.C. § 80b-15 claim are governed by federal law. With respect to the Declaratory Judgment Act, however, in diversity cases, state law governs the underlying substantive issues. Com. Union Ins. Co. v. Walbrook Ins. Co., 41 F.3d 764, 772-73 (1st Cir. 1994).

Defendants assert that New York law applies because the MLPEI Letter is a modification of the Advisory Agreement which contains a New York choice-of-law provision. Docket No. 304 at 33 (citing Davidowitz v. Patridge, No. 08 CIV. 6962 NRB, 2010 WL 5186803, at *9 (S.D.N.Y. Dec. 7, 2010)). The Doelgers rely on Massachusetts contract law to oppose summary judgment for these claims. See, e.g., Docket No. 309 at 53. In any event, all parties agree that New York and Massachusetts law are substantially similar with respect to contract law. See, e.g., id. at 36.

b. Analysis

i. Consideration

The Doelgers contend that the MLPEI Letter is invalid or unenforceable because it was not supported by consideration. Docket No. 1 ¶ 301; Docket No. 309 at 53 n.10. Defendants

counter that the consideration was referenced explicitly in the MLPEI Letter. Docket No. 304 at 33. Specifically, in "consideration of making the MLPEI offering available to" Mr. Doelger, he had to confirm the statements contained in the MLPEI Letter. Id. at 33-34. In other words, given the risk involved, JPMC would open the account only if Mr. Doelger confirmed the accuracy of the representations in the MLPEI Letter.

Under either New York or Massachusetts law, to form a valid contract, there must be an "offer, acceptance, and an exchange of consideration or meeting of the minds." Flaherty v. Park Plus, Inc., No. 1:22-CV-11909-NMG, 2023 WL 4995337, at *5 (D. Mass. June 22, 2023) (citations omitted); Harris v. Reagan, 199 N.Y.S.3d 264, 267-68 (2023). "Consideration requires imposing a legal detriment on the promisee and legal benefit on the promisor." Hannigan v. Bank of Am., N.A., 48 F. Supp. 3d 135, 140 (D. Mass. 2014) (citing Ekchian v. Thermo Power Corp., N. 00–P–1826, 56 Mass. App. Ct. 1116, 2002 WL 31856404, at *3 n.8 (Mass. App. Ct. 2002)); Anand v. Wilson, 32 A.D. 3d 808, 809 (N.Y.2d App. Div. 2006). "Under Massachusetts law, past consideration is insufficient to support a new promise; a retroactive contract must be supported by present consideration." Flaherty, 2023 WL 4995337, at *6 (citing Greater Boston Cable Corp. v. White Mountain Cable Const. Corp., 604 N.E.2d 1315, 1317 (Mass. 1992)); see also Lebedev v. Blavatnik, 142 N.Y.S.3d 511, 517-18 (2021) (past consideration cannot support a new agreement).

As stated in the MLPEI Letter, JPMC had "concerns" about Mr. Doelger's continued investment in MLPs and recommended instead that he "diversify [his] portfolio." Docket No. 276-67 at 3. The letter urges Mr. Doelger "to reduce your overall exposure to the MLP structures." Id. It also states "you may have little to no ability to sell or transfer these assets to limit losses in a severe correction, as has occurred with this sector in the past." Id. Nevertheless, as indicated in the letter, given Mr. Doelger's representations about his financial knowledge and

sophistication, and his acknowledgement that he was fully aware of the risk, JPMC would provide consideration of "making the MLPEI offering available" to Mr. Doelger if he agreed that certain statements were accurate and that he had made his own analysis (including legal and tax implications). Id. at 4. In addition, Mr. Doelger agreed to indemnify and hold harmless JPMC, JPMS, and their affiliates "in the event that any of the confirmations, statements or agreements made by you as reflected in this letter are incomplete or incorrect in any respect." Id.

The Doelgers argue that the portfolio was made available for past consideration – namely the signing of the August 10, 2015, Advisory Agreement, and other documents. Docket No. 309 at 53 n.10. Any consideration in the MLPEI Letter, the Doelgers argue, was "subsumed by the Advisory Agreement and the Term Sheet." Id. However, it is undisputed that the Advisory Account was not opened until October 1, 2015, after Mr. Doelger signed the MLPEI Letter.[115] The MLPEI Letter enabled the transfer of Mr. Doelger's account from Atlantic Trust.[116]

Accordingly, this Court finds that there was adequate consideration to form a contract.

ii. Hedge Clause

The Doelgers argue that the MLPEI Letter is an impermissible "hedge clause." Docket No. 309 at 51-52. The Doelgers' argument is legally and factually incorrect.

The Securities and Exchange Commission has expressed the opinion that there are few, if any, circumstances in which a hedge clause with a retail client would be consistent with its guidelines. Comm'n Interp. Regarding Standard of Conduct for Inv. Advisers, Rel. No. 5248, 2019 WL 3779889, at *4 n.31 (June 5, 2019). It defines a hedge clause as one that "purports to relieve an adviser from liability for conduct as to which the client has a non-waivable cause of action against the adviser provided by state or federal law". Id. The plain language of the MLPEI

[115] Def. SOF ¶ 124; Pl. Resp. ¶ 124.
[116] Def. SOF ¶ 110; Pl. Resp. ¶ 110.

Letter does not waive any non-waivable rights. Rather, it indemnifies JPMC from "incomplete or incorrect" representations from Mr. Doelger.[117] It is therefore not a hedge clause.

iii. Unconscionability

The Doelgers contend that the MLPEI Letter is unconscionable and the result of fraud. Docket No. 1 ¶ 307. Defendants respond that nothing in the record shows that the MLPEI Letter was the product of surprise or that its terms were unfair. Docket No. 304 at 34.

In order to prove that a contract's terms are unconscionable, "a plaintiff must show both substantive unconscionability (that the terms are oppressive to one party) and procedural unconscionability (that the circumstances surrounding the formation of the contract show that the aggrieved party had no meaningful choice and was subject to unfair surprise)." Boursiquot v. United Healthcare Servs. of Delaware, Inc., 98 Mass. App. Ct. 624, 630 (2020) (citations and internal quotation marks omitted); In re Conifer Realty LLC (EnviroTech Servs., Inc.), 964 N.Y.S.2d 735, 739 (2013).

Here, the letter asked Mr. Doelger, after consultation, to verify the accuracy of the letter's statements as to Mr. Doelger. Not only did Mr. Doelger sign, thereby agreeing to the accuracy of the statements, but did so after the opportunity to consult with his lawyer. Indeed, JPMC provided a copy of the letter to Mr. Doelger's lawyer by at least September 30, 2015.[118]

Accordingly, there is no evidence of record that shows that the circumstances surrounding the signing of the letter were unconscionable, nor was the letter itself.

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[117] Docket No. 276-67 at 4.

[118] Defendants maintain that Baker faxed a copy of the MLPEI Letter to Mr. Doelger's lawyer, which the Doelgers dispute. Def. SOF ¶ 113; Pl. Resp. SOF ¶ 113. This dispute, however, is not one about a material fact. The Doelgers do not dispute that JPMC emailed a copy to Mr. Doelger's lawyer on September 30, 2015, the day before it was signed on October 1, 2015. Def. SOF ¶ 114; Pl. Resp. ¶ 114.

iv. Fraudulent Inducement

Finally, the Doelgers seek a declaration that the MLPEI Letter is not enforceable because it was procured through fraudulent inducement. Docket No. 1 ¶ 303.

"A party who has been fraudulently induced by the defendant into entering a contract can rescind that contract." Griffin v. Coghill, No. 17-CV-11619-IT, 2018 WL 1122361, at *7 (D. Mass. Mar. 1, 2018) (citing Shaw's Supermarkets, Inc. v. Delgiacco, 575 N.E.2d 1115, 1117 (Mass. 1991)); Sokolow, Dunaud, Mercadier & Carreras LLP v. Lacher, 747 N.Y.S.2d 441, 446 (2002). "A contract induced by fraudulent misrepresentation is voidable." Griffin, 2018 WL 1122361, at *7 (citing Shaw's, 575 N.E.2d at 1117); VisionChina Media Inc. v. S'holder Representative Servs., LLC, 967 N.Y.S.2d 338, 343 (2013). "To show fraud in the inducement, a plaintiff must show 1) that the defendant made a false representation of material fact, 2) with knowledge of its falsity, 3) with the purpose of inducing the plaintiff to act thereon and 4) that the plaintiff relied upon the representation to his detriment." Id. (citations and internal quotation marks omitted).

The Doelgers have identified no such misrepresentations either in the complaint or their opposition. See Docket No. 309 at 53. To the extent they rely on allegations that there were false statements in the MLPEI Letter[119], that claim fails. The purpose of the letter was to have Mr. Doelger confirm the representations in the letter, and he was in the best position to know the truth of those representations.

Accordingly, summary judgment in favor of Defendants[120] should be granted with respect

[119] For example, the Doelgers allege that JPMC was in possession of other information that contradicted Mr. Doelger's net worth as stated in the MLPEI Letter. See Pl. SOF ¶ 295; Def. Resp. ¶ 295.

[120] The complaint does not specify which claims are asserted against which Defendants. However, Chickasaw was not a party to the MLPEI Letter. Count VI of the complaint contains

to this claim.

2. Rescission

The Doelgers claim that, to the extent that the MLPEI Letter is determined to be a contract, it is unenforceable under 15 U.S.C. § 80b-15, a provision of the Advisors Act. Docket No. 1 ¶ 310. Defendants argue that this claim fails because (1) JPMC is a bank, and the Advisors Act does not apply to banks; (2) even if the Advisors Act applied to JPMC, the statute of limitations bars rescission; and (3) the MLPEI Letter is not a hedge clause. Docket No. 304 at 31-32.

The Advisors Act does not apply to banks. Section 80b-15 provides for the rescission of investment advisors' contracts where they are created in violation of the Advisors Act. 15 U.S.C. §80b-15. The Advisors Act governs investment advisors. See 15 U.S.C. § 80b-1. The definition of investment advisors expressly excludes banks. 15 U.S.C. § 80b-2(a)(11); see also Am. Bankers Ass'n v. S.E.C., 804 F.2d 739, 747 (D.C. Cir. 1986). It is undisputed that JPMC is a bank.[121] Accordingly, the Doelgers' claim under the Advisors Act to rescind the MLPEI Letter fails, and this Court recommends that summary judgment be granted in favor of Defendants[122] with respect to this claim.

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no allegations against Chickasaw. Accordingly, Count VI fails as a matter of law against Chickasaw.

[121] The Doelgers argue that the Advisors Act applies because JPMS is an affiliate of JPMC and is covered by the Advisors Act. Docket No. 309 at 53. However, JPMS is not a party to this case. At a late stage in the proceedings, the Doelgers sought to add JPMS as a defendant. Docket No. 230. On September 21, 2023, this Court denied the corresponding motion to amend the complaint. Docket No. 271. Judge Kelley subsequently adopted this Court's report and recommendation. Docket No. 343.

[122] Summary judgment in favor of Chickasaw is appropriate because it was not a party to the MLPEI Letter.

C. Breach Of Contract – Count II And Breach Of The Covenant Of Good Faith And Fair Dealing – Count V

The Doelgers assert claims for breach of contract and breach of the covenant of good faith and fair dealing on the basis that Defendants breached the Advisory Agreements.

1. Choice-Of-Law

The Advisory Agreements incorporate the General Terms,[123] including a New York choice-of-law provision. The parties dispute whether New York or Massachusetts law should apply to the resolution of these claims. This Court, however, will bypass the choice-of-law analysis here because the parties agree that the law is similar in Massachusetts and New York. Docket Nos. 304 at 36 n.38, 41 n.56; 309 at 46.

2. Breach Of Contract

In their complaint, without any citation to any particular provision, the Doelgers allege that Defendants breached the 2015 and 2019 Advisory Agreements "by failing to invest the Doelgers' funds in accordance with the Doelgers' investment objectives" and "by failing to perform routine portfolio reviews to determine whether their recommended investment strategy was in the best interest of the Doelgers." Docket No. 1 ¶¶ 264, 265. In their opposition memorandum, without quoting any specific language, they allege that Defendants violated Sections 1(A), (C), (D), and (E) of the Advisory Agreements. Docket No. 309 at 46.

Under Massachusetts law, to prove a breach of contract claim, the plaintiff must show that "a valid, binding contract existed, the defendant breached the terms of the contract, and the plaintiff[ ] sustained damages as a result of the breach." Brooks v. AIG Sunamerica Life Assurance Co., 480 F.3d 579, 586 (1st Cir. 2007) (citation omitted). Under New York law, "[t]he essential elements of a cause of action to recover damages for breach of contract are the

[123] Docket Nos. 276-55 at 11 ¶ 8; 276-126 at 11 ¶ 8.

existence of a contract, the plaintiff's performance pursuant to the contract, the defendant's breach of its contractual obligations, and damages resulting from the breach." Waldorf v. Waldorf, No. 2021-08659, 2023 WL 8609197, at *1 (N.Y. App. Div. Dec. 13, 2023). However, under either state's law, the Plaintiffs must specify which terms were breached.[124] See Foss v. Marvic, 365 F. Supp. 3d 164, 167 (D. Mass. 2019), aff'd, 994 F.3d 57 (1st Cir. 2021); LMEG Wireless, LLC v. Farro, 140 N.Y.S.3d 593, 596 (2021). The Doelgers have not done so here, and their breach of contract claims fail for this reason alone.

While the Doelgers cite to Sections 1(A), (C),(D), and (E), they do not provide the specific contract language that was breached. Indeed, their claims of breach based on these sections make little sense. For example, Section 1(A) pertains to client information. Docket No. 276-44 at 7 ¶ 1(A). It provides that JPMC will collect information about the client but that the client will notify the bank of any changes to the information provided to the bank and provide information as requested by the bank. Id. It also states that JPMC will rely on the information provided by the client and have no liability for the client's failure to provide JPMC with accurate information. Id. It is hard to imagine what part of this section, which largely places obligations on the Doelgers, JPMC breached.

Section 1(D) provides JPMC with investment discretion. Id. ¶ 1(D). It is a lengthy section with multiple paragraphs, and the Doelgers have not identified which part of this section Defendants allegedly breached. Nor have they explained how JPMC could breach a section of a contract that provides it with "full discretion to make purchases, sales, exchanges, or investments or to take any other action that it deems necessary or desirable as to each Portfolio and the Assets

[124] The Doelgers must also prove causation. Their opposition memorandum failed to address Defendants' arguments that the Doelgers lack evidence of causation. In their sur-reply, the Doelgers admit that they did not respond to this argument because it was "ridiculous." Docket No. 338 at 14-15.

invested in any Portfolio." Id. ¶ 1(D)(i). The discretion was also subject to the "annexed Portfolio Schedule." Id. Here, Mr. Doelger selected the MLPEI Strategy, which the Portfolio Schedule specified was to invest in MLPs.[125]

The Doelgers do argue that JPMC breached the contract by not presenting portfolios in line with the Doelgers' investment objectives and "materially" failing to update the Doelgers' information and objectives. Docket No. 309 at 46-47. Such arguments overlap with language in Sections 1(C) and (E) but no specific contract language is provided, and no specific statements of fact are relied on to support the points made.[126] Even if the Doelgers are suggesting that the alleged failure to identify portfolios constitutes a breach, the language of the contract provides otherwise. Section 1(C)(i) only required JPMC to identify and present to the client one or more portfolios available through the program for investment of assets. Docket No. 276-44 at 7 ¶ 1(C)(i). JPMC was not required to determine itself that those portfolios were in line with the Doelgers' stated investment objectives. Rather, the client was solely responsible and had final decision-making authority for making such choices. Id.

Assuming the purported material failure to update claim relies on Section 1(E), the opposition fails to explain how the provision was breached. It states that JPMC kept the Doelgers in MLPs. Docket No. 309 at 47. However, this was an investment strategy selected by Mr. Doelger and, given that the contract provides that the client was solely responsible for investment decisions, the Doelgers have not created a genuine issue of material fact that would prevent the granting of summary judgment to JPMC on this count. With respect to Chickasaw, there is no dispute that it was not a party to the subject contracts. Therefore, it is entitled to

[125] Def. SOF ¶ 82; Pl. Resp. ¶ 82.
[126] The Doelgers rely on SOF ¶¶ 580 and 591 but these statements of fact either do not directly support the statements in the memorandum or are not supported by the evidence cited.

summary judgment on this claim as well.

3. Breach Of The Covenant Of Good Faith And Fair Dealing

"Under both New York and Massachusetts law, a covenant of good faith and fair dealing is implied in every contract." Fine v. Guardian Life Ins. Co. of Am. & Park Ave. Sec., 450 F. Supp. 3d 20, 27 (D. Mass. 2020) (citations and internal quotation marks omitted). In both jurisdictions, "the covenant provides that neither party shall do anything that will have the effect of destroying or injuring the rights of the other party to receive the fruits of the contract." Id. "The implied covenant does not . . . operate to create new contractual rights; it simply ensures that parties to a contract perform the substantive, bargained-for terms of their agreement and that parties are not unfairly denied express, explicitly bargained-for benefits." Id. (alteration in original).

Defendants provided a detailed refutation complete with evidentiary support of the complaint's allegations of any breach of the covenant of good faith and fair dealing. Docket No. 304 at 43-44. In response, Plaintiffs only offer three conclusory sentences without citations. Docket No. 309 at 48. For example, they state, without citation, that "the record is replete with examples of JP Morgan's breach of the covenant of good faith and fair dealing." Docket No. 309 at 48. This Court should not have to scour the record to find those examples. Endicott Constr. Corp. v. E. Amanti & Sons, Inc., No. 1:14-CV-12807-LTS, 2017 WL 3028877, at *15 n.166 (D. Mass. July 14, 2017). In addition, Chickasaw was not a party to the Advisory Agreements. There is no claim for a breach of good faith and fair dealing in the absence of a contract. Accordingly, there can be no claim against Chickasaw on this theory.

The Doelgers have not met their burden to show that a genuine issue of material fact

prevents the award of summary judgment on this claim.[127] Defendants' motion with respect to this claim should be granted.

D. Tort Claims[128]

1. Choice-Of-Law

Whether tort claims are to be governed by a choice-of-law provision depends on the intention of the parties reflected in the phrasing of specific clauses and the facts of each case. See McAdams v. Massachusetts Mut. Life Ins. Co., No. 99-30284-FHF, 2002 WL 1067449, at *12 (D. Mass. May 15, 2002). When the fundamental source of any duty owed by a defendant to a plaintiff is derived from a contractual relationship, including a claim for breach of fiduciary duty, then the choice-of-law provision should apply to non-contract claims. Alantra LLC v. Apex Indus. Tech. LLC, 636 F. Supp. 3d 223, 238 n.5 (D. Mass. 2022).

Defendants argue that the choice-of-law provision governs analysis of the breach of fiduciary claims. Docket No. 304 at 44 n.62. By its terms, however, that provision applies only to the interpretation of the agreement itself. See Docket No. 276-55 at 10 ¶ 8 ("this Agreement shall be governed by the law of the State of New York").

Plaintiffs argue that Massachusetts law should apply to the tort claims. Docket No. 309 at 36. Under Massachusetts law, which follows the Restatement (Second), rights and liabilities in tort are determined by the state law which, with respect to that issue, has the most significant relationship to the parties and the occurrence. Jenny B. Realty LLC v. Danielson, Inc., 456 F.

[127] This Court also notes that the Doelgers have not responded to Defendants' argument that the good faith and fair dealing claim is duplicative of their contract claim and/or impermissibly seeks extra-contractual rights. These arguments provide alternative reasons to grant summary judgment for Defendants on this claim.

[128] Defendants make a statute of limitations argument that affects all of their tort claims. Because this Court finds that summary judgment in favor of the Defendants is warranted on the merits, it does not address Defendants' timeliness argument.

Supp. 3d 307, 316 (D. Mass. 2020). Here, the Doelgers lived at least part of the year in Massachusetts and assert that "almost every relevant event in this dispute occurred" at JPMC's Boston office. Docket No. 309 at 35.

In any event, Defendants allow that, with respect to claims of breach of fiduciary and negligent misrepresentation, Massachusetts law and New York law are comparable. Docket No. 304 at 44 n.62, 56 n.101. In addition, with respect to the Doelgers' negligence/gross negligence claim, "both Massachusetts and New York courts will uphold tort claims to recover economic losses caused by the negligent breach of a contractual obligation." Szulik v. State St. Bank & Tr. Co., 935 F. Supp. 2d 240, 270 (D. Mass. 2013). Where the "outcome would be the same regardless of which state's law applies, there is no conflict and the court need not resolve the choice of law question." Jenny B. Realty, 456 F. Supp. 3d at 314.

2. Breach Of Fiduciary Duty – Count I

In their opposition memorandum, the Doelgers argue that Defendants breached fiduciary duties arising from (1) Defendants' role as investment advisors and various regulations; (2) the "Advisory Agreement[129]" and Defendants' own internal policies; and (3) the nature of the relationship between JPMC and the Doelgers. Docket No. 309 at 37.

To succeed on a claim for breach of fiduciary duty under either New York or Massachusetts law, a plaintiff must allege the following: "(1) [the] existence of a fiduciary duty arising from a relationship between the parties, (2) breach of that duty, (3) damages, and (4) a causal relationship between the breach and the damages." Szulik, 935 F. Supp. 2d at 275 (citing Kriegel v. Bank of Am., N.A., Civil Action Nos. 07cv12246–NG, 08cv11598–NG, 2010 WL

[129] The Doelgers do not specify whether they are referring to the 2015 or 2019 Advisory Agreement. It appears that "Advisory Agreement" is defined in their brief as the 2015 Advisory Agreement. See Docket No. 309 at 17. However, the claims fail under either agreement.

3169579, at *12 (D. Mass. Aug. 10, 2010); Musalli Factory For Gold & Jewelry v. JPMorgan Chase Bank, N.A., 261 F.R.D. 13, 26 (S.D.N.Y.) 2009).

a. Duplicative Claims

A cause of action for breach of fiduciary duty which is merely duplicative of a breach of contract claim does not survive as a matter of law. Alantra, 636 F. Supp. 3d at 238 (New York law); Cumins Ins. Society, Inc. v. BJ's Wholesale Club, Inc., 455 Mass. 458, 474 (2009) ("Plaintiffs who are unable to prevail on their contract claims may not repackage the same claims under tort law."). "Claims are duplicative where they are premised upon the same facts and seek the same damages for the alleged conduct." Alantra, 636 F. Supp. 3d at 238 (internal quotations and citations omitted). Here, the substance of the Doelgers' breach of contract claim and their breach of fiduciary claim based on the Advisory Agreements are identical.[130] There is no actionable tort for breach of a fiduciary duty where there is a written agreement covering the specific subject matter of the alleged fiduciary duty. Zorbas v. U.S. Trust Co., 48 F. Supp. 3d 464, 478 (E.D.N.Y. 2014). Accordingly, summary judgment should be granted for Defendants on any claim for breach of fiduciary duty that is duplicative of the Doelgers' breach of contract claim.

b. Other Types Of Fiduciary Claims[131]

The Doelgers, in their opposition, attempt to establish a fiduciary duty outside of the Advisory Agreements. First, they argue that a fiduciary relationship exists between the Doelgers and Defendants solely due to Defendants' roles as investment advisors as governed by various

[130] Compare, e.g., Count I (Breach of Fiduciary Duty) Docket No. 1 ¶¶ 250, 253 with Count II (Breach of Contract) Id. ¶¶ 264-65.

[131] The Doelgers allude to Mr. Doelger's mental health in conjunction with Defendants' fiduciary duties. See Docket No. 309 at 27. However, as discussed elsewhere in this opinion, the Doelgers have not shown a genuine issue of material fact as to whether Defendants were aware of Mr. Doelger's decline.

regulations. Docket No. 309 at 37-40. However, even if correct, the Doelgers have not established how those authorities apply to the scope of fiduciary duties here and how those duties were breached in this case.

Second, relying on common law, the Doelgers argue that a "special trust relationship developed between the parties" that created fiduciary duties on the part of Defendants. Docket No. 309 at 41-42. The special trust relationship also existed allegedly because the Doelgers had little to no investment experience. Id. However, the Doelgers' factual assertions here are generally unsupported.[132] Indeed, the undisputed facts show otherwise. For example, Peter Doelger signed an account opening application that stated he had 20+ years' experience in trading stocks and bonds, 15+ years' experience trading options, and 10+ years' experience trading structured products, emerging markets, and hedge funds/private placements.[133] He also signed the MLPEI Letter which states that he represented to JPMC that he was "financially knowledgeable and sophisticated, and capable of making [his] own assessment of the investment risks associated with an investment in the MLPEI offering without relying on us."[134]

Even if the Doelgers' assertions had a basis in fact, they are simply insufficient to establish a common law fiduciary duty. A plaintiff's "subjective beliefs and conclusory allegations that a 'special' relationship existed are insufficient to establish a fiduciary duty." Zorbas, 48 F. Supp. 3d at 487. A "plaintiff alone, by reposing trust and confidence in the defendant, cannot thereby transform a business relationship into one which is fiduciary in nature." Indus. Gen. Corp. v. Sequoia Pac. Sys. Corp., 44 F.3d 40, 44 (1st Cir. 1995) (internal

[132] The Doelgers rely on Pl. SOF ¶¶ 247-49 which provide only that JPMC advised the Doelgers on MLPs, a BIND pharmaceutical investment, and foreign currency transactions. Docket No. 309 at 42.
[133] Def. SOF ¶ 16; Pl. Resp. ¶ 16.
[134] Docket No. 276-67 at 3-5.

quotation marks and citation omitted). For all these reasons, the Doelgers have not established that a non-contractual fiduciary duty existed here.

c. Breach

The Doelgers argue that they have established "the myriad ways the duties owed to them by Defendants were breached." Docket No. 309 at 43-44. However, they do not explain which or what type of duties Defendants owed, let alone provide any description of how the listed actions violated those duties. They also have not identified how each Defendant specifically breached them. Rather, they state in conclusory fashion "[e]ach of these actions constitutes a material breach of Defendant's [sic] fiduciary duties." Id. at 44. For example, they assert that Baker never faxed the MLPEI Letter to Paul Roberts, Mr. Doelger's lawyer, and instead emailed it. Id. at 43. It is unclear what duty was breached by this action and what damages flowed as a consequence. Indeed, Mr. Doelger signed the MLPEI Letter after his lawyer received the email and stated prior to investing in the MLPEI offering he had "received the applicable offering documentation and [had] made [his] own analysis and investigation and consulted such investment, legal, tax, accounting and other advisers as [he] deemed necessary."[135]

For all these reasons, summary judgment should be granted for Defendants on the Doelgers' breach of fiduciary duty claims.

3. Negligence/Gross Negligence - Count III
And Negligent Misrepresentation - Count IV

a. Waiver Of Liability

Defendants argue that the Doelgers waived any negligence claims when they agreed to be bound by the General Terms. Docket No. 304 at 54-55. The General Terms limit JPMC's

[135] Docket No. 276-67 at 4.

liability to actions of "gross negligence or willful misconduct."[136] "Where the language of the exculpatory agreement expresses in unequivocal terms the intention of the parties to relieve a defendant of liability for the defendant's negligence, the agreement will be enforced." Banco Espirito Santo de Investimento S.A. v. Citibank, N.A., No. 03 Civ. 1537(MBM), 2003 WL 23018888, *11 (S.D.N.Y. Dec. 22, 2003) (citation omitted); see also Cormier v. Cent. Mass. Chapter of the Nat'l Safety Council, 416 Mass. 286, 288 (1993) (enforcing terms of release under which defendant exempted itself from liability for its own negligence).

Here, the Doelgers do not dispute the legal effect of the language itself. Rather, they argue that the waivers should not apply because they did not see those terms prior to the commencement of this lawsuit and never agreed to them at any point. Docket No. 309 at 18. However, the Doelgers have not shown a genuine issue of material fact on this issue. They rely on Yoon Doelger's declaration. Id. Paragraph 88 states that neither she nor Mr. Doelger were given the documents in 2015 when he opened the account. Docket No. 300-9 ¶ 88. However, she testified at her deposition that she was not present when Mr. Doelger signed the 2015 account application documents. Docket No. 324-4 at 27. Her affidavit therefore may not be considered on this point as it contradicts her deposition testimony and, to the extent she is relying on her husband's statements, her assertion is hearsay.

By signing the 2015 Advisory Agreement, Mr. Doelger acknowledged that he "received," "reviewed," "underst[ood]," and "agree[d] to" the General Terms.[137] Mr. Doelger's acceptance of the General Terms binds both Doelgers.[138] In order to add Mrs. Doelger to the account, the

[136] Docket No. 276-62 at 9 ¶ 11.
[137] Docket No. 276-55 at 7 § (ii), 11 § 8.
[138] See Docket No. 276-62 at 1 § 1 (A joint owner is bound by "all Obligations, whether or not [she] incurred the Obligation").

Doelgers both signed an account application and the 2019 Advisory Agreement.[139] That agreement states that it is "subject to and incorporates the J.P. Morgan General Terms for Accounts and Services."[140] Within that agreement is also a clause that provides that the Doelgers "received," "reviewed," "understood," and "agree[d]" to the General Terms.[141]

In any event, any dispute about whether the Doelgers received and reviewed the General Terms is not material to resolving the issue. Parties are presumed to know the contents of the contracts they sign. Steelmasters, Inc. v. Loc. Union 580 of Int'l Ass'n of Bridge, Structural Ornamental & Reinforcing Iron Workers, AFL-CIO, 2008 WL 312096, at *4 (E.D.N.Y. 2008) (enforcing terms incorporated by reference despite party's claim that it never received a copy of the document containing the incorporated terms); Awuah v. Coverall N. Am., Inc., 703 F.3d 36, 44 (1st Cir. 2012); Rivera v. Centro Medico de Turabo, Inc., 575 F.3d 10, 20 (1st Cir. 2009) (citations omitted) ("Absent fraud, a person is deemed to know the contents of a contract that he or she signs.").

Accordingly, the General Terms apply to any claim for negligence including negligent misrepresentation and Defendants may be granted summary judgment on those claims on this basis alone.

b. Gross Negligence

In terms of gross negligence, in their complaint, the Doelgers only mention "gross negligence" in the caption of the claim. Docket No. 1 at 44. "Gross negligence is substantially and appreciably higher in magnitude than ordinary negligence. . . . It is an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise

[139] Docket No. 276-126 at 11; see also Docket No 176-125 at 5 § (ii).
[140] Docket No. 276-126 at 11 ¶ 8.
[141] Docket No. 276-126 at 17.

ordinary care." Altman v. Aronson, 231 Mass. 588, 591 (1919). "It amounts to indifference to present legal duty and to utter forgetfulness of legal obligations so far as other persons may be affected." Id. Gross negligence, however, "falls short of being such reckless disregard of probable consequences as is equivalent to a willful and intentional wrong." Id. at 592.

The Doelgers provide no argument to support a claim of gross negligence. They simply state that "there are disputed issues of fact concerning several material misrepresentations and omissions Defendants made to Plaintiffs, including informing Plaintiffs that they were making all income on the MLP Investments when they were not and concealing warnings about Chickasaw." Docket No. 309 at 51. They make this argument in terms of proving negligence and gross negligence. However, they do not make any attempt show why the cited paragraphs evince gross negligence, and indeed, they do not.

Accordingly, the Doelgers have not met their burden to show that there is a triable issue of fact that Defendants committed gross negligence.

E. Chapter 93A – Count VIII

The Doelgers allege that Defendants engaged in deceptive trade practices in violation of M.G.L. c. 93A.[142] Docket No. 1 ¶¶ 315-20. Defendants argue that New York law applies and therefore the Doelgers' Chapter 93A claim should be dismissed. Docket No. 304 at 60. Defendants also assert that the Doelgers' 93A claims are "impossible to discern," and even assuming, arguendo, a claim is delineated appropriately, the Doelgers have not adduced sufficient evidence for the claim to survive summary judgment. Id. at 61.

1. Choice-Of-Law

In a recent case, the First Circuit ruled that a plaintiff could proceed with a Chapter 93A

[142] The Doelgers do not specify under which section they bring their 93A claim. Presumably, the claim is brough under section nine.

claim, despite a New York choice-of-law clause in a contract. See Kleiner v. Cengage Learning Holdings II, Inc., 66 F.4th 28, 32 (1st Cir. 2023). In Kleiner, the parties entered into a contract that stated that the "Agreement shall be construed and governed" according to New York law. Id. at 29. The clause did not "otherwise select any state's law as governing the parties' rights and obligations that are created by statute" or mandate that all disputes had to be resolved using New York law. Id. at 32. The First Circuit determined that the Chapter 93A claim could move forward because the agreement did not suggest "that the parties agreed that New York law would govern the adjudication of a claim that [the defendant] breached a statutory duty imposed by Massachusetts law." Id.

The same analysis applies here. JPMC's General Terms only apply to an interpretation of the contracts in this case. The applicable provision does not control the resolution of a claim that Defendants breached a statutory duty imposed pursuant to Massachusetts law. Accordingly, the Chapter 93A claim is not precluded by the choice-of-law provision.

The parties also make conflicting arguments as to whether Florida or Massachusetts law applies with respect to this claim. See Docket No. 304 at 60; Docket No. 309 at 35. This Court need not resolve that issue with respect to the Chapter 93A claim because it fails on the merits.

2. Analysis

Chapter 93A prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." M.G.L. c. 93A, §2(a). A successful claim under Chapter 93A requires a showing of (1) a deceptive act or practice on the part of the defendant; (2) an injury or loss suffered by the plaintiff, and (3) a causal connection between the defendant's deceptive act or practice and the plaintiff's injury. Casavant v. Norwegian Cruise Line, Ltd., 76 Mass. App. Ct. 73, 76 (2009), aff'd, 460 Mass. 500 (2011); Hershenow v. Enterprise Rent-A-Car Co. of Bos., Inc., 445 Mass. 790, 797 (2006)).

"It is well settled that a simple, or even intentional, breach [of contract] is insufficient in itself to constitute an unfair or deceptive trade practice under Chapter 93A." Findability Scis., Inc. v. Soft10, Inc., No. 20-CV-12236-DJC, 2023 WL 2529544, at *7 (D. Mass. Mar. 15, 2023) (alteration in original). "In order to transform a breach of contract into a Chapter 93A claim, the breach must be both knowing and intended to secure unbargained-for benefits to the detriment of the other party. Id. "Massachusetts courts have consistently held that conduct in disregard of known contractual arrangements and intended to secure benefits for the breaching party constitutes an unfair act or practice for c. 93A purposes." Id. In addition, in the financial and investment services context, a defendant is not liable for giving bad advice. Baker v. Goldman, Sachs & Co., 771 F.3d 37, 54 (1st Cir. 2014). Negligent misrepresentations give rise to a Chapter 93A liability only if they are "extreme or egregious." Id. (internal citations and quotations omitted). In addition, the SJC "has clearly articulated the standard that if a Chapter 93A claim is 'derivative of' other claims which fail as a matter of law, the Chapter 93A claim 'must also fail.'" Gattineri v. Wyman MA, LLC, 93 F.4th 505, 511 (1st Cir. 2024) (citing to Park Drive Towing v. City of Revere, 442 Mass. 80 (2004).

The Chapter 93A claim does not contain any of the required specifics. Docket No. 1 ¶¶ 315-20. Even in their opposition to Defendants' motion for summary judgment, including Defendants' claim that the Chapter 93A allegations lack specifics, the Doelgers provide none. Instead, they assert the following:

> Plaintiffs have set forth a slew of unethical and unscrupulous conduct by Defendants, including false statements and fraudulent conduct by Baker and others, undisclosed conflicts of interest and several other breaches of fiduciary duties, breaches of the covenant of good faith and fair dealing, and a host more. Any disputes Defendants have are factual and should not be determined on summary judgment.

Docket No. 309 at 55. The Doelgers have therefore failed to provide any specifics, legal or

factual, as to what conduct constitutes a violation of Chapter 93A. Although they submitted 462 statements of fact, they cite to none of them with respect to the defense of their Chapter 93A claim in their opposition memorandum. This Court should not have to hunt for such evidence for this particular claim.[143] Endicott Constr., 2017 WL 3028877, at *15 n.166. Accordingly, this Court recommends that summary judgment with respect to the Chapter 93A claim be granted.

F. Elder Financial Exploitation In Violation Of Florida Statute §415 – Count IX

The Doelgers assert a claim of elder financial exploitation in violation of Florida law. They allege specifically that Mr. Doelger was, for purposes of the statute, a vulnerable adult and that Defendants exploited the Doelgers by investing their assets in high-risk investments and made misrepresentations to get them to do so. Docket No. 1 at ¶¶ 322-25.

Assuming, arguendo, that such a claim is properly before this Court, it fails on the merits.[144] Florida's Adult Protective Services Act ("FAPSA"), creates a private cause of action for a "vulnerable adult who has been abused, neglected, or exploited as specified in this chapter." Fla. Stat. § 415.1111.

First, there is no evidence of record to show that Mr. Doelger was a "vulnerable adult" under Florida law. A "vulnerable adult" is defined as someone "whose ability to perform the normal activities of daily living or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging." Fla. Stat. § 415.102(28). A plaintiff must show more than cognitive and physical decline. See, e.g., Arberman v. PNC Bank, Nat'l

[143] In their sur-reply, the Doelgers cite to many of their statements of fact without linking them to the Chapter 93A claim, let alone any other claim. See Docket No. 338 at 15-17.
[144] This Court elects not to resolve the choice-of-law issue with respect to this claim, but instead makes a recommendation on the merits.

Ass'n., 22-80983-CIV, 2022 WL 18402402, at *3 (S.D. Fla. Dec. 19, 2022), aff'd, No. 23-10182, 2023 WL 3910573 (11th Cir. June 9, 2023).

There is no evidence of record that Mr. Doelger's ability to perform the "normal daily activities of daily living" were impaired during the relevant time. To the contrary, the record shows that Mr. Doelger travelled between 2015 and 2020.[145] He swam and rowed.[146] He engaged in lucid conversations about world politics.[147] In response, the Doelgers do not provide any legal authority or citations to any of the statement of facts. See Docket No. 309 at 56. Rather, they point to paragraph 31 of the Yoon Declaration. Even if it were proper to consider that paragraph, Mrs. Doelger provides no dates pertaining to her husband's infirmities. Accordingly, the Doelgers' FAPSA claim fails on this basis alone.

Defendants also challenge whether the Doelgers' claim satisfy the other prongs of the statute: namely whether Defendants abused or neglected Mr. Doelger, whether they were caregivers, and whether they exploited Mr. Doelger. In their memorandum, the Doelgers present no meaningful opposition to these arguments. They provide no legal authority or citation to the statement of facts. Rather, they present mere conclusions tracking occasionally the language of the statutory definitions. See Docket No. 309 at 55-57. More is required. See, e.g., Bohannon v. Shands Teaching Hosp. and Clinics, Inc., 983 So.2d 717, 721 (Fla. Dist. Ct. App. 2008) (claim legally insufficient that tracks the statutory definitions but unsupported by the facts). For all these reasons, this Court recommends that summary judgment be granted for Defendants on this claim.

[145] Def. SOF ¶ 7; Pl. Resp. ¶7.
[146] Def. SOF ¶ 9; Pl. Resp. ¶ 9.
[147] Def. SOF ¶ 14; Pl. Resp. ¶ 14.

V. RECOMMENDATION

For the foregoing reasons, this Court recommends that Judge Kelley grant Defendants' motion for summary judgment. Should Judge Kelley adopt my recommendation in its entirety, then JPMC's counterclaims would remain to be resolved at trial.

VI. REVIEW BY DISTRICT JUDGE

The parties are hereby advised that under the provisions of Fed. R. Civ. P. 72(b), any party who objects to these proposed findings and recommendations must file specific written objections thereto with the Clerk of this Court within 14 days of service of this Report and Recommendation. The written objections must specifically identify the portion of the proposed findings, recommendations, or report to which objection is made, and the basis for such objections. See Fed. R. Civ. P. 72. The parties are further advised that the United States Court of Appeals for this Circuit has repeatedly indicated that failure to comply with Fed. R. Civ. P. 72(b) will preclude further appellate review of the District Court's order based on this Report and Recommendation. See Phinney v. Wentworth Douglas Hosp., 199 F.3d 1 (1st Cir. 1999); Sunview Condo. Ass'n v. Flexel Int'l, Ltd., 116 F.3d 962 (1st Cir. 1997); Pagano v. Frank, 983 F.2d 343 (1st Cir. 1993).

/s/ Jennifer C. Boal
JENNIFER C. BOAL
United States Magistrate Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

PETER DOELGER and YOON DOELGER, Plaintiffs, v. JPMORGAN CHASE BANK, N.A. and CHICKASAW CAPITAL MANAGEMENT, LLC, Defendants.	Civil Action No. 21-CV-11042-AK

MEMORANDUM AND ORDER RE: MAGISTRATE JUDGE BOAL'S REPORT AND RECOMMENDATION ON THE PARTIES' MOTIONS TO STRIKE AND DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

ANGEL KELLEY, D.J.

On June 23, 2021, Plaintiffs Peter and Yoon Doelger ("the Doelgers") commenced this action against Defendants JPMorgan Chase Bank, N.A. ("JPMC") and Chickasaw Capital Management, LLC ("Chickasaw"). [Dkt. 1]. Plaintiffs allege that Defendants breached their obligations to the Doelgers as their investment advisers. [Id. at 1]. The Court referred the case to Magistrate Judge Jennifer Boal ("M.J. Boal") for full pretrial proceedings and report and recommendation on dispositive motions. [Dkt. 170]. Defendants subsequently moved for summary judgment [Dkt. 273], and Plaintiffs opposed the motion. [Dkt. 309]. Defendants then moved to strike portions of Yoon Doelger's declaration [Dkt. 323], and Plaintiffs filed their own Motion to Strike the James Baker ("Baker") and Daniel Jacobs ("Jacobs") declarations. [Dkt. 335]. M.J. Boal issued a Report and Recommendation ("R&R") on March 25, 2024, denying the Plaintiffs' Motion to Strike the Baker and Jacobs declarations and recommending that

Defendants' Motion for Summary Judgment be granted in its entirety. [Dkt. 383]. Plaintiffs filed objections[1] to the R&R [Dkt. 391], and Defendants opposed the Doelgers' objections. [Dkt. 398]. Upon thorough review and consideration of the Plaintiffs' numerous objections to the R&R, Plaintiffs' objections are overruled, the Court **ADOPTS** the Report & Recommendation in its entirety, and **GRANTS** Defendants' Motion for Summary Judgment.

I. MOTIONS TO STRIKE

A. Legal Standard—Review of a Magistrate Judge's Disposition

A district court may refer dispositive and non-dispositive motions to a magistrate judge for an R&R. See 28 U.S.C. § 636(b)(1)(B); Fed. R. Civ. P. 72. On a non-dispositive matter, the district judge must "modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). Under the "clearly erroneous" standard, the district judge must accept the magistrate judge's findings of fact and the conclusions drawn from them "unless, after scrutinizing the entire record, [the court] 'form[s] a strong, unyielding belief that a mistake has been made.'" Phinney v. Wentworth Douglas Hosp., 199 F.3d 1, 4 (1st Cir. 1999) (quoting Cumpiano v. Banco Santander P.R., 902 F.2d 148, 152 (1st Cir. 1990)). Under the "contrary to law" requirement, a district judge must review pure questions of law de novo, see PowerShare, Inc. v. Syntel, Inc., 597 F.3d 10, 15 (1st Cir. 2010), and factual findings for clear error. Phinney, 199 F.3d at 4. Factual findings are clearly erroneous when "the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." In re IDC Clambakes, Inc., 727 F.3d 58, 63-64 (1st Cir. 2013).

[1] This memorandum will first address the factual objections raised by the Plaintiffs, followed by an examination of the legal objections.

B. Legal Standard—Motion to Strike

Federal Rule of Civil Procedure 56(c)(4) requires that "[a]n affidavit or declaration used to support or oppose a motion [for summary judgment] must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated." Fed. R. Civ. P. 56(c)(4). In deciding a motion for summary judgment, "a court may take into account any material that would be admissible or usable at trial . . . [but] inadmissible evidence may not be considered." Horta v. Sullivan, 4 F.3d 2, 8 (1st Cir. 1993). If evidence cannot be presented in a form that would be admissible at trial, the Court may not rely on it. Gorski v. N.H. Dep't. of Corr., 290 F.3d 466, 475-76 (1st Cir. 2002).

It is well-settled that a motion to strike is the correct way to challenge affidavit evidence in a summary judgment motion. Facey v. Dickhaut, 91 F. Supp. 3d 12, 19 (D. Mass. 2014). Accordingly, the moving party must clearly identify the parts of the affidavit they object to and the reasons for their objections, and the court will ignore only the inadmissible parts of the affidavit and consider the rest. Casas Off. Machs., Inc. v. Mita Copystar Am., Inc., 42 F.3d 668, 682 (1st Cir. 1994).

C. Defendants' Motion to Strike

As an initial matter, Defendants moved to strike the declaration of Yoon Doelger ("Yoon") [Dkt. 323] in support of Plaintiffs' Opposition to Defendants' Motion for Summary Judgment. Defendants contend that this Court should refrain from considering Yoon's declaration when considering Defendants' Motion for Summary Judgment because she makes 1) statements precluded by spousal immunity; 2) "statements that are not made on personal knowledge . . . ; (3) statements that are otherwise hearsay . . . ; (4) inconsistent statements that

trigger the sham affidavit doctrine . . . ; and 5) statements that constitute argument rather than facts." [Id. at 1-2].

The R&R concluded that, in many instances, the statements at issue in Yoon's declaration are not relevant to resolving the arguments the parties raise at summary judgment. [Dkt. 383 at 5]. Rather than rule on every issue raised by the Defendants' Motion to Strike, M.J. Boal ruled on specific portions of the declaration, as needed. [Id.]. M.J. Boal ultimately concluded several statements and paragraphs constituted hearsay.[2] [Id. at 11 n.58, 12 n.70, 38].

The R&R states that Yoon's statement that Peter Doelger ("Peter") "told her that it 'was never true' that there was 'a letter that said that he had $100 million,'" was hearsay and could not be considered. [Id. at 11 n.58]. The R&R additionally concludes that paragraphs 50, 72, 77, 121, 135, and 138 from Yoon's declaration constitute impermissible hearsay. [Id. at 12 n.70]. Plaintiffs had relied on those paragraphs to support their argument that Baker's August 28, 2015, email inaccurately described conversations between him and Peter. [See Dkts. 300-5 at 8-22; 322 at 52]. Lastly, M.J. Boal found that paragraph 88 of Yoon's declaration contradicts her deposition testimony regarding whether she was present when Peter signed the 2015 account application documents on August 10, 2015. [Dkt. 383 at 38]. Thus, Yoon's affidavit cannot be relied on for this point and to the extent she relies on her husband's statements, that is hearsay, without any applicable exception to the hearsay rules. [Id.].

Plaintiffs objected to M.J. Boal's striking the portion of Yoon's declaration related to the August 10, 2015, meeting "without addressing the relevant case law." [Dkt. 391 at 33 n.193]. They cite to Armstrong v. White Winston Select Asset Funds, 647 F. Supp. 3d 36, 40 (D. Mass.

[2] Hearsay is defined as a statement that "a party offers in evidence to prove the truth of the matter asserted in the statement." Fed. R. Evid. 801(c). "[H]earsay evidence cannot be considered on summary judgment." Dávila v. Corporación de P.R. para la Difusión Pública, 498 F.3d 9, 17 (1st Cir. 2007).

2022), but it is not clear for what purpose. Nevertheless, Armstrong is consistent with M.J. Boal's finding that Yoon's declaration statement (that Peter did not receive the 2015 General Terms) should be disregarded because it contradicted her testimony that she was not present when Peter signed the 2015 Advisory Agreement. [Dkt. 383 at 38].

The sham affidavit rule applies when an affidavit submitted in connection with a motion for summary judgment contradicts that witness's prior deposition testimony. Armstrong, 647 F. Supp. 3d at 40. When there is an apparent contradiction, as there is here, "a satisfactory explanation is required" in the contradictory, post-deposition affidavit. Mahan v. Bos. Water & Sewer Comm'n, 179 F.R.D. 49, 55 (D. Mass. 1998); see also Colantuoni v. Alfred Calcagni & Sons, Inc., 44 F.3d 1, 4-5 (1st Cir. 1994) ("When an interested witness has given clear answers to unambiguous questions, he cannot create a conflict and resist summary judgment with an affidavit that is clearly contradictory, but does not give a satisfactory explanation of why the testimony is changed."). And as later stated in Mahan, "[i]f a party simply could offer a contradictory, post-deposition affidavit to defeat summary judgment without providing a 'satisfactory explanation' for the contradiction, the purpose of summary judgment would be defeated." 179 F.R.D. at 53 (internal quotations omitted).

A non-dispositive motion referred to a magistrate judge, such as a motion to strike, is governed by the clear-error standard. See Fed. R. Civ. P. 72(a). Because the conclusions reached in the R&R were not clearly erroneous, the Court adopts M.J. Boal's reasoning and **AFFIRMS** the R&R as to Plaintiffs' Motion to Strike.

D. The Doelgers' Motion to Strike

The Doelgers moved to strike the declarations of JPMC investment advisors James Baker and Daniel Jacobs. [Dkt. 335]. In their brief opposing the R&R, however, Plaintiffs only raise

one objection to M.J. Boal's conclusions regarding their Motion to Strike [Dkt. 391 at 36], which the Court will address. In their Motion to Strike, Plaintiffs argued that Baker's declaration should be stricken because it is not based on personal knowledge, and it contradicts both Baker's prior statements and statements by JPMC compliance officers. [Dkt. 335-1 at 8-12]. M.J. Boal concluded that the two substantive paragraphs in Baker's declaration were, as Baker noted, based on his experience working at JMPC for over thirteen years. [Dkts. 383 at 3; 321-15 ¶¶ 2-4]. Thus, the information Baker provided in those paragraphs was based on his personal knowledge. [Dkt. 383 at 3 ("The text of these paragraphs alone rebuts the Doelgers' arguments that Baker lacked personal knowledge.")]. Plaintiffs objected to this and repeated their argument that Baker's declaration conflicts with statements from JPMC compliance officers. [Dkt. 391 at 36]. For support, Plaintiffs cite to correspondence between JPMC employees discussing approval of Baker's investment request on behalf of Peter, given certain suitability limits. [See Dkt. 391 at 36 n.231 (citing Dkt. 331 ¶¶ 288, 334-37); see also Dkt. 322 at 152]. The email correspondence does not conflict with Baker's declaration, which states that it was his understanding that exceptions could be made to the suitability limits "on a case-by-case basis." [Dkt. 321-15 ¶ 3].

After reviewing the R&R for clear error, the Court finds none. Plaintiffs' objections are overruled, and the R&R is **AFFIRMED** as to the Doelgers' Motion to Strike.

II. DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

A. Legal Standard—Review of a Magistrate Judge's Recommendations

Where a magistrate judge has issued an order on a dispositive matter referred by a district judge and a party timely objects, "the district judge must determine de novo any part of the magistrate judge's disposition that has been properly objected to." Fed. R. Civ. P. 72(b)(3). "Absent objection . . . [a] district court ha[s] a right to assume that [the affected party] agree[s] to

the magistrate's recommendation." Templeman v. Chris Craft Corp., 770 F.2d 245, 247 (1st Cir. 1985). "[A] party's written objections to the magistrate's report and recommendation must be specific, concise and supported by legal arguments and citations to the record. Broad, yet unsupported objections will not be permitted and failure to make specific and documented objections may foreclose de novo review." Crooker v. Van Higgins, 682 F. Supp. 1274, 1281-82 (D. Mass. 1988).

The Court notes "[f]ailure to raise objections to the Report and Recommendation waives the party's right to review in the district court and those claims not preserved by such objection are precluded on appeal." Davet v. Maccarone, 973 F.2d 22, 31 (1st Cir. 1992); see also Crooker, 682 F. Supp. at 1281 ("[D]istrict court judges on a de novo review of a magistrate's report and recommendation may entirely ignore arguments not presented to the magistrate."). Additionally, "[p]arties must take before the magistrate, 'not only their best shot but all of their shots.'" Stauffer v. Internal Revenue Serv., 285 F. Supp. 3d 474, 478 (D. Mass. 2017) (quoting Borden v. Sec'y of Health & Hum. Servs., 836 F.2d 4, 6 (1st Cir. 1987)). In conducting its de novo review, the Court "may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge." 28 U.S.C. § 636(b)(1)(C).

B. Legal Standard—Summary Judgment

The purpose of summary judgment is to "pierce the pleadings and to assess the proof in order to see whether there is a genuine need for trial." Mesnick v. Gen. Elec. Co., 950 F.2d 816, 822 (1st Cir. 1991) (citing Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990)). Summary judgment may be granted when the record presents no "genuine dispute as to any material fact and the mov[ing party] is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The Court must consider 1) whether a factual dispute exists; 2) whether the factual

dispute is "genuine," such that a "reasonable fact-finder could return a verdict for the nonmoving party on the basis of the evidence;" and 3) whether a fact genuinely in dispute is material, such that it "might affect the outcome of the suit under the applicable substantive law." Scott v. Sulzer Carbomedics, Inc., 141 F. Supp. 2d 154, 170 (D. Mass. 2001); see also Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986) ("Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment."). When ruling on a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [their] favor." Anderson, 477 U.S. at 256.

The moving party is responsible for "identifying those portions [of the record] which it believes demonstrate the absence of a genuine issue of material fact." Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). It can meet its burden either by "offering evidence to disprove an element of the plaintiff's case or by demonstrating an 'absence of evidence to support the non-moving party's case.'" Rakes v. United States, 352 F. Supp. 2d 47, 52 (D. Mass. 2005) (quoting Celotex, 477 U.S. at 325). Once the moving party shows the absence of any disputed material fact, the burden shifts to the non-moving party to place at least one material fact into dispute. Mendes v. Medtronic, Inc., 18 F.3d 13, 15 (1st Cir. 1994) (citing Celotex, 477 U.S. at 325). "[C]onclusory allegations, improbable inferences, and unsupported speculation [are] insufficient to discharge the nonmovant's burden." Rockwood v. SKF USA Inc., 687 F.3d 1, 9 (1st Cir. 2012) (internal quotations omitted). The nonmoving party's failure "to make a sufficient showing on an essential element of [their] case" for which they have the burden of proof "renders all other facts immaterial." Celotex, 477 U.S. at 323. Under those circumstances, "the moving party is 'entitled to a judgment as a matter of law.'" Id. (quotations omitted).

C. Objections to Factual Findings in the R&R[3]

Before reaching the R&R's legal conclusions, Plaintiffs object that the R&R omits key facts and makes improper findings of fact. To begin, Plaintiffs argue that the R&R insufficiently discusses Peter's mental health decline. [Dkt. 391 at 9]. This is simply not true. The R&R includes a concise summary highlighting the ordeals Peter struggled with during the relevant time. [Dkt. 383 at 18-19]. The R&R details how, in 2014, doctors noted that Peter had a history of cognitive defects and had recently experienced an altered mental status. [Id. at 18]. The R&R also notes that by 2020, Peter was diagnosed with having major depression and a suspected cognitive problem. [Id.].

Plaintiffs also claim that the R&R overlooks five material facts: 1) "Defendants' medical expert admitted that a person with dementia cannot make financial decisions without complication;" 2) "JPM had an elder escalation policy . . . and its stated purpose was 'to identify potential red flags observed with respect to elder and vulnerable clients;'" 3) "JPM knew of several red flags, including Peter's memory loss, erratic and irrational behavior;" 4) "Defendants' expert Gillespie said the red flags here warranted escalation to Baker's superiors;" and 5) despite the red flags, "JPM took no steps to follow its policy or otherwise protect Peter." [Dkt. 391 at 9]. However, these five facts are either not material, the Plaintiffs mischaracterize them, or they are not supported by the evidence cited.

First, Defendants' medical expert, Dr. Ziv Cohen, stated that "it would be highly unlikely for someone with diagnoseable dementia to be able to handle their finances and work without complication." [Dkt. 301-335 at 5]. Plaintiffs omit the fact that Dr. Cohen also said that he

[3] The Court assumes familiarity with the relevant procedural and factual background of this case, as it is detailed in the R&R. [Dkt. 383 at 2-19]. Unless otherwise noted, all capitalized terms have the meanings ascribed to them in the R&R.

thought "the record in specifics and in its totality" did not indicate Peter had diagnoseable dementia during the relevant time. [Id. at 4]. Regardless, these statements are not material or in dispute; therefore, the R&R did not improperly overlook this fact.

Next, the existence of a JPMC elder escalation policy and its purpose are not disputed [see Dkt. 331 at 274-75]; therefore, this does not present a genuine material fact in dispute.

Third, the record Plaintiffs cite does not support the contention that JPMC knew of "Peter's memory loss, erratic and irrational behavior," constituting red flags. [Dkt. 391 at 9; see also id. at n.11]. For example, based on one email Plaintiffs rely on, Plaintiffs state, "Baker expressed annoyance at Peter's desire to engage in long and repetitive conversations." [Dkt. 331 at 276]. However, in the 2015 email Baker wrote to a colleague, he states, "[I] don't have the time [today] to get dragged into another 45 minute macroeconomic discussion (which is what I just did with [Peter] yesterday)." [Dkt. 301-77 at 2]. A conversation on the same topic is not necessarily repetitive; a fair reading of Baker's email merely suggests that he was trying to avoid a long phone conversation with Peter. Plaintiffs also point to a 2016 email Baker wrote to assert that he was aware of "changes in Peter's energy levels" and Peter's desire to have Yoon more involved in conversations regarding their finances "in light of recent health challenges." [Dkt. 331 at 277]. Plaintiffs' carefully worded language is misleading and vague as to whether the health challenges were related to Peter's mental health or something else, but the email they cite specifies: "[Peter] seemed to be doing ok ***following the eye surgery***—less energy than usual but that's it. . . . Following the surgery Peter really wants to have Yoon more involved in these conversations." [Dkt. 276-74 at 2 (emphasis added)]. Plaintiffs also cite to another email Baker wrote in 2017 to claim that "Baker acknowledged that Peter had strongly held illogical beliefs regarding his assets." [Dkt. 322 at 278]. Again, Plaintiffs mischaracterize the record. At the end

of an email exchange with a colleague discussing a roundabout approach to unwinding a swap, Baker wrote, "Thanks for the flexibility here in accommodating the client. [Peter's] thoughts on his cash balance aren't always the most logical, but he feels strongly about them." [Dkt. 301-24 at 2]. Here, Baker simply was confirming that the monies to be used were not from Peter's deposit accounts, as he had a strong preference against doing so. None of the emails Plaintiffs rely on suggest JPMC knew or even believed Peter was behaving erratically or irrationally, or that he was demonstrating memory loss.[4]

In support of the fourth objection regarding red flags warranting escalation to superiors, Plaintiffs mischaracterize the statements of Chickasaw's expert, Phillip Gillespie ("Gillespie"), who Chickasaw retained to offer his opinion "as to whether Chickasaw fulfilled its 'suitability' obligation to the plaintiffs . . . as a sub-advisor in the managed account program sponsored and managed by [JPMC]." [Dkt. 301-323 at 4]. Gillespie did not say, "the red flags [in Peter's situation] warranted escalation to Baker's superiors." [Dkt. 391 at 9]. Rather, Plaintiffs' counsel described a hypothetical scenario in which a client in his 80s speaks to his investment advisor less frequently and the wife speaks to the advisor more frequently and tells him her husband is forgetful; Counsel then asked Gillespie whether those details were a red flag in that situation; and Gillespie replied, "Potentially, yes. . . . Depends on the context but . . . it would be something that you would want to think about." [Dkt. 301-334 at 67-68]. Setting aside the fact that Gillespie hedged his answer to a hypothetical and not to the Doelgers' actual situation, Gillespie was retained to opine on Chickasaw and its suitability obligation to the Doelgers; *not* on whether JPMC had fulfilled its obligations.

[4] The Court also notes that Plaintiffs did not raise this point before M.J. Boal; therefore, it is waived anyway. Davet, 973 F.2d at 31 ("Failure to raise objections to the Report and Recommendation waives the party's right to review in the district court.").

Plaintiffs state that the fifth material fact the R&R overlooks is that JPMC did not follow its own policy or "otherwise protect Peter." [Dkt. 391 at 9]. Plaintiffs cite to paragraph 565 of the Statements of Fact, which states Baker was aware "Peter exhibited several of the signs in the Elder Escalation Form, Baker did not submit the form until February of 2021." [Dkt. 331 at 281]. The filled-out escalation form cited, however, states the opposite. Under the "Signs of Potential Diminished Capacity" section, Baker wrote, "None observed. Client's lawyer claimed in a Demand Letter dated 2/18/2021 that Client's mental health was 'in decline.'" [Dkt. 276-156 at 2]. In response to the question "How did JPM/employee learn of the activity/behavior," Baker answered, "Demand Letter from Attorney/Son-in-Law dated 2/18/2021. No first hand observation of any behavior." [Id. at 3]. The record does not support Plaintiffs' objection.

Plaintiffs next allege that the R&R ignores the fact that Peter was seeking guidance from his investment advisers at JPMC, Baker and Douglas Moon, regarding diversifying his portfolio [Dkt. 391 at 10] and that, in an internal email between manager Daniel Curtin and Moon, Curtin jokes that "Death is the best tax planning for MLPs." [Id.]. Relying on this quoted line of the email, it appears Plaintiffs are implying that Peter's advisers did not take his request seriously, but this is a mischaracterization of the email exchanges Plaintiffs cite. In response to Peter's expressed desire to discuss strategies to minimize tax obligations when selling highly appreciated MLPs, Moon held an internal meeting with colleagues "to generate ideas for Peter regarding his investment portfolio in MLPs." [Dkt. 301-69 at 2]. When they fell short of ideas, Moon reached out to Curtain [Dkt. 301-70 at 2], but the evidence cited does not indicate whether the JPMC advisers followed up with Peter or if they advised him on what to do. Neither Curtin's response to Moon's email nor the context in which it was made suggest Peter's investment advisers were glib when Peter was seeking their guidance. Because these facts are insufficient to reach any

kind of conclusion, without more they are not material to any issue and the R&R appropriately omitted them.

Plaintiffs' next objection is that the R&R omits the fact that Baker "targeted" Peter for the Chickasaw MLP Program "[f]or all of 2015." [Dkt. 391 at 10-11]. Once again, the evidence Plaintiffs rely on does not support their assertions that he was targeted. Plaintiffs point to a few emails Baker wrote in relation to a lunch meeting Chickasaw representatives Ed Kelly ("Kelly") and Geoffrey Mavar ("Mavar") had with JPMC employees in Boston to discuss their MLP strategy. [Dkts. 301-85 at 2; 301-86 at 2]. Kelly subsequently followed up and reached out to Baker asking whether there was "any interest in arranging a client meeting in early June." [Dkt. 301-83 at 3]. Baker replied, "I'll check with the team and see if we have any interested clients/prospects that are available on the 3rd." [Id. at 2]. The following day, Baker again emailed Kelly and wrote, "[T]hanks for your offer to help out with our existing client. . . . Once you have had a chance to run the analysis on this portfolio we can determine if it makes sense to try to schedule an in-person meeting." [Id.]. Nothing in these emails suggests JPMC "specifically targeted" Peter, and certainly not for "all of 2015;" the emails are dated in May 2015. [Dkt. 391 at 10].

In further support of their argument that Baker specifically targeted Peter for the Chickasaw MLP Program "[f]or all of 2015," Plaintiffs point to a lunch meeting in August 2015. [Dkt. 391 at 10]. Plaintiffs argue that the R&R omits the fact that Kelly and Mavar did not ask Peter questions about his interest in MLPs, his investment objectives, or determine his financial snapshot at the meeting. [Id.]. Based on the presentation deck [Dkt. 276-42], the lunch meeting appears to have been an informational presentation—at that point, asking those questions would have been outside of the services the Chickasaw representatives were there to provide. The

record does not support Plaintiffs' assertion that Baker did not tell Peter at the meeting that he should diversify. [See Dkt. 391 at 10-11]. Rather, Kelly never heard Baker say Peter and Yoon should not be investing in MLPs. [Dkt. 301-248 at 56]. Baker stayed with Peter and Yoon for approximately another half hour after Kelly and Mavar left the room [Dkt. 276-47 at 2], and there is nothing in the record mentioning what they discussed during that time. Similarly, the record does not support Plaintiffs' claim that Baker encouraged Peter to invest in MLPs with Chickasaw. [See Dkt. 391 at 4-5]. This is a mischaracterization of what Kelly said at his deposition. Kelly was simply under the impression that Baker thought Chickasaw would successfully manage Peter's existing MLP portfolio. [See Dkt. 301-248 at 55 ("[Baker] thought that we could do a good job for [Peter's] portfolio and he already had a portfolio.")].

Plaintiffs also allege that days before the meeting between Baker, Kelly, and Mavar on August 10, 2015, JPMC employees altered or forged account opening documents for Peter's MLPEI account. [Dkt. 391 at 11]. Plaintiffs provide many details they point to as circumstantial evidence that demonstrates that the opening documents were fraudulently changed to show Peter's net worth was $100 million instead of $50 million, among other changes. [Id. at 11-13]. For example, Plaintiffs allege that Moon sent Baker a copy of Doelger's 2012 balance sheet on August 11, 2015; there is no record showing the Account Opening Documents were changed between August 7 and August 10, 2015; and Baker had access to the Account Opening Documents throughout the period they were modified. [Id. at 12-13].

Plaintiffs argue that all these important facts were omitted from the R&R, and that M.J. Boal wrongly concluded that JPMC "did not swap out the $50 million net worth page after Peter signed the documents." [Id. at 13]. The R&R addressed Plaintiffs' assertions in a footnote 56; [see Dkt. 383 at 10], but the Court finds that all the alleged facts Plaintiffs raise are either

immaterial or do not support Plaintiffs' conclusion—especially when viewed in light of additional facts. The Court agrees with the R&R that Plaintiffs have not produced evidence that the net worth balance page was swapped. In an August 5, 2015, email from a JPMC analyst, Dylan Dittrich ("Dittrich"), to the Boston account opening team, Dittrich asked them to prefill account opening documents for the MLP Energy & Infrastructure Opportunistic Advisory Program for Peter. [Dkt. 276-41 at 2]. The unsigned draft of the account opening documents that the account opening team prefilled states that Peter's investment amount is $1 million and that both his liquid and net worth are $50 million. [Id. at 17]. An internal account opening summary initiated by Jesse Martinez, Jr. the following day states that Peter's liquid net worth was $100 million and that his initial funding amount was $30 million. [Dkt. 301-346 at 4]. This suggests that the account opening documents were changed before Peter signed anything four days later.

At the August 10, 2015, lunch meeting with the two Chickasaw representatives, Peter "signed account opening documents on the spot." [Dkt. 276-47 at 2]. The signed copy of the account opening documents, dated August 10, 2015, states that both Peter's liquid and total net worth are $100 million, and the investment amount was $30 million. [Dkt. 276-43 at 15]. Between August 10, 2015, and September 11, 2015, however, it was not clear the exact amount Peter would invest with Chickasaw. [See Dkts. 301-248 at 52-54 (Kelly confirming that between August 10 and September 11, it had not been determined how much money Peter would initially put into the Chickasaw account); 276-46 at 2 (Email from Baker to Moon and Dittrich stating, "[Peter] also signed account docs as I didn't want that to slow us down once we have a plan."); 276-47 at 2 (Email from Baker to Kelly stating, "I just need to clear some operational hurdles . . . to determine the initial size of the account.")]. One month later, Dittrich once again emailed the

account opening team in Boston and sent them "the completed documents for [Peter's] MLPEI account" [Dkt. 276-53 at 2], which stated that Peter's investment amount was $30 million and that both his liquid and net worth were $100 million. [Dkt. 276-45 at 15]. While it is true that the net worth and investment amount numbers in the prefilled draft and the signed copy of the account opening documents are not the same, the record does not support Plaintiffs' assertion that Defendants swapped out pages.

Plaintiffs next object to M.J. Boal's finding of fact that Peter "represented to Baker that his net worth was in the range of $100 million." [Dkts. 383 at 11; 391 at 13]. Plaintiffs argue that Peter's net worth and JPMC's understanding of what it was is clearly a disputed material fact. [Dkt. 391 at 13]. While Plaintiffs challenge this conclusion [Dkt. 331 at 53], they only cite to two specific paragraphs of Yoon's declaration, which M.J. Boal correctly struck because the statements were hearsay and could not be considered. [Dkt. 383 at 11 n.58]. On the other hand, Defendants cite to the 2015 Advisory Agreement, dated August 10, 2015 that Peter signed, which states that both his liquid and total net worth are $100 million. [Dkt. 276-43 at 15]. Plaintiffs point out that a day after the August 2015 lunch meeting, on August 11, 2015, Moon sent Baker a balance disclosure sheet from 2012 that Peter signed, stating that his total net worth was $33,800,000. [Dkts. 301-103 at 2; 301-8 at 2]. Of course, this does not establish what Peter's net worth was in 2015.

Nothing in the record suggests Peter gave Baker an updated personal financial statement in August or September 2015, that Baker obtained a balance sheet or personal financial statement from Peter generally, or that Baker contacted Bruce Haverberg, Peter's accountant, to obtain Peter's net worth. [Dkt. 300-1]. Because nothing in the record appears to establish Peter Doelger's actual net worth in August 2015, the Court must reach the same conclusion as the

R&R: Peter represented to Baker that his net worth was in the range of $100 million, and nothing in the record appears to contradict this statement of fact, such as evidence produced by Plaintiffs that Peter's net worth was something other than that amount. As M.J. Boal points out, "the document itself states Mr. Doelger's net worth was $100,000,000. He signed the document on August 15, 2015, and explicitly certified its accuracy." [Dkt. 383 at 11 n. 58].

Relatedly, Plaintiffs object that the R&R acknowledges but fails to discuss the fact that parties dispute whether the 50% suitability limit in the MLP Program was a hard cap or whether exceptions could be made. [Dkt. 391 at 14]. But this is not a material issue of fact: Irrespective of whether Peter's net worth was $50 million or $100 million, the proposed $33 million investment for Peter in the MLP Program far exceeded the 5% liquid net worth suitability restriction for that advisory program. [Dkts. 301-89 at 3-6; 331 at 152-53]. Therefore, Plaintiffs' objection is overruled.

Plaintiffs also allege that Baker significantly altered an email he had written to Supervisory Manager Jeff Lee ("Lee") before forwarding it to Jeff Burke ("Burke") (East Region Head of the J.P. Morgan Private Bank), and that the R&R failed to mention this. [See Dkt. 391 at 15]. Specifically, Baker's August 28, 2015, email to Lee states that Peter's MLP portfolio was $33 million and the forwarded version to Burke states Peter's MLP portfolio was $45 million. [Id.]. Based on this, Plaintiffs assert that the R&R's reliance on the altered email is an erroneous finding of fact. [Id.]. However, the R&R relies on Baker's original email to Lee stating that Peter "currently holds a portfolio of $33 [million]" of MLPs [Dkt. 276-50 at 2], and not the altered email. Therefore, the Court overrules Plaintiffs' objection.

While the redline does suggest that Baker may have changed the email he forwarded to Burke, it is not incontrovertible proof that Baker falsely represented the size of the proposed

investment to get around suitability limits. [Dkt. 391 at 15]. There are emails Baker and others sent that conformed with the modified version of the email that Baker forwarded to Burke, which suggests he was not trying to obfuscate what he was doing or "get around" internal procedures. For example, on August 27, 2015, at 6:52 pm, Baker emailed Ed Kelly about transitioning Peter's Atlantic Trust MLP account and wrote, "we should be able to fund a $33 MM account . . . [Peter] would continue to hold the other $15 MM of MLPS in a side pocket account and look to draw that down/move that into the Chickasaw portfolio over time." [Dkt. 301-110 at 2]. On August 27, 2015, at 7:33 pm John Beggans (CFA and Managing Director) emailed Daniel Curtin and Jeffrey Burke and wrote, "[Peter] custodies about $50mm in MLPs here now that is managed by Atlantic Trust. . . . [There will be] about $33mm of in-kind MLPs to go to Chickasaw." [Dkt. 301-115 at 2]. The total market value of Peter's current MLP holdings on May 20, 2015, appears to have been approximately $47 million. [Dkts. 301-83 at 2; 301-84 at 2]. In sum, the R&R's reliance on Baker's email to Lee was not an improper finding of fact, and the redline of the two emails is not documentary evidence of any wrongdoing. For those reasons, Plaintiffs' objection is overruled.

Plaintiffs raise several objections regarding facts surrounding the MLPEI Letter (also referred to as the "Big Boy Letter"). [Dkt. 391 at 16-17]. First, Plaintiffs object that the R&R does not mention the fact that Beggans wrote to Burke that "Peter Doelger will sign any letter we draw up." [Dkt. 391 at 16 (quoting Dkt. 301-11)]. Plaintiffs do not explain why they raise this objection or how it is relevant. Nor do Plaintiffs support their objection with any citations to the record or case law. Nevertheless, in the context of the email in its entirety, this comment is not the smoking gun Plaintiffs claim it is. Beggans sent an email updating Burke and letting him know that Peter called the previous night around 6:30 pm seeking guidance and hoping for a

verbal decision by the end of the day regarding whether he could transfer $33 million of his MLP positions to Chickasaw. [Dkts. 301-10 at 2-3; 301-11 at 2]. Beggans commended Baker for managing Peter's expectations well and assuring him that they would do their best. [Dkt. 301-11 at 2]. Beggans further mentioned that Peter would likely be willing to sign any letter their team drafted ***if they were 99% sure of the direction they wanted to take***, which would allow them to start working with Peter's accountant to begin the process. [Id.] Beggans apologized to Burke for the urgency and noted that Peter was starting to push for an answer. [Id.]. Given this context, Beggans' comment is neither nefarious on its face nor material. Thus, the Court overrules Plaintiffs' objection.

Next, Plaintiffs claim that the R&R "overlooks all evidence that the Big Boy Letter was fraudulent," and that JPMC was in a better position than Peter to know the truth about Peter's net worth and other financial representations. [Dkt. 391 at 16]. Plaintiffs allege three statements in the MLPEI Letter were false: 1) Peter held $45 million in MLPs at Atlantic Trust; 2) Peter was leaving $12 million with Atlantic Trust; and 3) Peter's liquid net worth was approximately $100 million. [Id.].

To support the claim that Peter only held $26.9 million in MLPs at Atlantic Trust and JPM knew this, Plaintiffs rely on an account summary for an account ending in 1009, for the period of September 1, 2015, to September 30, 2015. [Dkt. 301-129 at 5]. First, the account summary Plaintiffs rely on states that the current market value of the account was over $28.9 million. [Id.]. Second, a list of Peter's MLP holdings on May 20, 2015, stated they were worth over $47 million. [Dkts. 301-83 at 2; 301-84 at 2]. It is also important to note how quickly and drastically Peter's assets fluctuated in value. [Compare Dkt. 301-116 at 5 (showing the ending market value of the account ending in 1009 to be over $35 million on August 31, 2015) with Dkt.

301-129 at 5 (showing the ending market value of the account ending in 1009 to be nearly $29 million on September 30, 2015)]. Based on this and the fact that the MLPEI letter was drafted and reviewed over the course of several days at the end of September 2015 [see Dkts. 301-125 at 2; 301-126; 276-61], the Court finds that there is not sufficient evidence in the record to indicate what documents JPMC employees relied on to devise the $45 million figure included in the MLPEI Letter or to establish whether they knew the $45 million figure was accurate at the time of signing. For the same reasons, the Court rejects Plaintiffs' assertion that JPMC employees knowingly "fabricated" that Peter was leaving $12 million of his MLP portfolio with Atlantic Trust. [Dkt. 391 at 16].

Plaintiffs also allege that JPMC knew Peter's liquid net worth was not approximately $100 million. [Id.]. However, the record does not support this. The 2015 Advisory Agreement Peter signed indicates Peter's liquid net worth was $100 million. [Dkt. 276-43 at 15]. Peter signed the MLPEI letter, confirming he had a "liquid net worth of approximately $100,000,000." [Dkt. 276-60 at 3; see also Dkt. 301-137 at 2 (email from Moon dated October 8, 2015, stating that he spoke with Bruce Haverberg about obtaining a new balance sheet and that Haverberg "[f]elt comfortable saying that JPM[C] ha[d] all [of Peter's] material assets outside of personal use real estate."); but see Dkt. 301-14 at 2 (email from Prad Wadhwa dated September 10, 2015, stating that they "have vision on ~$62.5MM in assets, which are with [JPMC]"); Dkt. 301-96 at 55-56 (Baker's deposition where he says he knew Peter had a "variety of investments" and "significant assets" that he held "away from [JPMC].**"**). As the R&R points out, "The purpose of the [MLPEI Letter] was to have [Peter] confirm the representations in the letter, and he was in the best position to know the truth of those representations." [Dkt. 383 at 27]. The Court agrees and overrules Plaintiffs' objection.

Plaintiffs next object to the R&R's omission that JPMC did not disclose the risks of a cross-currency swap and an interest rate cap to Peter or that JPMC, as counterparty, "would profit directly from Peter's losses." [Dkt. 391 at 18]. Peter signed the Swap Communications Representation Letter [Dkt. 276-83 at 4], which asked Peter to acknowledge that JPMC was "acting in its capacity as a counterparty and is not undertaking to assess the suitability of any [s]wap for [Peter]." [Id. at 3]. Peter chose not to appoint a "Designated Evaluation Agent," an independent third party who could have helped him determine whether to enter into the swap transaction with JPMC. [Id.]. Peter also signed the Rate Cap Transaction Confirmation agreement letter [Dkt. 276-106 at 7], which details the relationship between JPMC and Peter. The letter states that JMPC "is not acting as a fiduciary for or an adviser to [Peter] in respect of [the rate cap transaction]." [Id. at 5]. In addition, the agreement notes that the parties are "not relying on any communication (written or oral) of the other party as investment advice or as a recommendation to enter into [the rate cap transaction]," and that the parties are "capable of assuming, and assume[] the risks" of the transaction. [Id.]. Because Plaintiffs fail to explain why these omissions are a material issue of fact or to establish that JPMC owed Peter a duty to disclose this information, the Court overrules Plaintiffs' objection.

Plaintiffs object to the R&R's failure to mention that Defendants repeatedly advised Plaintiffs against selling their MLPs between 2015 and 2020 and instead suggested alternatives to address their decline in investments and increasing debt. [Dkt. 391 at 18]. Plaintiffs highlight three instances. First, Plaintiffs argue JPMC recommended Plaintiffs get a home equity line of credit (HELOC) on their Boston home, which they allege is a violation of JPMC's own policies. [Id.]. The December 2018 email Plaintiffs cite to is one Baker directed to Peter and Yoon to "summarize the status of [their] assets and liabilities and potential next steps." [Dkt. 301-233 at

2]. While Baker did recommend getting a HELOC on the Doelgers' Boston home, he noted that it would be used to "meet short-term cash flow needs . . . and/or draw on it to pay off" the Doelgers' securities-based LOC. [Id. at 3]. This recommendation is not a violation of JPMC policies.[5]

Second, in 2019, Scott Schnipper emailed Baker to suggest moving proceeds from Peter's MLPs into Brent Crude oil; specifically, a structured note JPMC was launching. [Dkt. 301-239 at 2]. "[R]educing half the MLP exposure and rolling that will give you a better mix of risk return," wrote Schnipper. [Id.]. He also noted the correlation between MLPs and Brent Crude: "very similar exposure, but crude has downside protection". [Id.]. The Court agrees with Defendants that Plaintiffs did not provide any "evidence to show [Schnipper's proposed] alternate investment was relevant to or advisable for the Doelgers," or that the information is material more generally. [Dkt. 331 at 242-43].

Third, Plaintiffs claim that Baker repeatedly told Plaintiffs in early 2020 not to sell their MLPs and that it would be "aggressive" and "extreme." [Dkt. 391 at 18]. Plaintiffs mischaracterize the testimony and document they cite. At her deposition, Hee-Jean Kim ("Kim"), Yoon's daughter, recalled a phone call with Baker on March 17, 2020 regarding the declining value of the Doelgers' MLPs. "[Baker] said it would be an extreme measure [to sell everything off] . . . ." [Dkt. 301-338 at 19]. After Kim pushed Baker to give her parents advice on what to do, "[her] understanding of [what Baker said]" was that "because [her] parents had debt, that selling was okay, that it could be something they could do." [Id. at 20]. On March 17,

[5] Plaintiffs point to two manuals. The February 2019 Registered Representative Compliance Manual ("2019 RR Manual) states, "Registered representatives should carefully consider the risk of a product with the age and retirement status of the customer in mind. . . . Certain products or strategies pose risks that may be unsuitable for elders," including "[m]ortgaging home equity for investment purposes." [Dkt. 301-316 at 73]. The July 2019 Wealth Management Written Supervisory Procedures Manual notes "common sales practice violations" and related red flags [Dkt. 301-317 at 22], including "[u]sing home equity to invest in securities." [Id. at 24 ("You may not recommend this strategy to any client, including seniors or vulnerable adults")].

2020, Baker emailed Trey Eppes and summarized a meeting he had had with the Doelgers that morning. [Dkt. 301-283]. Baker wrote, "[Doelgers] wanted to sell all MLPs. I discussed market is likely to be highly volatile in the nearterm [sic]. . . . Given the leverage and risk of margin call and their discomfort with the positions ***I said selling all the positions was an aggressive but suitable decision***." [Id. at 2 (emphasis added)]. In sum, Plaintiffs' selective quoting and mischaracterization of the record fails to raise a material issue of fact. Consequently, the Court overrules Plaintiffs' objection.

D. Objections to the R&R's Conclusions Regarding Plaintiffs' Claims

1. Declaratory Judgment (Count VI) and Rescission (Count VII)

Plaintiffs have four objections related to the declaratory judgment and rescission claims. First, they argue that the R&R uses the MLPEI Letter to shield Defendants, thereby turning it into a hedge clause. [Dkt. 391 at 29].[6] This is a conclusory statement without justification or supporting argument of any kind. This is an improper objection the Court need not address. See Vélez-Padro v. Thermo King De Puerto Rico, Inc., 465 F.3d 31, 32 (1st Cir. 2006) ("Conclusory objections that do not direct the reviewing court to the issues in controversy do not comply with [Fed. R. Civ. Pro.] Rule 72(b)"); Brenner v. Williams-Sonoma, Inc., No. 13-CV-10931, 2016 WL 5661987, at *1 (D. Mass. Sept. 28, 2016) ("Waiver of de novo review by failing to file proper objections does not entitle a party to 'some lesser standard' of review." (quoting Thomas v. Arn, 474 U.S. 140, 149-50 (1985)).

[6] Plaintiffs also contend that the R&R incorrectly does not mention the case law Plaintiffs cite regarding hedge clauses. [Id.]. However, the R&R does not need to, since the MLPEI Letter does not contain a hedge clause. The SEC defines a hedge clause as, "a clause in an advisory agreement that purports to limit an adviser's liability under that agreement." Comm'n Interpretation Regarding Standard of Conduct for Inv. Advisers, Investment Advisers Act Release No. 5248, 2019 WL 3779889, at *4 n.31 (June 5, 2019). The MLPEI Letter does not seek to limit JPMC's own liability. Rather, it seeks to indemnify JPMC from any incorrect "confirmations, statements, or agreements" Peter made to JPMC. [Dkt. 276-60 at 4].

Second, Plaintiffs object to the fact that the R&R found it immaterial that Baker allegedly caused Peter to not have enough time to consult his attorney, Paul Roberts ("Roberts") before signing the MLPEI Letter on October 1, 2015. [Dkt. 391 at 23]. As the R&R notes, this fact is in dispute, but the Court agrees that whether Baker first faxed the MLPEI Letter to Peter's lawyer on September 24, 2015,[7] or merely emailed it on September 30, 2015, is not a material fact. [Dkt. 383 at 26, n.118].

"In general, an unconscionable contract has been defined as one which is so grossly unreasonable as to be unenforc[ea]ble because of an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party." King v. Fox, 7 N.Y.3d 181, 191, 851 N.E.2d 1184, 1191 (2006). To establish that the MLPEI Letter was unconscionable, Plaintiffs must show that the contract was both substantively and procedurally unconscionable when it was made. Boursiquot v. United Healthcare Servs. of Del., Inc., 98 Mass. App. Ct. 624, 630 (2020); see also Gillman v. Chase Manhattan Bank, N.A., 73 N.Y.2d 1, 10-11, 534 N.E.2d 824, 828 (1988) (stating that procedural unconscionability entails "an examination of the contract formation process and the alleged lack of meaningful choice"). Procedural unconscionability occurs when the "circumstances surrounding the formation of the contract show that the aggrieved party had no meaningful choice and was subject to unfair surprise." Boursiquot, 98 Mass. App. Ct. at 630 (quoting Machado v. System4 LLC, 471 Mass. 204, 218, 28 N.E.3d 401, 414 (2015).

Based on a review of the record and the circumstances, that is not the case here. The record does not indicate Baker used deceptive or high-pressured tactics to force Peter to sign.

[7] The Court notes, however, that the record strongly indicates Baker never faxed Roberts the MLPEI Letter. At the request of JPMC's counsel, an IT person "retrieve[d] any faxes he could locate by searching the emails [Roberts] received in September 2015. He was able to locate three total faxes. None of those faxes were from JP Morgan and none of them concerned Peter or Yoon." [Dkt. 300-4 at ¶ 9].

Peter knew well in advance there would be a meeting with the Chickasaw representatives. [Dkt. 276-40 at 2 (August 6, 2015, email from Baker to Moon stating, "Peter asked me to schedule a meeting with the Chickasaw team ASAP . . . so we have one scheduled on Monday with Peter, Yoon and the Chickasaw team")]. Baker emailed Peter's lawyer a copy of the MLPEI Letter the day before Peter signed it. [Dkt. 276-61]. Moreover, Peter could have chosen to reschedule the October 1, 2015, meeting to have additional time to consult with his lawyer before signing. See Elite Parfums, Ltd. v. Rivera, 872 F. Supp. 1269, 1273 (S.D.N.Y. 1995) (rejecting the argument that the defendant had no time to consult a lawyer or get the agreement translated when the plaintiff's representative told the defendant that he only had a "few hours" to sign); Roberts v. Smith Barney, Harris Upham & Co., 653 F. Supp. 406, 418 (D. Mass. 1986) (finding that failure "to inform [plaintiffs] of their legal rights or to tell them to consult an attorney" were insufficient allegations to establish an unconscionable procedural defect in the formation of the contract). Peter, not Baker, was in the best position to know whether he had had sufficient time to review the MLPEI Letter and whether he had discussed it with his attorney. Therefore, the Court does not find that the circumstances surrounding the signing of the letter were procedurally unconscionable.

Plaintiffs next turn to the substantive conscionability of the letter. They argue that the R&R misreads the MLPEI Letter, which they allege has unconscionable misrepresentations that *JPMC* made to Peter. [Dkt. 391 at 29]. It is the other way around. *Peter* made representations to JPMC, which were then included in the MLPEI Letter. [Dkt. 276-60]. By signing the letter, JPMC was asking Peter to confirm that information was correct. [See Dkt. 276-60 at 3-4 ("You have informed us . . ."; "you have represented to us . . ."; "You confirm that . . .")]. At the end of the letter, JPMC included a paragraph indemnifying them from any misrepresentations "***made by***

[Peter] as reflected in [the] letter are incomplete or incorrect in any respect." [Id. at 4 (emphasis added)]. Therefore, the MLPEI Letter was not substantively unconscionable.

Finally, Plaintiffs argue that the R&R misapplies 15 U.S.C. § 80b-15, a provision of the Investment Advisers Act of 1940 ("Advisers Act"). [Dkt. 391 at 30]. According to Plaintiffs, because JP Morgan Securities, LLC ("JPMS") is subject to the Advisers Act and is party to the MLPEI Letter, the letter is invalid. [Id.]. This is another unsupported, conclusory objection that the Court need not address. Nonetheless, Plaintiffs cannot rescind the MLPEI Letter as to JPMS, since JPMS is not a party to this lawsuit. [See Dkt. 383 at 28 n.121].

2. Breach of Contract (Count II) and Breach of the Covenant of Good Faith and Fair Dealing (Count V)

Plaintiffs' first objection regarding the contract-based claims is that the R&R incorrectly summarizes Section 1(C)(i) of the 2015 Advisory Agreement. [Dkt. 391 at 30]. They argue that this section does not state that the client is responsible for ensuring the portfolio aligns with their investment objectives and instead merely requires the client to select one of the portfolios presented to them. Id. However, Section 1(C)(i) states that the "Client is solely responsible for selecting Portfolios, and [the] Client retains final decision-making authority and responsibility with respect thereto." [Dkt. 276-44 at 7]. Furthermore, while Section 1(B) stated JPMC would "assist [the Doelgers] in the review, evaluation, and/or formulation of [the Doelgers'] investment objective," they were still "solely responsible for making all decisions regarding the adoption and implementation of all investment objectives." [Id.]. The client was "solely responsible for monitoring its investment objectives." [Id.].

Plaintiffs also argue that the R&R "ignores the authorities on how [investment discretion] must be exercised," and that by breaching its fiduciary duties, JPMC was also breaching Section 1(D)(i) of the 2015 Advisory Agreement. [Dkt. 391 at 31]. Just like in their opposition to

Defendants' Motion for Summary Judgment, Plaintiffs do not explain in their objections "how JPMC could breach a section of a contract that provides it with 'full discretion to make purchases, sales, exchanges, or investments or to take any other action that it deems necessary or desirable as to each Portfolio and the Assets invested in any Portfolio.'" [Dkt. 383 at 30-31 (quoting Section 1(D)(i) of the 2015 Advisory Agreement [Dkt. 276-44 at 7])]. Furthermore, Defendants' obligations were limited to investing "subject to the annexed Portfolio Schedule" [Dkt. 276-44 at 7], which was limited to investing in "publicly traded partnerships, limited liability companies and corporations, predominantly in the energy sector," since Peter had selected the MLPEI Strategy. [Dkts. 276-55 at 16; 300-6 at ¶82]. Therefore, Plaintiffs' objections do not support Plaintiffs' breach of contract[8] claim and are overruled.

3. The Negligence Claims (Counts III & IV)

Plaintiffs raise five objections regarding the negligence claims. First, Plaintiffs argue that the R&R wrongly dismissed the negligence claims against Chickasaw based on the limitation of liability clause in JPMC's General Terms. [Dkt. 391 at 32].

[8] Plaintiffs object to M.J. Boal's finding on causation by arguing that the Defendants' causation theory is baseless and unsupported by law. [Dkt. 391 at 28]. They assert that the Defendants' claim—that the Plaintiffs were not damaged because another adviser would have acted just as poorly—is speculative and lacks legal precedent. [Id.]. They also point out that the Defendants' argument disregards Yoon, based on an unfounded belief that she was always with her husband. [Id.]. The Plaintiffs emphasize that the theory lacks factual support and is essentially "science fiction" rather than a valid legal argument. [Id.]. Again, Plaintiffs mischaracterize Defendants' arguments, which were that the Plaintiffs cannot prove causation because there is no reason to believe Peter would have abandoned his MLP investment strategy even if the Defendants had not made the MLPEI program available, as Peter had committed to a leveraged, concentrated MLP strategy long before 2015 and continued with it despite recommendations to reduce risk and MLP concentration. [Dkt. 277 at 24]. Defendants are not asserting that "Plaintiffs weren't damaged because another adviser would have behaved as badly as Defendants." [Dkt. 391 at 28]. Rather, Defendants argue that other investment advisers would have acted similarly to Baker and Atlantic Trust due to the limited scope of their engagement. [Dkt. 277 at 24-25]. Peter hired them specifically to manage an MLP portfolio, which restricted their discretion to only managing the MLPs. Given the contractual limitations, they did not have the authority to Peter's portfolio; their role was confined to managing the MLPs and warning him about the associated risks. The remainder of Plaintiffs' paragraph under the causation heading consists of conclusory, unsupported statements.

First, Chickasaw was not a party to the Advisory Agreements, which incorporated the General Terms. [Dkts. 276-55 at 11; 276-126 at 11]. Therefore, Chickasaw cannot be dismissed on that basis. This Court nonetheless grants summary judgment for Defendants on the negligence claims as to Chickasaw because they are duplicative of Plaintiffs' breach of contract claim. As clearly stated in Zorbas, "a breach of contract will not give rise to a tort claim unless a legal duty independent of the contract itself has been violated." Zorbas v. U.S. Tr. Co., N.A., 48 F. Supp. 3d 464, 491 (E.D.N.Y. 2014) (quoting Bayerische Landesbank, N.Y. Branch v. Aladdin Cap. Mgmt. LLC, 692 F.3d 42, 58 (2d Cir. 2012)); see also Anderson v. Fox Hill Vill. Homeowners Corp., 424 Mass. 365, 368, 676 N.E.2d 821, 823 (1997) (stating that a "failure to perform a contractual obligation is not a tort in the absence of a duty to act apart from the promise made"). Plaintiffs have not established any duties separate and apart from the Advisory Agreements [Dkts. 276-55; 276-126] or the Agreement for Investment Management Services (the "AIMS") [Dkt. 276-30] and the term sheet associated with the Advisory Account (the "2015 Term Sheet") [Dkt. 276-57], which govern the relationship between Plaintiffs and Chickasaw. Consequently, the Doelgers' objection regarding the negligence claims against Chickasaw is overruled.[9]

Plaintiffs next object that the R&R limits Defendants' liability of gross negligence based on a limitation of liability clause in the General Terms, which Plaintiffs argue is a hedge clause

[9] In Plaintiffs' third Notice of Supplemental Authority [Dkt. 415], they argue that the R&R misapplied New York law in recommending the dismissal of the tort claims against the Defendants. In support, Plaintiffs cite Ria R Squared, Inc. v. DW Partners, LP ("DW Partners"), a real estate case where, on appeal, an order dismissing several claims, including breach of contract, breach of fiduciary duty, and breach of the implied covenant of good faith and fair dealing, was reversed to reinstate all claims except for negligent misrepresentation. DW Partners, No. 1757, 2024 WL 4045729 (N.Y. App. Div. Sept. 5, 2024). The DW Partners court reinstated certain claims as not duplicative because they involved distinct duties and actions beyond mere breach of contract. However, DW Partners is inapposite here because Plaintiffs have not alleged bad faith actions beyond mere non-performance of contractual obligations.

and is thus unenforceable. [Dkt. 391 at 32]. They argue that even if the General Terms are enforceable, the limitation of liability clause is not. [Id.]. Plaintiffs allege that if the Court were to adopt the R&R's recommendation on this issue, "it would be the first court in the country to enforce such a hedge clause." [Id.].

The SEC defines a hedge clause as, "a clause in an advisory agreement that purports to limit an adviser's liability under that agreement." Comm'n Interpretation Regarding Standard of Conduct for Inv. Advisers, Investment Advisers Act Release No. 5248, 2019 WL 3779889, at *4 n.31 (June 5, 2019). A hedge clause is not per se unenforceable. See id. "[W]hether a hedge clause violates the Advisers Act's antifraud provisions depends on all of the surrounding facts and circumstances, including the particular circumstances of the client (*e.g.*, sophistication)." Id.

> [A]n adviser violates the antifraud provisions of the Advisers Act, for example, when (i) there is a contract provision waiving any and all of the adviser's fiduciary duties or (ii) there is a contract provision explicitly or generically waiving the adviser's Federal fiduciary duty, and in each case there is no language clarifying that the adviser is not waiving its Federal fiduciary duty or that the client retains certain non-waivable rights (also known as a "savings clause").

Priv. Fund Advisers; Documentation of Registered Inv. Adviser Compliance Revs., Investment Advisers Act Release No. 6383, 2023 WL 5527515, at *118 (Aug. 23, 2023). The scope of an adviser's fiduciary duty "may be shaped by agreement." In re Comprehensive Cap. Mgmt., Inc., Investment Advisers Act Release No. 5943, 2022 WL 103533, at *3 (Jan. 11, 2022).

Here, the clause at issue in the General Terms indicates, "[e]xcept as otherwise provided by law, [JPMC's] sole liability and that of Morgan Affiliates to [the Doelgers] . . . shall be any direct damages [Plaintiffs] incur because of [JPMC or Morgan Affiliates'] gross negligence or willful misconduct." [Dkt. 276-62 at 9]. The phrase "[e]xcept as otherwise provided by law," serves as a savings clause stating that JPMC and its affiliates are still liable for any duties owed

to its clients under federal and state laws. Therefore, the clause in the General Terms does not waive a fiduciary duty and does not violate the antifraud provisions of the Advisers Act.[10]

Ultimately, the R&R rightly notes that the waiver of liability is enforceable.[11] As Defendants point out, none of the cases or SEC settlement agreements Plaintiffs cite hold that fiduciaries cannot limit the scope of their liability to acts of gross negligence. [Dkt. 398 at 33 n.127]. Thus, Plaintiffs' objection is overruled.

Plaintiffs also object to one of M.J. Boal's findings of fact regarding Yoon's testimony. [Dkt. 391 at 32-33]. In their Opposition to the Motion for Summary Judgment, Plaintiffs argue that they did not review the General Terms before the commencement of this lawsuit and that they never agreed to them. [Dkt. 309 at 18]. Thus, the liability waiver contained in the General Terms should not apply. [Id.]. To support this claim, Plaintiffs rely on Yoon's declaration in which she states that neither she nor Peter were given the General Terms at the meeting on August 10, 2015, that they attended when Peter opened the advisory account. [Dkt. 300-9 ¶ 88]. The R&R found that Yoon's deposition conflicted with her declaration as to whether she even

[10] The R&R correctly notes that the Advisers Act does not apply to JPMC anyway, as it is a bank. [Dkt. 383 at 28 ("The Advisors Act governs investment advisors. See 15 U.S.C. § 80b-1. The definition of investment advisors expressly excludes banks. 15 U.S.C. § 80b-2(a)(11)"].

[11] Lee v. Allied Sports Assocs., Inc., 349 Mass. 544, 550, 209 N.E.2d 329 (1965) ("It is the rule in [Massachusetts] that the failure to read or to understand the contents of a release, in the absence of fraud or duress, does not avoid its effects."); Sharon v. Newton, 437 Mass. 99, 105, 769 N.E.2d 738 (2002) ("Massachusetts law favors the enforcement of releases."); Greenleaf Arms Realty Tr. I, LLC v. New Bos. Fund, Inc., 81 Mass. App. Ct. 282, 292, 962 N.E.2d 221, 230 (2012) ("Exculpatory clauses in . . . fiduciary-related contracts are enforceable in the Commonwealth."); Sjogren v. Bd. of Trs. of Dutchess Cmty. Coll., 189 N.Y.S.3d 237, 239 (App. Div. 2023) (stating that an exculpatory agreement that unequivocally expresses parties' intent "to relieve a defendant of liability for its own negligence," will be enforced); see, e.g., Habberstad v. Revere Sec. LLC, 183 A.D.3d 532, 532 (N.Y. App. Div. 2020) (enforcing clause relieving a fiduciary "of liability for acts and omissions other than willful misconduct"); Banco Espirito Santo de Investimento, S.A. v. Citibank, N.A., No. 03-CV-1537, 2003 WL 23018888, at *11 (S.D.N.Y. Dec. 22, 2003) (finding that plaintiff could only recover against defendant "upon specific factual allegations" of "willful malfeasance, bad faith, gross negligence or reckless disregard of" the defendant's duties and obligations because of agreements limiting the defendant's liability to those causes of action); Cormier v. Cent. Mass. Chapter of the Nat'l Safety Council, 416 Mass. 286, 288 (1993) (finding that waiver form plaintiff signed, releasing defendant from "any and all liability, loss, damage, costs, claims and/or causes of action, including but not limited to all bodily injuries," was sufficient to bar plaintiff's negligence claim (internal quotations omitted)).

attended the August 10, 2015, meeting. [Dkt. 383 at 38]. Thus, her affidavit could not be used to establish that the Doelgers never saw the General Terms in 2015. [Id.].

Plaintiffs object to this factual finding, however, and argue that Yoon did attend the meeting. The record suggests she did in fact attend that meeting [See Dkts. 276-46 at 2 (email from Baker to Douglas Moon and Dylan Dittrich dated August 10, 2015, summarizing meeting and mentioning Yoon's attendance); 276-47 at 2 (email from Baker to Ed Kelly dated August 11, 2015 summarizing meeting and mentioning Yoon's attendance)], but this is insufficient to support the claim that Peter did not receive or review the General Terms. Not only are there contradictions between Yoon's declaration and her deposition, but also throughout her deposition Yoon could not remember details or dates in which events took place.[12] It is clear Yoon does not have a memory that the Court can rely upon. Based on her own testimony, it does not seem like Yoon understood or was paying attention to what was happening during the meetings she recalls attending. [See, e.g., Dkt. 321-10 at 11 (34:9-35:2) (stating that at meetings she attended with Peter and his advisers at JPMC, Yoon stayed silent because she did not understand what they were discussing), 21 (77:8-12, 22-25) (stating she became involved in financial discussions with advisers at JPMC in 2015, "[b]ut the conversation and meeting and business structure, that I don't remember. Even if I [was] involved, I never understood"), 26 (94:21-95: 6) (referencing an email in which Baker noted Yoon asked questions about the Doelgers' portfolio at a meeting, Yoon said, "Strange thing is I don't remember. Even though Jimmy Baker gave me something, I would have not—I don't understand"), 31 (114:12-17, 116:10-16) (stating that at a November 2017 meeting, she was not aware of what Peter, Roberts, Haverberg, Moon, and Baker were

[12] See, e.g., Dkt. 321-10 at 7 (20:7-21:7),10 (30:16-20), 14 (48:25-49:8), 16 (56:10-20), 18 (63:11-24), 19-20 (69:21-70:19), 23 (83:10-23), 27 (98:13-18), 31 (115:19-116:3), 37 (138:22-139:3), 40 (151:16-20), 46 (174:6-176:11), 57 (218:22-219:8), 60 (230:12-231:11), 93 (362:24-363:4).

talking about because her "mind was far away")]. Therefore, the Court cannot rely on Yoon's declaration or deposition as evidence that during the August 10, 2015, meeting she would have actually known or been aware of whether Peter received or reviewed the General Terms.

As the R&R points out, the 2015 Advisory Agreement contains a provision in which Peter "received," "reviewed," "underst[ood]," and "agree[d] to" the General Terms. [Dkts. 276-55 at 7; 383 at 38]. Plaintiffs have been unable to point to evidence in the record that contradicts this. Therefore, the Court also agrees with M.J. Boal's conclusion that Peter accepted the General Terms and that they bind Yoon as well. [See Dkts. 276-62 at 7 § 1 (A joint owner is bound by "all Obligations, whether or not [she] incurred the Obligation"); 383 at 38].

Plaintiffs object to the R&R's conclusion that they did not "evince gross negligence." [Dkts. 383 at 40; 391 at 34]. Plaintiffs admit that they did not make an argument distinguishing negligence and gross negligence. [Dkt. 391 at 33]. However, they claim they did not do so because Defendants did not. [Id.]. This is not true. Defendants explicitly argued that Plaintiffs were unable to point to evidence establishing that Defendants engaged in gross negligence and made the distinction between negligence and gross negligence. [Dkt. 304 at 55]. Defendants then identified five "allegations that lack[ed] evidentiary support" for a negligence claim. [Id. at 55-56]. By providing the standard for gross negligence, it is implied that if these five allegations cannot establish negligence, they also cannot rise to the level of gross negligence. [See id. at 56 ("For the reasons provided above . . . Plaintiffs cannot show that Defendants' purportedly negligent or grossly negligent actions caused them injury.")].

Plaintiffs also object to the R&R's conclusion because they believe they did provide an argument to support a claim of gross negligence by pointing to "at least three material negligent misrepresentations." [Dkt. 391 at 33]. In their objections, Plaintiffs provide more details

regarding the three alleged disputed issues of fact [id. at 33-34], but they still fail to show how these examples establish gross negligence. [See Dkt. 383 at 40 ("[Plaintiffs] do not make any attempt [to] show why the cited paragraphs evince gross negligence, and indeed, they do not.")]. Plaintiffs merely make the unsupported, conclusory statement that the R&R's conclusion regarding the "three material negligent misrepresentations" is "erroneous as a matter of law." [Dkt. 391 at 33-34]. Therefore, the Court overrules this objection.

4. The Florida Adult Protective Services Act Claim (Count IX)

Plaintiffs object that the R&R found that Peter "was not a vulnerable adult" under the Florida Adult Protective Services Act ("FAPSA"). [Dkts. 391 at 35; 383 at 43]. But the record does not establish Peter was a "vulnerable adult" within the meaning of the statute. In enacting FAPSA, the Florida legislature intended "to provide for the detection and correction of abuse, neglect, and exploitation through social services and criminal investigations and to establish a program of protective services for all vulnerable adults in need of them." Fla. Stat. § 415.101(2) (2010). The Legislature intended for FAPSA "to place the fewest possible restrictions on personal liberty and the exercise of constitutional rights" and "encourage[s] the constructive involvement of families in the care and protection of vulnerable adults." Id. Under FAPSA, a "vulnerable adult" is defined as someone "whose ability to perform the normal activities of daily living[13] or to provide for his or her own care or protection is impaired due to a mental, emotional, sensory, long-term physical, or developmental disability or dysfunction, or brain damage, or the infirmities of aging." Fla. Stat. § 415.102(28) (2023).

Specifically, Plaintiffs object to the R&R's finding because it is based on the fact that "at some points *of unknown frequency*, Peter traveled, swam, and rowed." [Dkt. 391 at 35]. For

[13] "Activities of daily living" are defined as, "functions and tasks for self-care, including ambulation, bathing, dressing, eating, grooming, toileting, and other similar tasks." Fla. Stat. § 415.102(2) (2023).

support, Plaintiffs argue that the R&R relies on conversations that took place in 2015-2020 "based on one 2019 email" and "Baker's statement on undated 'geo-politics and current events' chats." [Id. at 29 n. 218; Dkt. 383 at 44 n.145-47]. The record, however, suggests Peter often discussed geopolitics and current events with his financial advisers over the years.[14] Furthermore, it is not disputed that from "2015 through 2020, the Doelgers traveled and lived between their homes in Boston Massachusetts; Palm Beach, Florida; and Paris, France." [Dkt. 331 at ¶ 7].].

To rebut the R&R's conclusion that Peter was not a vulnerable adult, Plaintiffs make three claims. First, they state that "Peter's dementia is rapidly progressive and episodic." [Dkt. 391 at 35]. To support this, Plaintiffs rely on the results of a CT scan and an MRI scan of Peter's brain that were conducted on May 5, 2014, and June 10, 2014, respectively. [Dkts. 301-2, 301-4]. The "impression" section of the CT report summarized the findings: "Mild involutional changes and chronic ischemic change. No acute abnormality." [Dkt. 301-2 at 2]. In his report, Defendants' medical expert, Dr. Ziv Cohen ("Cohen"), wrote the following:

> These findings are nonspecific and essentially ruled out any acute pathological processes in his brain. They are common findings in normal healthy elderly persons but could be consistent with dementia if symptoms are present. These CT scan findings themselves, however, do not indicate dementia.

[14] [See, e.g., Dkts. 276-21 at 2 (June 20, 2014, email from Paul McPheeter to Peter stating, "Agree w/ your view on the escalation in Iraq helping on the crude oil price front"); 276-22 at 2 (August 4, 2014, email from Moon to Dittrich summarizing an email between Moon, Baker, and Peter during which they discussed "China & global implications if hard landing" as well as "Interest rates in U.S. & Europe"); 301-64 at 2 (November 11, 2014 email from Baker to Moon stating Baker talked to Peter "for ~45 minutes on MLPS, Japan, China, Alibaba, Oil, etc."); 276-37 at 2 (July 31, 2015 email from Baker to Moon stating that at a meeting that day "Peter admitted that he is still fascinated with shorting China"); 286-74 at 2 (February 2, 2016, email from Baker to Moon summarizing a meeting between Baker, Peter, and Yoon in which Baker observed, "[Peter] is increasingly negative on Chinese and global growth and is becoming more concerned that the Saudis [sic] oil policy has changed from a business decision to one that is increasingly based on geopolitics and pride."); 276-90 at 2 (January 11, 2017, email from Baker to Catherine Lynch summarizing Peter's views on geopolitics and current events); 276-111 at 2 (internal document detailing a meeting in Palm Beach, Florida between James Baker and Plaintiffs on December 5, 2018, in which they "[d]iscussed global economy, markets, and progress on home sale."); 301-246 at 2 (May 2, 2019 email from Baker to Trey Eppes summarizing a meeting with the Doelgers and their account, stating that Baker had "[d]iscussed oil and market outlook with Peter")].

[Dkt. 321-13 at 7]. In his report, Plaintiffs' medical expert, Dale Panzer ("Panzer"), merely summarized the CT report and stated, without explanation, that "CT scan imaging over time was consistent with dementia," but he included a CT scan from November 24, 2020 as a part of his report and does not distinguish when he believes the imaging begins to indicate dementia. [Dkt. 301-319 at 5]. Regarding the results in the June 10, 2014 MRI report, Cohen noted that the "findings are indicative of vascular disease leading to small strokes. This finding can be seen in individuals without any symptoms or illness, but could also be consistent with vascular problems leading to dementia." [Dkt. 321-13 at 7]. Panzer wrote that the findings from the MRI scan all "have an association with cognitive change." [Dkt. 301-319 at 5]. In other words, the MRI and CT reports *could* indicate dementia, but they do not support Plaintiffs' claim that Peter's dementia at that time was rapidly progressive and episodic.

Second, Plaintiffs claim "Baker acknowledged Peter was illogical." [Dkt. 391 at 29]. This is not supported by the record. After explaining the need for a more complicated approach to unwind a currency swap Peter wished to complete, Baker noted in an email to a colleague, "Thanks for the flexibility here in accommodating the client. His thoughts on his cash balances aren't always the most logical, but he feels strongly about them." [Dkt. 301-24 at 2]. Baker's comment regarding Peter's preference to not use any money from his deposit accounts to unwind a cross-currency swap does not mean Baker believed Peter was illogical generally. Plaintiffs' assertion is a leap and inference that the record does not support.

Third, Plaintiffs allege that "by 2020 [Peter] 'had difficulty recalling the month or the town he was residing in, was unable to recall a short story after hearing it or draw the face of a clock, and struggled to alphabetize letters.'" [Dkt. 391 at 29 (citing SOF)]. The excerpts from the document Plaintiffs cite does not paint the full picture. The document includes notes that

neuropsychiatrist Angela Scicutella, M.D., Ph.D., took regarding a Zoom telehealth conference with Peter on September 28, 2020. [Dkt. 301-33 at 2]. While Dr. Scicutella's notes include the information in the quoted language Plaintiffs cite, she also wrote, "[Peter] reads the newspaper, takes walks and swims in the family's heated pool . . . has been using a rowing machine and watching football on TV. ***[Patient] is able to do his own [activities of daily living***]." [Id. (emphasis added)]. Dr. Scicutella's assessment, based on a limited neurobehavior exam, indicated that Peter's "clinical picture is [consistent with] major depression with psychotic features." [Dkt. 301-33 at 3]. Additionally, she diagnosed Peter with "major depression with psychotic features" and suspected a cognitive issue as well. [Id. at 4]. This assessment is insufficient to establish Peter was a "[v]ulnerable adult" under FAPSA. Fla. Stat. § 415.102(28).

The R&R thoughtfully considered all the evidence Plaintiffs cite. [See Dkt. 383 at 18-19]. The Court agrees that none of this evidence establishes that Peter's ability to perform "normal activities of daily living" was impaired during the relevant time. [See Dkt. 383 at 44]. As the R&R points out, the record shows Peter traveled and moved around between 2015 and 2020. [See Dkt. 331 ¶ 7]. Peter did indeed swim and row. [Id. at ¶ 9; see also Dkt. 301-32 at 2 (October 26, 2020, Dr. Scicutella notes of Zoom evaluation of Peter stating that he "does swim for about 1.5 hours/day and enjoys that activity")]. Peter was able to have sophisticated, lucid conversations about world politics. [Id. ¶ 14; supra n.10]. More importantly, the record indicates Peter had questions and expressed opinions about how to manage his finances over the years.[15]

[15] [See e.g., Dkts. 276-26 at 3 (September 10, 2014, email from Baker to Peter stating, "I just wanted to follow-up on your question about the potential risks of moving some of your outstanding USD credit obligations onto a Euro-based credit facility."); 276-35 at 2 (June 9, 2015 email from Baker to Kelly stating, "I spoke to [Peter] today and he did express interest once again in meeting your [Chickasaw] team"); 301-99 at 2 (August 5, 2015 email from Baker to Kelly providing background about Peter, including, "[Peter] has been very interested in the recent M&A sector

Plaintiffs also object that the R&R "ignores Dr. Panzer's opinion that doctors who evaluated Peter would not be expected to note concerns regarding his ability to manage finances." [Dkt. 391 at 35]. Plaintiffs fail to support their objection with specific facts or legal citations. Instead, Plaintiffs cite to the Unified Statement of Facts, in which they say the same thing: "managing one's own finances would not ordinarily be the topic of medical records from a doctor." [Dkt. 331 at 91].[16] Even so, Plaintiffs cannot then assume that if doctors did evaluate Peter's ability to manage finances, they would conclude he could not do so. The fact doctors might not normally test or evaluate a patient for financial competency does not help establish Peter was a vulnerable adult under FAPSA. It is also certainly noteworthy that while his family

and in particular the Kinder Morgan roll-up"); 276-72 (December 23, 2015 email from Emily Granoff, an investment specialist, to Baker with the subject line "Peter wants more MLPs"); 276-74 at 2 (February 2, 2016 email from Baker to Douglas summarizing a meeting with Peter and Yoon in which Baker writes, "We discussed paying down the line [of credit] by $2 MM to reduce [Peter's] interest costs. He was very concerned that if he were to pay down the line he may not have access to this cash in the future if a need were to arise."); 276-82 at 2 (November 15, 2016 email from Baker to Richard Freund following up on an email from the previous year stating, "Our client [Peter] never completed the Dodd-Frank paperwork that you provided last fall, but now wants to revisit a similar trade and is ready to complete the necessary paperwork"); 276-92 at 2 (April 19, 2017 email from Moon to Baker summarizing a meeting he had with Peter stating, "[Peter] [a]sked about the Euro & Pound. . . . He's bullish on the U.S. economy. Thinks the equity market is frothy. . . Not worried about MLPs"); 301-23 at 3 (June 30, 2017, email from Joseph Bigda to Baker stating, "I spoke with Peter a couple of times today. He was ready to trade if the EUR broke through 1.15. Since the EUR sold off a bit this am and held in around 1.1410 he is happy to wait."); 301-212 at 2 (May 4, 2018 email from Baker to Roberts outlining topics that would be discussed during a conference call, including, "Renewal of the [Doelgers'] line of credit—was scheduled for August, but at Peter's request [was] just renewed early out to August of 2019"); 301-29 at 2 (March 13, 2019 email from Moon to three people in which he summarized a meeting with the Doelgers noting, "[The Doelgers] recognize the primacy of the MLP portfolios in driving their risk exposure. . . . Yoon is interested in lowering their exposure and therefore volatility, but Peter is less certain about selling. He is very open to alternative means of future returns and income")].

[16] In contrast, Defendants point out that "none of the doctors who evaluated Mr. Doelger from August 2015 through March 2020 recorded in his medical files any concerns about his ability to manage his own finances" [Dkt. 331 at 91], which M.J. Boal cites. [Dkt. 383 at 18]. For support, Defendants quote a sentence from Dr. Charles Morris' notes, dated September 14, 2016. [Dkt. 276-81 at 3-4]. Dr. Morris wrote that he reviewed Peter's social and family history with him and that "He works at MIT currently. [Peter] is married, is able to handle finances and work without complication." [Dkt. 276-81 at 4]. That statement appears to be Dr. Morris' impression based on what Peter relayed to him or is a summary of what Peter told him rather than an assessment of Peter's financial capacity. In addition to noting that Peter was able to manage his finances and work, Dr. Morris also wrote that "At times, [Peter] was tangential, and worked in references to Michael Bloomberg and Donald Trump during his narrative." [Id.]. Reviewing Dr. Morris' notes in totality, it appears Peter's self-assessment at this time would not have been the most reliable.

members expressed concern about Peter's delusions, anxiety, and paranoia,[17] the Court did not find anything in the record demonstrating his family members, attorney, or accountant raised any concerns to his healthcare providers or Defendants about Peter's ability to manage the couple's finances or to care for himself.[18] Whether Peter could "perform the normal activities of daily living" is something doctors *would* normally be expected to opine on—especially if a patient's family members[19] expressed concerns.

Relatedly, Plaintiffs object that the R&R did not evaluate Peter's mental health at specific points, and instead wrongly accepted "general statements on unspecified times." [Dkt. 391 at 35]. Yet Plaintiffs fail to cite to a specific part of the R&R that they object to and also fail to support their argument, making this an improper objection. See Crooker v. Van Higgins, 682 F. Supp. 1274, 1281-82 (D. Mass. 1988) ("[A] party's written objections . . . must be specific, concise and supported by legal arguments and citations to the record. Broad, yet unsupported objections will not be permitted . . . ."). Moreover, the records supporting the R&R's conclusions regarding Peter's "ability to perform 'the normal daily activities of daily living'" do

[17] [See, e.g., Dkts. 301-3 at 2 (June 3, 2014, notes from Dr. Wolf stating that prior to Peter's visit, Dr. Wolf spoke to his daughter who told him that she and Yoon "both felt that [Peter] was changed over the last 2 months and that he was having paranoid feelings, which was not something he had done previously"); 301-12 at 5 (September 3, 2015 medical discharge instructions, in which the healthcare provider noted that during a follow up conversation with Yoon, she said "[Peter] was always a little paranoid and that these episodes seem to be worsening. She says that he is a high functioning individual that has no issues with caring for himself.")].

[18] In September 2015, Peter even gave his doctor permission to speak to his attorney Roberts [Dkt. 302 at 6], but nothing in the record indicates Roberts had or raised concerns about Peter's ability to manage his business or financial affairs.

[19] The Court also notes that Peter's daughter, Emily Doelger, was a physician [Dkt. 301-33 at 2] who seems to have stayed abreast of how her father was doing. For example, Emily communicated frequently with Peter's lawyer in 2015 [see Dkt. 276-71 at 3-6 (itemized bill from Atty. Roberts)]and at Emily's behest Dr. Scicutella evaluated Peter in 2020 [Dkt. 301-33 at 2].

provide specific dates.[20] The R&R rightly concluded that the Doelgers did not provide any legal authority or citations that undermined those findings of fact in their Opposition to the Motion for Summary Judgment. [See Dkt. 383 at 44].

Plaintiffs make a conclusory[21] objection that the R&R's case law is inapposite and deals with "other sections of the law." [Dkt. 391 at 36]. It is not the Court's responsibility to guess what Plaintiffs mean by this or to address wholly underdeveloped arguments. In sum, Plaintiffs' objections regarding the R&R's findings as to whether Peter was a "vulnerable adult" under FAPSA are overruled.

5. Chapter 93A (Count VIII)

Plaintiffs object to the R&R conclusion that because it denied the other claims, the 93A claim also had to be dismissed. [Dkt. 391 at 22]. Plaintiffs seem to imply that the R&R should have evaluated Defendants' conduct in its entirety rather than assessing each action individually. [Dkt. 391 at 23]. However, Plaintiffs do not provide a specific objection, and they do not provide any supporting citations to the record or case law to support this objection. Therefore, the Court does not address this objection and overrules it.

6. Breach of Fiduciary Duty (Count I)

Plaintiffs raise three main objections to the R&R regarding their breach of fiduciary duty claim. They allege that the R&R incorrectly found 1) Defendants do not have fiduciary duties; 2) Plaintiffs' fiduciary duty claim is duplicative of their breach of contract claim; and 3) the

[20] [See Dkts. 276-26 at 2 (September 11, 2014, email from Moon to Baker stating Peter's house in Palm Beach had a mortgage, but that "[h]is Boston and [P]aris homes [were] not levered"); 276-72 at 2 (December 23, 2015 email from Emily Granoff to Baker stating that Peter was swimming in the Atlantic that morning); 276-21 at 2 (June 20, 2014, email from Paul McPheeters to the Doelgers mentioning "the escalation in Iraq" and agreeing with Peter's analysis of how it will impact oil prices); 276-121 at 2 (June 17, 2019, email from Baker to Trey Eppes mentioning discussion with Peter regarding "interest rates, oil prices, the Fed, and the Red Sox")].

[21] "Conclusory objections that do not direct the reviewing court to the issues in controversy" do not trigger Rule 72(b). Velez-Padro v. Thermo King De P.R., Inc., 465 F.3d 31, 32 (1st Cir. 2006).

R&R overlooks Defendants' obligations to Plaintiffs and Defendants' breaches. [Dkt. 391 at 19-28]. To begin, neither the R&R nor Defendants dispute that Defendants had fiduciary duties to Plaintiffs. [Dkt. 398 at 26]. Therefore, this objection and the related objections[22] are overruled.

The R&R also correctly concluded there is no common law fiduciary duty based on a "special trust relationship." [Dkt. 383 at 36-37]. To state a claim for breach of fiduciary duty under Massachusetts law, plaintiffs must show "(1) the existence of a duty of a fiduciary nature, based upon the relationship of the parties, (2) breach of that duty, and (3) a causal relationship between that breach and some resulting harm to the plaintiff." Amorim Holding Financeria v. C.P. Baker, 53 F. Supp. 3d 279, 295 (D. Mass. 2014) (quoting Hanover Ins. v. Sutton, 46 Mass. App. Ct. 153, 705 N.E.2d 279, 288–89 (1999)). "A fiduciary relationship exists when a party places special trust and confidence in another who knowingly accepts the responsibility." Salois v. Dime Sav. Bank of NY, No. CIV.A. 95-11967-PBS, 1996 WL 33370626, at *9 (D. Mass. Nov. 13, 1996). Plaintiffs argue the special trust relationship was based on the Doelgers' lack of experience in investing and reliance on their investment advisers. [Dkt. 309 at 34]. While Peter may not have been a professional, he was nonetheless a sophisticated investor with decades of experience in trading investments. [See, e.g., Dkt. 276-6 at 3 (2009 brokerage account application Peter signed on July 15, 2019, which indicates that he had 20+ years' experience trading stocks and bonds, 15+ years' experience trading options, and 10+ years' experience trading structured products, emerging markets, and hedge funds/private placements, and that the primary source of his income was "[i]nvestments.")]. Peter also regularly consulted his attorney

[22] Plaintiffs also object that the R&R incorrectly ignores controlling law that states Defendants have fiduciary duties to Plaintiffs, ignores Defendants' admissions they were fiduciaries, and overlooks Defendants' documents stating they were fiduciaries. [Dkt. 391 at 19-22].

and accountant about his investments.[23] And as the R&R notes, "[e]ven if the Doelgers' assertions had a basis in fact, they are simply insufficient to establish a common law fiduciary duty." [Dkt. 383 at 36]. There is no "relationship of higher trust" here that rises above the agreements between the parties. Zorbas v. U.S. Tr. Co., 48 F. Supp. 3d 464, 479 (E.D.N.Y. 2014) (internal quotations and citations omitted); see also Morton v. Aizenberg, No. 21-CV-7782 (NSR), 2024 WL 1892435, at *3 (S.D.N.Y. Apr. 29, 2024) (under New York Law "[m]anagers of discretionary investment accounts, such as Defendants here, 'owe their clients a fiduciary duty,' but only insofar as that duty is 'embodied in their agreement with their clients, to manage the account in a manner that comports with the client's investment objective.'") (quoting Zorbas, 48 F. Supp. 3d at 488-89)); Indus. Gen. Corp. v. Sequoia Pac. Sys. Corp., 44 F.3d 40, 44 (1st Cir. 1995) ("courts have repeatedly cautioned that the plaintiff alone, by reposing trust and confidence in the defendant, cannot thereby transform a business relationship into one which is fiduciary in nature.") (internal quotations and citations omitted).

Next, this Court adopts the R&R's analysis and conclusion that a breach of fiduciary duty is a duplicative claim of a breach of contract claim since both claims are based on "the same facts and seek the same damages." [See Dkt. 383 at 35 (quoting Alantra LLC v. Apex Indus. Techs. LLC, 636 F. Supp. 3d 223, 238 (D. Mass. 2022)); compare Dkt. 1 ¶¶ 250, 253 (Count I – Breach of Fiduciary Duty) with id. ¶¶ 264-65 (Count II – Breach of Contract)]. "Where a

[23] [See, e.g., Dkts. 276-32 at 2 (December 11, 2014, email from Baker to Moon stating that Peter's accountant, Bruce Haverberg ("Haverberg"), was advising him to take some losses from his BIND position and that Peter asked Baker to call Haverberg with him together); 276-33 at 2 (Haverberg's summary of professional services rendered from December 1, 2014 through January 31, 2015, including "[u]pdate and review of MLP schedules," "numerous discussions regarding MLP investments" and "discussions and analysis of year end opportunities of selling MLP interests"); 276-71 at 6 (2015 bill from Roberts detailing professional services rendered, including a phone call with Peter regarding MLPs on September 24, 2015); 301-186 at 2 (November 22, 2017, email from Moon to Baker summarizing a meeting attended by Plaintiffs, Roberts, and Haverberg (by phone) where MLP position was discussed)].

fiduciary duty is based upon a comprehensive written contract between the parties, a claim for breach of fiduciary duty is duplicative of a claim for breach of contract." Alitalia Linee Aeree Italiane, S.P.A. v. Airline Tariff Pub. Co., 580 F. Supp. 2d 285, 294 (S.D.N.Y. 2008). There is no contradiction with R&R's conclusion regarding the fiduciary duty claims and its conclusion that the contract claim should be dismissed as to Chickasaw because it was not a party to the Advisory Agreement. The R&R states "summary judgment should be granted for Defendants ***on any claim for breach of fiduciary duty that is duplicative*** of the Doelgers' breach of contract claim." [Dkt. 383 at 35]. In other words, the R&R was recommending granting summary judgment ***only*** for the breach of fiduciary claims that were based on the Advisory Agreements—the other breach of fiduciary claims were not dismissed on that basis. Instead, the R&R recommended granting summary judgment for any of the other breach of fiduciary duty claims because "[Plaintiffs] do not explain which or what type of duties Defendants owed, let alone provide any description of how the listed actions violated those duties. They have also not identified how each Defendant specifically breached them." [Id. at 37].

Lastly, Plaintiffs argue that the R&R "[o]verlooks [d]efendants' [o]bligations to Plaintiffs and Defendants' [b]reaches." [Dkt. 391 at 25]. First, Plaintiffs state that Defendants rely on the Comm'n Interpretation Regarding Standard of Conduct for Inv. Advisers, Investment Advisers Act Release No. 5248, 2019 WL 3779889 (June 5, 2019) and that the R&R does not discuss Tilkin's discussion of suitability. [Dkt. 391 at 25]. Specifically, Plaintiffs rely on Tilkin's opinion that "Defendants' actions were not in line with industry standards and their suitability obligations" [Dkt. 390 at 19-20], as evidence of Defendants' breach of obligations toward the Doelgers. However, Tilkin's affidavit is inadmissible for proving a breach, as an expert witness cannot testify to a legal conclusion. See Snyder v. Wells Fargo Bank, NA, 594 Fed. Appx. 710,

714 (2d Cir. 2014) (noting that while an expert "may opine on an issue of fact within the jury's province," they "may not give testimony stating ultimate legal conclusions based on those facts"); Marx & Co., Inc. v. Diners' Club Inc., 550 F.2d 505, 509-10 (2d Cir. 1977) (holding that "conclusions as to the legal significance of various facts" were "testimony concerning matters outside [the expert's] area of expertise."); Am. Empire Surplus Lines Ins. Co. v. J.R. Contracting & Env't Consulting, Inc., No. 1:23-CV-04942 (AT), 2024 WL 3638329, at *9 (S.D.N.Y. Aug. 2, 2024) ("[C]ourts exclude expert testimony that provides legal opinions, legal conclusions, or interprets legal terms; those roles fall solely within the province of the court."). Furthermore, Plaintiffs fail to specify which investments were unsuitable, how they were unsuitable, or provide any evidentiary or legal support for their conclusory statement. See Scott v. Chipotle Mexican Grill, Inc., 315 F.R.D. 33, 48 (S.D.N.Y. 2016) ("[N]o expert may supplant the role of counsel in making argument . . . [or] the role of the [factfinder] [in] interpreting the evidence.").

Plaintiffs next argue that Defendants have duties of care and of loyalty [id. at 25-26] but fail to specify how Defendants have allegedly breached those duties. Even though the R&R pointed out that Plaintiffs failed to "provide any description of how the listed actions violated" the duties Defendants allegedly owed [Dkt. 383 at 37], Plaintiffs once again make the same mistake and state in conclusory fashion that the thirteen listed actions are "[n]on-exhaustive examples of Defendants' breaches of fiduciary duties." [Dkt. 391 at 27].

Lastly, Plaintiffs argue that Baker "failed to inform supervisors of signs of Peter's diminished capacity as per JPM's Elder Policy." [Id. at 28]. Yet neither the Doelgers nor their family or representatives told Defendants that Peter was suffering from any form of cognitive decline, diagnosed with any mental health condition, or receiving any form of treatment for a mental health condition. It seems as if Plaintiffs expected Defendants to surmise Peter was

struggling with his mental health based solely on Yoon's having told Baker several times that Peter had memory problems. [Dkts. 300-5 ¶93; 321-10 at 45 (173:4-6, 15-17) (Yoon Doelger stating in her deposition that starting in 2018, "when he called me. Jimmy Baker ask [sic], how is Peter doing? So I said, well, he's just doesn't [sic] remember things")]. Ultimately, this is central point to this action—whether there was reason for the defendants to know that Peter was suffering mental and cognitive decline, sufficient to render him unable to make the financial decision that he did. As unfortunate as it is, the Court finds there is no evidence in the record to supports Plaintiffs claim.

For all of these reasons, Plaintiffs' objections regarding the breach of fiduciary duty claim are overruled.

III. CONCLUSION

For the reasons stated above, the Court **ADOPTS** Magistrate Judge Boal's R&R in its entirety. Accordingly, Plaintiffs' objections to the Magistrate Judge's Boal's R&R are **OVERRULED**, and Defendants' Motion for Summary Judgment is **GRANTED**.

SO ORDERED.

Dated: September 27, 2024

/s/ Angel Kelley
Hon. Angel Kelley
United States District Judge

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

YOON DOELGER, and PETER DOELGER, *Plaintiffs,* vs. JPMORGAN CHASE BANK, N.A., and CHICKASAW CAPITAL MANAGEMENT, LLC, *Defendants.*	No. 1:21-cv-11042-AK

ORDER ENTERING FINAL JUDGMENT ON PLAINTIFFS' CLAIMS, DISMISSING DEFENDANT JPMORGAN CHASE BANK, N.A.'S COUNTERCLAIMS WITHOUT PREJUDICE, AND STAYING ALL DEADLINES AND PROCEEDINGS

On September 27, 2024, the Court issued a Memorandum and Order (the "Order") [Dkt. 418] granting Defendants JPMorgan Chase Bank, N.A. ("JPMC") and Chickasaw Capital Management, LLC's ("Chickasaw") (collectively "Defendants") Motion for Summary Judgment as to all of Plaintiffs Yoon and Peter Doelger's (the "Doelgers") claims. JPMC's counterclaims against the Doelgers were not addressed in the Order.

On October 17, 2024, JPMC filed a motion [Dkts. 422, 423] for entry of a partial final judgment on the Doelgers' claims and seeking to either: (1) voluntarily dismiss its counterclaims without prejudice, allowing it to reassert those claims if the Doelgers' claims are reinstated after appeal or if they attempt to assert substantively similar claims in another action; or (2) alternatively, stay JPMC's counterclaims during the pendency of any appeal. On October 25, 2024, the Doelgers and Chickasaw joined JPMC (collectively, the "Parties") in filing a joint motion (the "Joint Motion") [Dkts. 424, 425] requesting the same relief, as well as a stay of

Defendants' potential applications for attorney's fees or costs pending the resolution of the Doelgers' anticipated appeal.

On October 28, 2024, the Doelgers filed the Notice of Appeal [Dkt. 426]. On October 30, 2024, the Court issued an order [Dkt. 429] stating the action was administratively stayed pending resolution of the appeal. On November 8, 2024, the Doelgers filed a motion [Dkts. 432, 433] requesting the Court rule on the previously filed Joint Motion. Defendants took no position on that motion [Dkt. 434]. On November 27, 2024, the Court directed the Parties to prepare a single proposed order that enters final judgment on the Doelgers' claims, voluntarily dismisses JPMC's counterclaims without prejudice, and stays all other deadlines and proceedings in the action [Dkt. 435].

Having reviewed and considered all the aforementioned filings, and for the reasons stated therein [see, e.g., Dkt. 423 at 10–12; Dkt. 425 at 5] and below, the Court finds just cause for the entry of partial final judgment on Plaintiffs' claims pursuant to Federal Rule of Civil Procedure 54(b).

First, the Order "has the requisite aspects of finality," as in it, the Court dismissed all of Plaintiffs' claims against Defendants. See Niemic v. Galas, 286 F. App'x 738, 739 (1st Cir. 2008) ("We first ask 'whether the judgment has the requisite aspects of finality.' The answer to that question is not in doubt here, since the judgment dismissed all claims against the medical defendants." (internal citation omitted)).

Second, the Court expressly finds there is "no just reason for delay." Fed. R. Civ. P. 54(b). Entering partial final judgment now will allow the Court to avoid wasteful and potentially duplicative litigation. If any of the Doelgers' claims are reinstated after appeal, all claims and counterclaims can be dispensed with in a single trial. On the other hand, "[i]f the summary

judgment order is affirmed on appeal," this means that, effectively speaking, JPMC's counterclaims "would be moot," which "weigh[s] in favor of a determination that there is no just delay." Patel v. 7-Eleven, Inc., 504 F. Supp. 3d 1, 4 (D. Mass. 2020). There is no interrelation of claims that might render interlocutory appellate review inefficient. See id. Moreover, entering partial final judgment now will also prevent "unnecessary cost" from being incurred. Niemic, 286 F. App'x at 740. Finally, facilitating a prompt resolution of this matter also serves the interests of all parties involved.

For the foregoing reasons, it is now therefore **ORDERED:**

1. Final judgment is entered dismissing all the Doelgers' claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure, based on an express determination that "there is no just reason for delay" in entering judgment in light of the findings and reasoning articulated above.
2. JPMC's counterclaims (as set forth in Counts I–III of its Answer, see Dkt. 25 at 93–96) are dismissed without prejudice to JPMC's right to reassert those claims under one of the following two circumstances: (1) in this action, but only in the event that any of the Doelgers' claims are reinstated after appeal of any final judgment dismissing the Doelgers' claims, or (2) in any action the Doelgers commence in which they assert the same or substantially similar claims.
3. In the event any of the Doelgers' claims are reinstated following an appeal of any final judgment dismissing the Doelgers' claims, JPMC's counterclaims will, upon JPMC's request after remand, be reinstated *nunc pro tunc* to their status immediately prior to their dismissal without prejudice pursuant to this Order.

4. All deadlines and other proceedings in this action, including any application by Defendants for fees or costs, are hereby stayed pending the resolution of any appeal of any final judgment dismissing the Doelgers' claims.

5. This stay will remain in effect until lifted by further order of this Court.

SO ORDERED.

Dated: December 9, 2024

/s/ Angel Kelley
Honorable Angel Kelley
U.S. District Court Judge

Jeff,

As discussed, below please find the details of Peter Doelger and the MLP request. Let me know if you have any questions or need any additional information:

Peter Doelger has been a client of JPM for ~20 years. He worked in the utility/energy business for 30 years before selling his business to Honeywell in the late 1990s. He has extensive experience investing in MLPs - he knows Rich Kinder (who founded Kinder Morgan and helped pioneer the modern MLP industry) personally and has been invested in MLPs since the late 1990s. He understands the sector and the industry very well and is comfortable holding a large portion of his portfolio in these type of assets. He has had a large allocation to MLPS throughout the last decade, never reducing his position in 2008 or in the recent Oil market downturn.

Peter's estimated net worth is ~$90 - 100 MM and he currently holds a portfolio of $~~33~~45 MM of MLPS. These MLPS are managed by Atlantic Trust and custodied at J.P. Morgan. Peter has become frustrated with his existing manager and asked if we could help make introductions to some other managers in the space. He met with the Chickasaw team and came away very impressed. He wants to move ~~his entire~~ $33 MM of his portfolio ~~to~~into our OAP:MLPEI (Chickasaw) strategy.

I understand that this portfolio is ~33% of his LNW and this is well above the recommended 5% bite size for this strategy. We will only be moving his existing MLPs into this strategy and will not be adding ~~an~~any additional cash to the asset class as a part of this transfer. We have told Peter on multiple occasions that we believe his allocation to the asset class is too high, but he is comfortable with the risks and believes in the opportunity in the space long term. He would be happy to sign any additional disclosures that would be necessary in order to open this account.~~I spoke to the manager selection team and they mentioned that this had been done in the past with this strategy.~~

Let me know if you have any questions or need any additional information.

Thanks,
Jimmy

From: Baker, James J <james.j.baker@jpmorgan.com>
To: Curtin, Daniel J <daniel.j.curtin@jpmorgan.com>
Sent: 8/28/2015 5:50:12 PM
Subject: RE: Peter Doelger - MLPEI Request

Thanks, Jeff is working with his boss and Kim Ferris on seeing what can be done here. He seems more positive that we can come up with a solution here, but a little pressure/support from the Jeff Burke/business side I'm sure would be helpful too. I'll keep you updated on the call at 2:00.

Thanks,
Jimmy

James J. Baker, CFA | Investment Specialist | **J.P. Morgan Private Bank** | 50 Rowes Wharf, Floor 4, Boston, MA 02110-3339
T: 617 310 0328 | F: 857 488 3612 | james.j.baker@jpmorgan.com | jpmorgan.com

From: Curtin, Daniel J
Sent: Friday, August 28, 2015 11:17 AM
To: Baker, James J
Subject: RE: Peter Doelger - MLPEI Request

Nice email. Are we still at the Jeff lee level?

Sent with Good (www.good.com)

-----Original Message-----
From: Baker, James J
Sent: Friday, August 28, 2015 09:58 AM Central Standard Time
To: Lee, Jeffrey
Cc: Curtin, Daniel J; Beggans, John B
Subject: Peter Doelger - MLPEI Request

Jeff,

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T: 617 310 0328 | F: 857 488 3612 | james.j.baker@jpmorgan.com | jpmorgan.com

From: Baker, James J <james.j.baker@jpmorgan.com>
To: Burke, Jeffrey A <jeffrey.a.burke@jpmorgan.com>
CC: Wadhwa, Prad <prad.wadhwa@jpmorgan.com>;Beggans, John B" <John.B.Beggans@jpmorgan.com>;Curtin, Daniel J" <daniel.j.curtin@jpmorgan.com>
Sent: 8/28/2015 7:16:01 PM
Subject: FW: Peter Doelger - MLPEI Request

Jeff,

Thanks for taking the time to discuss the potential new MLP business this afternoon. Below is some additional color on the client and the current situation. If you have any questions or need any additional information please let me know.

Thanks,
Jimmy

James J. Baker, CFA | Investment Specialist | **J.P. Morgan Private Bank** | 50 Rowes Wharf, Floor 4, Boston, MA 02110-3339
T: 617 310 0328 | F: 857 488 3612 | james.j.baker@jpmorgan.com | jpmorgan.com

J.P. Morgan Securities LLC
JPMorgan Chase Bank, N.A.

From: Baker, James J
Sent: Friday, August 28, 2015 10:58 AM
To: Lee, Jeffrey
Cc: Curtin, Daniel J; Beggans, John B
Subject: Peter Doelger - MLPEI Request

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T: 617 310 0328 | F: 857 488 3612 | james.j.baker@jpmorgan.com | jpmorgan.com

J.P. Morgan Securities LLC
JPMorgan Chase Bank, N.A.

From: Baker, James J <james.j.baker@jpmorgan.com>
To: Curtin, Daniel J <daniel.j.curtin@jpmorgan.com>
CC: Beggans, John B <John.B.Beggans@jpmorgan.com>
Sent: 8/27/2015 11:51:56 PM
Subject: RE: Peter Doelger

DC,

Thanks - just discussed with Beggans by phone, I think he captured all the details in his email to Burke.

Moon and I spoke to him today - pressed him on his net worth and told him we would need more details to move forward. He didn't provide a concrete number because I honestly don't think he knows an exact number. He asked us to touch base with his accountant about it, which we will. I'd estimate it is somewhere in the $80-100 MM range.

Let me know if there's any other info you need.

Thanks,
Jimmy

Sent with Good (www.good.com)

-----Original Message-----
From: Curtin, Daniel J
Sent: Thursday, August 27, 2015 07:14 PM Eastern Standard Time
To: Baker, James J
Cc: Beggans, John B
Subject: RE: Peter Doelger

Yes. Can you send me an email with the short version of the story so I can forward it. Did you ever get him to give you his actual net worth?

Sent with Good (www.good.com)

-----Original Message-----
From: Baker, James J
Sent: Thursday, August 27, 2015 05:50 PM Central Standard Time
To: Curtin, Daniel J
Cc: Beggans, John B
Subject: Peter Doelger

Just gave us the green light to fund a $33 MM Chickasaw Portfolio. I mentioned it to Jeff Lee again today but it seems to be stuck in risk no man's land. Peter is very tax sensitive and this market pullback is providing the perfect opportunity to make this transition. If we wait too long the tax bill may grow to the point where this change no longer makes practical sense to Peter and we could lose this opportunity.

Can we discuss the best way to go about escalating/expediting this tomorrow?

ADD112

possible.

Q. Did Mr. Doelger ever tell you that he was worth $100 million?

A. I don't recall him ever telling me that.

Q. You can put that document aside.

(Exhibit 72 marked for identification)

Q. Mr. Moon, I'm handing you what's been marked as Exhibit 72. Please take a moment to review the document, and let me know when you're finished.

A. Okay. Thank you.

Q. Do you recall having a conversation among yourself, Mr. Baker, and Mr. Doelger on August 27, 2015?

A. I don't remember specifically other than this reminder.

Q. And does this reminder refresh your recollection as to what was discussed?

A. Yes.

Q. Okay. So what was discussed?

A. Well, only what's here. According to this, there was a discussion about his net worth.

Q. Okay. And what did Mr. Doelger say about his net worth?

A. I don't recall specifically.

Q. But what does it say according to this?
A. Well, according to this, it says we would need -- did not provide a concrete number.
Q. And then Mr. Baker goes on to say "because I honestly don't think he knows an exact number." Do you see that?
A. I do.
Q. And you had testified earlier that you never recall him saying he was worth $100 million. Is that correct?
A. That's correct.
Q. Do you ever remember him saying he was worth $80 million?
A. No.
Q. Do you ever remember him saying a specific number about his net worth?
A. I don't.
Q. Okay. Do you ever remember him saying anything that gave an impression that he knew what his net worth was at that time?
MR. MCCAUGHEY: Objection to form.
A. I'm sorry. Could you repeat the question?
Q. Do you recall Mr. Doelger ever saying anything that gave you the impression that he knew his net worth at that time, in August 2015?

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

YOON DOELGER and
PETER DOELGER,

Plaintiffs,

v.

JPMORGAN CHASE BANK, N.A. and
CHICKASAW CAPITAL MANAGEMENT, LLC,

Defendants.

Civil Action No. 1:21-cv-11042-AK

AFFIDAVIT OF BRUCE HAVERBERG IN SUPPORT OF PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

I, Bruce A Haverberg, on oath hereby depose and state the following:

1. I am a certified public accountant and I maintain an office in Burlington, Massachusetts. I submit this affidavit in support of the Doelgers' Opposition to Defendants' Motion for Summary Judgment.

2. I have known Peter and Yoon Doelger for many years and have been preparing their tax returns since 2004.

3. I was and am generally aware of the Doelger's assets and liabilities since most of them had some tax consequences. Over the years, I also assisted Peter and Yoon in preparing mortgage applications from time to time, which included schedules of their assets and liabilities.

4. As I said at my deposition in this case, Peter and Yoon never had a net worth anywhere near $100 million during the time I have known them.

5. I do not believe that James Baker of JP Morgan ever asked me in 2015, or at any point, what Peter's net worth was.

6. Had Mr. Baker called me in 2015 and asked me if Peter's net worth was at least $100 million, I would have definitely said no.

Dated: October 19, 2023

Bruce A. Haverberg

J.P.Morgan

EXTENSION OF CREDIT FORM Personal Financial Statement

Statement of Financial Condition

Please complete your Financial Condition as of (mm/dd/yyyy) 11/17/2016

ASSETS

Type	Schedule #	Amount ($)
Cash and cash equivalents		3,400,000
Liquid investments and marketable securities		33,500,000
Cash value of life insurance	1	
Restricted or control stocks		
IRAs, KEOGHs, 401(k)s and other retirement assets		
Personal real estate	2	22,500,000
Commercial/investment real estate	3	
Partnership/private corporation	4	
Non-marketable securities/alternative investments/ private equity	5	
Account and loan receivables		
Automobiles and other personal property		
Other assets (itemize)		
Total assets		$59,400,000

LIABILITIES

Type	Schedule #	Amount ($)
Unsecured debt to banks	6	
Secured debt to banks	6	16,000,000
Margin debt		
Loans against IRAs, KEOGHS, 401(k)s and other retirement assets		
Personal real estate mortgage/equity	2	4,000,000
Commercial/investment real estate mortgage	3	
Amounts payable to others		
Unpaid income tax		
Other unpaid taxes and interest		
Other debts (itemize)		
Total liabilities		20,000,000
Net worth (total assets – total liabilities)		39,400,000

SOURCES OF INCOME

Type	Monthly Amount ($)	Annual Amount ($)
Gross salary		
Interest income		
Dividend income		2,600,000
Bonus/commissions		
Net cash flow–real estate investments		
Net cash flow–other partnerships		
Net cash flow–S corporations		
Sale of securities		
Sale of real estate (please attach list)		
Sale of other assets (please attach list)		
Other income		
Total income	0	2,600,000 0

Round to nearest dollar

EXPENSES

Type	Annual Amount ($)	Current Year ($)
Federal taxes		
State and local taxes		
Real estate taxes		
Mortgage payments		
Bank interest expenses		
Bank principal repayments		
Margin interest expenses		
Other interest expenses		
Living expenses		
Co-op/condo maintenance/HOA		
Residential rental expenses		
Pension contributions		
Homeowner's insurance premiums		
Alimony/child support		
Other expenses		
Total expenses	0	0

is a question. It can be explainable and benign or not.

Q. When Mr. Baker received that 2016 personal financial statement that was handwritten, Mr. Doelger in the room sitting down with him going over his finances, should Mr. Baker have provided that to whoever processes KYC information to update it?

MR. FRENIERE: Objection as to form.

A. I've said before, I will stand by it, it should have triggered a suitability analysis, a subsequent suitability analysis. What their process is for, you know, providing it to other parts of J.P. Morgan for other instances is -- I don't know and I don't want to opine on it.

Q. And your position is Chickasaw did not have to know anything about its customer?

A. They didn't. They didn't have to know that information.

Q. And then No. 4, I believe we've covered this, but your position is that Chickasaw had no separate or independent obligation to determine suitability because it was relying on J.P. Morgan?

From: pba-prod-credit-engine@jpmorgan.com

To: KATHERINE.E.POST@JPMORGAN.COM <KATHERINE.E.POST@JPMORGAN.COM>;SANDEEP.SHETTY@RESTRICTED.CHASE.COM <SANDEEP.SHETTY@RESTRICTED.CHASE.COM>;katherine.e.post@jpmorgan.com <katherine.e.post@jpmorgan.com>

Sent: 4/17/2017 2:58:01 PM

Subject: Renewal Loan Pricing Approval Peter W Doelger - Approved

Ticket Information:

Ticket #	9903020877
Ticket Status	Approved
Initiator	SANDEEP SHETTY

Approval Status

Team	SID	Name	Status	Date
US Capital Advisor	J912100	KATHERINE E POST	Approved	4/17/2017

Facility Information:

Region	US TEAM-LED EAST REGION
Market	US TL BOSTON
Capital Advisor	Katherine Elizabeth Ramsey Post
Banker	Douglas V Moon
Client Name	Peter W Doelger
Old Facility / Client Spread (bps)	110.00
Pricing Date	4/17/2017
Facility Program	Standard
Facility Type	Advised
Revolving Facility	Revolving
Facility Status	Renewal
Currency	USD
Facility Amount	19,000,000.00
Expected Utilization	100.00%
Facility Tenor (WAFL)	>1.0 Year | <= 1.5 Year
Expected Draw Type	Variable
Rate Reset Frequency	1M
Loss Given Default (WALGD)	0.5%
Default Grade	5 or NC
Multinational	N

Other Product Details:

Put Loan	N
SBLC/Guarantee Backed Facility Related	N
Does this facility have an embedded LC?	N

Proposed Fees:

	Non-Usage Fees	Up-Front Arrangement Fee
Standard Fee (bps)	0.00	0.00
Proposed Fee (bps)	0.00	0.00
Variance (Discount)/Premium (bps)	0.00	0.00

Proposed Pricing:

	Prime	LIBOR	Fed Funds	Overnight LIBOR	Money Market / Offered
Base Rate Less COF	4.00	0.99	0.91	0.93	0.99
Standard Client Spread (bps)	0.00	120.00	170.00	170.00	120.00
Proposed Client Spread (bps)		110.00			
Variance (Discount/Premium) (bps)		(10.00)			

ADD119

Approval Group	Capital Advisor (VP+)
Approval Factor	Spread Below Target
Proposed Net Pretax Spread (bps)	65.49
Proposed Marginal ROE	> 50%

Reasons for Exception Approval Details:

Highest Level Approval Required:
Capital Advisor (VP+)

Reason(s) Approval is Required:
Spread Below Target

Who is the client?:
Peter Doelger

What is the nature of our relationship with the client?:
We are requesting to keep pricing as is in order to maintain a strong relationship with the client. The client currently has over $16MM outstanding and we do not want to change pricing and risk the client paying down the entirety of the line as a result. Total cash balance for the client is $4.1MM and prior year revenue was $289K

Supplementary comments:

Exception Reasons:

Old Pricing Grid

Relationship Information (USD)

Product	Annualized Revenue (As of Feb 2017)	Balances (As of Feb 2017)	Anticipated Balances
Credit	138,522.3	16,120,186.29	0
Deposits	24,869.66	1,435,906.37	0
Brokerage / Investment Management	221,664.72	38,341,558.15	0
Mortgage	0	0	0
Custody	0	0	0
Fiduciary	0	0	0
Other	0	0	0
Total	385,056.68	55,897,650.81	0

Non Credit Revenue Yield:
0.62 %

Total Yield:
0.69 %

Other Exception Details:

Conditional Approval:
No

Conditional Approval Comments:

ARC String

008; E1; F1; 19000000; 19000000; 0.5%; I8; D1; USD; 1.5; H1; 0.0; 1.5; 120.0; 0.0; 120.0; Act 110.0; -10.0; NA; NA; ; G2; 110.0; 0.0; 0.0; 0.0; 0.0; 0.0; Y; N; N; N; N; N; B6; C3

FOR JPMC INTERNAL USE ONLY

ADD120

From: Moon, Douglas V <douglas.v.moon@jpmorgan.com>
To: Post, Katherine E <katherine.e.post@jpmorgan.com>
CC: von Kuhn, Andrew FR <andrew.fr.vonkuhn@jpmorgan.com>;McKeever, Joseph P <joseph.p.mckeever@jpmorgan.com>
Sent: 3/12/2014 4:07:59 PM
Subject: Re: April Annual Review/Repricing - Doelger, Peter W. - Summary Analysis Fac ID [redacted]8765

Thanks. Yes. It is sensitive, but we should proceed as you describe.

I may see him next week
DM
Doug Moon
(O) 617-310-0447
(C) 781-775-5276

sent by blackberry. I do not get text messages on my gadgets. Please email or call me.

From: Post, Katherine E
Sent: Wednesday, March 12, 2014 12:02 PM
To: Moon, Douglas V
Subject: FW: April Annual Review/Repricing - Doelger, Peter W. - Summary Analysis Fac ID [redacted]8765

FYI – Peter's line is up for renewal at the end of April, so we need to decide on pricing by end of March time frame to give us time to regenerate docs. As a refresher, Peter is currently at L+ 1.00% and the new grid pricing is L+1.20%. At a minimum, it would be good if Peter would be amenable to at least at 5-10bps increase, but we of course do not want to discourage usage. Thoughts?

Best regards,

Katherine

Katherine E. (Ramsey) Post | Vice President | J.P. Morgan Private Bank
50 Rowes Wharf, 4th Floor, Boston, MA 02110
Ph: 617.310.0731 | Fax: 617.310.0314 | E-Mail: katherine.e.post@jpmorgan.com

To ensure a prompt response for all client service related matters, please contact Nancy Dunbar, Client Service:
PWM-Service2480@jpmorgan.com | T: 877.576.2480 | F: 888.252.1417

From: Huie, Kar Min
Sent: Tuesday, March 11, 2014 10:23 AM
To: Post, Katherine E
Cc: Stacey, Richard P
Subject: April Annual Review/Repricing - Doelger, Peter W. - Summary Analysis Fac ID [redacted]8765

Katherine,
Are we going to seek a pricing increase or pricing exception for this one?
It's a April Review.

ADD121

From: Baker, James J <james.j.baker@jpmorgan.com>
To: Protzmann, Matt <matt.protzmann@jpmorgan.com>;Connolly, Christian T" <christian.t.connolly@jpmorgan.com>
CC: Moon, Douglas V <douglas.v.moon@jpmorgan.com>
Sent: 4/26/2018 9:47:43 PM
Subject: Matt Doelger

Spoke to Matt Doelger for 30 minutes today:

- Talked about debt, LTV, rates, etc.
- Seems to be some confusion in our role as banker and advisor. We as a bank are comfortable with his current debt levels as he has collateral sufficient to cover his outstanding credit. He is not in a margin call and is not on a "clock" to make a paydown. The note is not coming due. However, we as advisors believe he is over levered and should be working to reduce his debt over time. Appears these two messages are being confused.
- Discussed the $1 MM proposed paydown on the line. He said "there's plenty of negative carry on his balance sheet, I'm not sure $1 MM will even make a difference compared to the black hole that is the PB house". He seems to be one of the drivers pushing for the sale of the PB house. He agreed this is a low hanging fruit though and we should take care of.
- Sounds like the house isn't going to sell this year – Matt reiterated that the broker is saying December/January is prime selling season and they missed it this year. Expect to sell in Q1 2019 at this point. Wanted to make sure "they were good" to wait that long. Again said they should be but depends on the performance of MLPS as collateral. Discussed options if MLPs do drop – selling MLPS, adding a HELOC to the house to take collateral pressure off of MLPS portfolio
- Peter and Yoon now feel like there is an August "deadline" where they line comes due and they must have a plan. I stressed this is a formality and we have renewed the line 10 times in the last 10 years. He said this has been a serious source of stress for peter and Yoon and if we could renew this early it would really helped. Talked to KP – this will be no problem.
- He also asked about having a conference call with our MLP IB analyst to discuss the sector. He said Anne (Luisi?) set one of these up for him in the past and it was very helpful. I mentioned Peter and I have regular calls with the Chickasaw team. He was less interested in that as "of course they think they're own asset class is great, if they said it wasn't, they'd lose business." More interested in what our IB analyst has to say. I warned him it was earnings reasons and could be difficult to get a call scheduled – he said he was free 4/30 at 5:00 or 6:00, 5/2 at 5:00 or 6:00 or 5/4 from 3:00 – 5:00
- **Matt/Christian – Can you work with our Equity coverage team to see if we can reach out to someone on Jeremy Tonet's team to get this call scheduled during one of those times?**

Thanks,
Jimmy

James Baker, CFA | Vice President | Investment Specialist | **J.P. Morgan Private Bank** | 50 Rowes Wharf, Floor 04 | Boston, MA 02110 | T: 617 310 0328 | eFax: +1 857.488.3612 | james.j.baker@jpmorgan.com | jpmorgan.com/privatebank

J.P. Morgan

J.P. Morgan Securities LLC | JPMorgan Chase Bank, N.A.

Appendixes

Appendix A: Use of Material Nonpublic Information

Regulations 12 CFR 9.5(b) for national banks and 12 CFR 150.140(b) for FSAs require that a bank exercising fiduciary powers adopt and follow written policies and procedures adequate to maintain its fiduciary activities in compliance with applicable law. Among other relevant matters, the policies and procedures should address, where appropriate, the bank's methods for ensuring that fiduciary officers and employees do not use material nonpublic information in connection with any decision or recommendation to purchase or sell any security. The OCC expects bank fiduciaries to adopt and follow policies and procedures that provide effective methods to prevent improper use of material nonpublic information and ensure compliance with applicable law, including federal securities laws. The improper use of insider information may also expose bank employees, and the bank itself, to OCC administrative actions and possible civil litigation. In addition, such actions expose the bank to significant reputation risk.

Information Barriers Between the Fiduciary and Commercial Areas of the Bank

Bank policies should require an information barrier, sometimes referred to as a "Chinese wall," that prevents the passage of material inside information between a bank's fiduciary department and areas of the bank or its affiliates that perform activities such as commercial lending and investment banking. The passage of such information would be in violation of securities laws and regulations, as well as fiduciary standards. A total separation of fiduciary and commercial functions within a bank is not required, and joint marketing to and servicing of customers is not prohibited. Rather, the required information barrier should isolate fiduciary personnel making investment decisions from material nonpublic information that might influence those decisions. Similarly, the barrier should prevent individuals in other areas of the bank or an affiliate from using information obtained by the bank in its fiduciary capacity, including when the bank acts as indenture trustee, to influence credit decisions or actions unrelated to the bank's fiduciary role.

A bank fiduciary could potentially obtain material nonpublic information from a variety of sources, including commercial lending relationships, transfer agent activities, underwriting activities, investment banking activities, industry contacts, and employees' personal relationships. Banks should establish policies and procedures designed to prevent the inappropriate use of material nonpublic information in making fiduciary investment decisions, regardless of how the information is obtained.

Insider Trading and Securities Transaction Reporting

A bank's policies and procedures should address insider trading. Illegal insider trading generally refers to buying or selling a security while in possession of material nonpublic information about the security. Insider trading violations may also include "tipping" such

From: Yoon Doelger <ykdoelger@yahoo.com>
To: Baker, James J <james.j.baker@jpmorgan.com>
Sent: 8/10/2019 3:13:02 PM
Subject: Re: JPM - Liabilities

Good morning Jimmy,
Thanks so much. Have a great weekend in NJ. Talk to you on Monday. Yoon

On Friday, August 9, 2019, 04:28:02 PM EDT, Baker, James J <james.j.baker@jpmorgan.com> wrote:

Peter and Yoon,

Great catching-up this morning. Just wanted to briefly summarize some of the items we discussed today.

The current outstanding balance on the line of credit if $10,945,908.51 and with the current drop in interest rates the all-in interest cost on this line is currently 3.2%

Based on your current asset values it would take an approximately 8.25% decline in MLP prices (without any precautionary moves) in order to result in a margin call so while the buffer has declined there is still significant room here.

Here are the estimated closing costs on a $2 MM HELOC – JPM would cover the first $5k of costs so the all-in cost to you would be expected to be only $500:

$2MM Mortgage or HELOC in Boston:	
Estimated Title & Recording Fees:	$3,500
Settlement Fee:	$850
Estimated Appraisal Fee:	$1,200
Total Estimated Closing Costs:	**$5,550**

As we discussed, I like the HELOC option as it is easy to set-up and you only pay interest if you use it. It can provide an effective emergency backstop in the event of a significant decline in MLP prices with little upfront costs

Hope this is helpful and look forward to discussing in more detail on Monday. Have a great weekend.

Jimmy

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J.P. Morgan

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ADD124

From: Moon, Douglas V <douglas.v.moon@jpmorgan.com>
To: Baker, James J <james.j.baker@jpmorgan.com>
Sent: 11/22/2017 8:49:07 PM
Subject: draft client "Disco" meeting 11/21/2017

11/21/2017 – 2+ hour meeting with Peter, Yoon, Paul Roberts, and Bruce Haverberg (by phone). JPM staff included Jimmy, Doug & Jonathan.

The meeting was split roughly into 2 parts - -- 1) a discussion of the **MLP portfolio** and; 2) a review of the **ATLAS** estate disposition exhibits.

Peter said that the **MLPs** have on the whole been a good investment and that the income has been reliably stable. He and Yoon recognize that they are volatile and after recent underperformance (relative to S&P for example) it may be a good time to evaluate their position, the tax picture, and the strategic leverage associated.

Jonathan then walked through the ATLAS results and made suggestions and observations. The family's key goals are simple - - Treat all three of their kids equally through the estate and ensure that Peter & Yoon each have plenty to live on comfortably through their lives.

The Rev Trust structures flow into 'part a' & 'part b' trusts for surviving spouse & 3 kids equally (Matthew, Emily & He-Jean) and ultimately to grandkids. Immediate action is to fund the revocable trusts and advise about balancing the assets as needed across Peter & Yoon. Jonathan review some other tools which were not of immediate interest (529's, annual exclusion gifts, etc.)

Tim Stein (Laurie & Cutler) may or may not be continuing on as T&E Advisor & co-trustee. Paul Roberts will follow-up there. Current grandchildren: Emily has 2 (7&4), Matthew & wife Sarah have 3 (6, 4, 1 mo), and He-Jean has 2 (3&2).
Yoon may be owner of the Boston condo ($7mm).

Follow up:
DM send Bruce the electronic version of the ATLAS
JB prepare return data on the MLP portfolio
JPM team provide advice on timing and magnitude of balance sheet adjustments, with & without pro-forma Palm Beach sale. Integrate Bruce insight on tax position. Include LOC analysis.
DM work with the family and advisors to fund the family's revocable trusts
DM/JO work with the clients to balance the assets (Liquid versus RE)
DM send Paul Roberts the Ammendments to the trusts
JO – work with Paul Roberts to think about putting boston property into an LLC
JPM team arrange lunch with Peter & Yoon (Palm Beach) to review plan at a summary level again after Rev Trusts are funded

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Marjorie Dely | Administrative Assistant | T: 617-310-0434| marjorie.dely@jpmorgan.com

ADD125

From: Doug Moon [doug@ofopartners.com]
Sent: 3/13/2019 11:01:03 AM
To: Christian Connolly [christian.connolly@ofopartners.com]; Ezra Levine [ezra.levine@ofopartners.com]; Karen Sugar [karen.sugar@ofopartners.com]
Subject: DVM - meeting summary - "Disco" family: $40mm

CONFIDENTIAL

3/13/2019 – DM 1.5hour lunch with the family . They are highly interested in continuing to work with DVM & OFO. Had a few questions about the Firm and it's philosophy. More so, they wanted to talk about their situation. They remain uneasy about the level and cost of the leverage they have accumulated and wanted to discuss strategies to adjust. Interest costs (x-mortgage) are $40,000/mo.
They also recognize the primacy of the MLP portfolios in driving their risk exposure as well as income ($2mm/yr). Yoon is interested in lowering their exposure and therefore volatility, but Peter is less certain about selling. He is very open to alternative means of future returns and income to supplement or replace their reliance on oil & gas pipelines.

Their **key goals** are to lower their debt, keep high income, lower their burn rate, and to organize their administration better. They could use more peace of mind.

JPM has suggested adding a HELOC to the Palm Beach property as backstop liquidity. **241 El Vedado** has been listed for 9 mos, and they are told it may take 18 mos. to sell. They bought for $7.2mm in May of 2012. It was listed in March 2018 for $13.9mm and has been reduced twice (currently listed $11.9mm). They have a $4mm 3% mortgage that will float starting in 12/2019. Their plan would be to down-size to a condo in Palm Beach and remain florida residents.

They may want to sell both the Paris and Boston apartments as well – partly to raise liquidity and to lower their expenses, but also to diminish the work involved in having so many places. Paris is modest (2br 2 bath), and Boson is probably in the $5mm-$7mm range.

Followup: DM get statements. Call CPA Bruce for update on basis. Discuss balance sheet & investment strategies with OFO team.

Doug Moon, CFA
Co-Founder & CEO
O.F.O. Partners
doug@ofopartners.com
781-775-5276 (m)

Patient: DOELGER,PETER 1768249(MGH) 06/15/37 M
Author: Electronically Signed by David F. Brown, M.D.

Signed 09/06/2015 07:30
Visit Date: 09/03/2015

Attending Physician/NP Documentation

Date/Time of Encounter: 09/03/15 13:14 [dfb1]

Information Source: Medical records and electronic records reviewed. Patient interviewed and patient examined. [dfb1]

History of Present Illness:

HPI: 78 yo man with AF and about a year of documented paranoid delusional behavior and cognitive decline presents voluntarily after reporting he was hit wit weaponized radio waves that gave him stomach pains. No actual trauma , no vom, fever, current abd pain. No SI/HI. Similar to prior episodes per his wife and the medical record. [dfb1]

Physical Exam:

General: Vitals as per nursing notes.Ox2 [dfb1]
Head/Eyes: The head is normocephalic and atraumatic. [dfb1]
ENT: Patient's airway is intact. [dfb1]
Neck: The neck is supple. [dfb1]
Chest/Respiratory: The lungs are clear to auscultation bilaterally. [dfb1]
Cardiovascular: The heart sounds have a normal S1/S2. [dfb1]
GI/Abdomen: Abdomen is soft. The abdomen is nontender and nondistended. [dfb1]
Musculoskeletal: The patient has a normal range of motion for all limbs and joints. [dfb1]
Neurologic: The neurological exam shows no focal deficits. recall 0/3 obj in 3'. [dfb1]
Psychiatric: The patient is cooperative. The patient denies suicidal ideation. [dfb1]

Differential Diagnosis and Plan:

Differential Diag/Plan: paranoid ideations without exvidence that this represents a new problem or exacerbation. labs are unremarkable ofr an organic cause. will discharge to the care of his wife. PCP aware and confirms the chroniciity. [dfb1]

ED Course/Reassessment: 09/03/15 16:37 Assumed care of this patient from John Matthews PA-C. In brief, 78yo M with PMHx of vertigo and PAF with paranoia, no SI/HI, can take care of himself. Is functional at home. Going on for 1.5 years. Thinks people are "out to get him". Wife is coming to get him.
[] Has geriatric psych follow up at BWH
[] Seeing PCP next Tuesday
[] When wife arrives, will discharge and have security escort him out. [ac72]
I have spoken to Dr. Marshall Wolf who states that this behavoir is typical. He also says that he has psychiatric help at BWH from a senior member and one of the issues was that the patient has been non-compliant with his Seroquel. Dr. Wolf says that he will see the patient on Tuesday 9/8/15. 09/03/15 15:48

Patients results are normal and he may go. I have called his wife (917-697-6629) and she has agreed to come and pick him up. I have instructed the nurses and the PA taking pass off that security should chaperone him to his wifes car at 5pm when she said she would arrive. I walked patient to his wifes car myself. 09/03/15 16:46 [jjm91]

Diagnosis: paranoid ideation; cognitive deficits; dementia [dfb1]

Teaching/Supervising MD Attestation: I have personally seen and examined the patient and reviewed the PA's findings, plan and discharge medications. As necessary, I have appended the note with my suggestions, comments or clarification to the PA's findings, plan and medication(s) in the note above. [dfb1]

do not concede—then they are bound by the forum selection clause. "Enforcement of a forum selection clause is an appropriate basis for a motion to dismiss pursuant to Rule 12(b)(3)…." *5381 Partners LLC v. Shareasale.com, Inc.*, 2013 WL 5328324, at *2 (E.D.N.Y. 2013).[47]

E. Plaintiffs Have Not Asserted Viable Claims Against JPMS

The claims raised against JPMS are also futile.[48] First, Plaintiffs' claims against JPMS are subject to a binding FINRA arbitration clause, and therefore Plaintiffs' attempt to amend their complaint to add such claims is futile. *See, e.g.*, *Eubanks v. Gasbuddy, LLC*, 2022 WL 16963807, at *6 (D. Mass. 2022) (denying leave to amend where new and existing parties would be subject to arbitration clause).[49] Second, JPMS has preclusive defenses against any number of claims (*e.g.,* the baseless alter ego claim) Plaintiffs now wish to raise. Third, while Defendants cannot address here the *700+* separate references to JPMS, they can say that the PAC (like the original Complaint) still focuses its attention on the 3005 Account, which held the OAP-MLPEI strategy investments. JPMS was not party to the Advisory Agreement for that account, and it is not clear how JPMS could be held responsible for acts related to it. The bulk of the JPMS allegations relate to the 3005 Account and, therefore, they are likely futile.

JPMS expects to have many other defenses if it is added as a defendant. That said, the points above are enough to show that the PAC claims and allegations as to JPMS are futile.

CONCLUSION

For the foregoing reasons, Defendants respectfully request that the Motion be denied.

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[47] On this topic, Plaintiffs' Memorandum briefly mentions allegations of a violation of the Form ADV requirement. Mem. at 7. Aside from a new claim about a Form ADV obligation under the AIMS, the other Form ADV allegations were in the original Complaint (Dkt. 1 ¶¶ 221-227), and Defendants can address these original Form ADV allegations in greater detail later, *e.g.*, as part of any dispositive motions.

[48] Notably, even if JPMS were a party with "alleged likely liability," this would not relieve Plaintiffs of "[their] own responsibility to have timely asserted the claim in [their] own complaint, or to give some adequate reason not to have done so." *Acosta-Mestre*, 156 F.3d at 52-53.

[49] Even if Plaintiffs could avoid the arbitration clause (they cannot), the PAC lacks information needed to demonstrate diversity jurisdiction over JPMS. *See, e.g.*, *Avant Cap. Partners, LLC v. W108 Dev. LLC*, 387 F. Supp. 3d 320, 322 (S.D.N.Y. 2016) (complaint failing to identify citizenship of members of limited liability company "does not adequately allege the existence of diversity jurisdiction"). If JPMS destroys diversity, this Court would need to exclude JPMS to retain jurisdiction. *Cf. Wenzel v. Sand Canyon Corp.*, 841 F. Supp. 2d 463, 472 (D. Mass. 2012) (Boal, J.) ("[T]he Court will dismiss Commerce from the action so as to preserve diversity jurisdiction…."), *abrogated in nonrelevant part by Culhane v. Aurora Loan Servs.*, 708 F.3d 282 (1st Cir. 2013).

intended.

Now, we're not saying the agreement necessarily needs collateral evidence, but I'm sure we're going to disagree about how you interpret that agreement, and it would be awfully helpful to know what the parties intended and what their communications were about the meaning of that agreement.

We didn't do any of that because we didn't have a claim based on AIMS. We've looked in excruciating detail about the advisory agreement, and we would have to give at least a glance at the AIMS agreement in order to properly defend a claim regarding that agreement.

12:20PM

Your Honor, we, of course, mention in the papers the other topics that were raised in the amended complaint. The trade confirmation, some of this, your Honor, I wish they had brought this earlier because I believe it would have come out in discovery that the plaintiffs had all of the trade confirmation information from the get-go in their monthly statements, that they waived even getting trade confirmation. Of course, that didn't come out until our papers because we just got this motion to amend.

12:20PM

And, your Honor, I think I still emphasize that if we haven't really talked about futility, we went over why these claims were futile on several different bases. We haven't really talked about the fact that J.P. Morgan Securities definitely has an arbitration clause that it can enforce. I'm

A. The MLPEI Agreements Mandate That This Lawsuit Involving The MLPEI Agreement And JPMC Services Be Brought In Court, Not Arbitration

1. The MLPEI Agreements And The General Terms Explicitly Preclude Arbitration Of The Claims At Issue In The FINRA Arbitration

The Non-Arbitration Clauses contained in the MLPEI Agreements plainly preclude arbitration of the FINRA SOC claims. (*See* Ex. 2 at 6 of 18 (the Doelgers "acknowledge and understand that . . . any dispute arising out of investment management services provided by [JPMC] . . . will not be subject to arbitration"); Ex. 3 at 4 (the parties "submit to the exclusive jurisdiction of [] federal or state court . . . for all legal proceedings arising out of this Agreement").) These clauses should be enforced.[9] Further, the agreements related to the line of credit and other JPMC products also lack an agreement to arbitrate, and therefore those transactions are not subject to arbitration. *See* Fact § I.A–B *supra*.

The Doelgers cannot evade the Non-Arbitration Clauses by simply suing JPMS in the place of JPMC. The "fact a party is a non-signatory to an agreement is insufficient, standing alone, to preclude enforcement of a forum selection clause." *Europa Eye Wear Corp. v. Kaizen Advisors, LLC*, 390 F. Supp. 3d 228, 231 (D. Mass. 2019). The First Circuit has consistently held forum selection and arbitration provisions can be applied to actions against a non-signatory when the allegations are closely related to or depend on the existence of the contract. *See, e.g.*, *id.* ("[T]ort claims against a non-signatory are within the scope of a forum-selection clause if the tort claims ultimately depend on the existence of a contractual relationship between the signatory parties.").[10]

[9] *See, e.g.*, *MIT Fed. Credit Union v. Cordisco*, 470 F. Supp. 3d 81, 85 (D. Mass. 2020) (enforcing arbitration exemption provision and finding claims not subject to arbitration agreement because "the parties consented to exclude collection disputes from its scope"); *Claudio-De Leon v. Sistema Universitario Ana G. Mendez*, 775 F.3d 41, 48 (1st Cir. 2014) ("A forum selection clause is prima facie valid and, absent a strong showing by the resisting party that the clause is unreasonable under the circumstances, it should not be set aside.").

[10] *See also, e.g.*, *Banco Popular De Puerto Rico v. Airborne Grp. PLC*, 882 F. Supp. 1212, 1216 (D.P.R. 1995) ("[W]hen the alleged conduct of non-parties to a contract is closely related to the contractual relationship, all the participants, parties and non-parties, should benefit from and be subject to any forum selection clauses contained in

ELDER AND VULNERABLE CLIENT ESCALATION FORM

(For use by U.S. Private Bank, U.S. Private Bank LATAM and J.P. Morgan Securities)

J.P.Morgan

The purpose of this form is to be used by U.S. Private Bank, U.S. Private Bank LATAM and J.P. Morgan Securities employees to identify potential red flags observed with respect to **elder** and **vulnerable** clients. See page 4 for important definitions to be considered when completing this form.

Instructions:

1) The employee who observed the behavior is responsible for completing sections 1 through 5 of this form. It is important to use only factual information. Consult your Supervisory Manager if you have any questions.

2) Forms are to be submitted by the Supervisory Manager via email to the following groups as applicable:
   - Private Bank U.S. – PB Incident and Client Advisory via email to US.PB.Alerts@jpmorgan.com
   - Private Bank LATAM - BQC LATAM via email to BQC_LATAM_Escalations@restricted.chase.com
   - JPMS – JPMS Incident and Client Advisory Group via email to jpms.ica@jpmorgan.com

3) Incident and Client Advisory ("ICA") / Business Quality Control ("BQC") teams are responsible for completing sections 6 through 8 of this form. It is the responsibility of ICA/BQC to contact Global Securities and Investigation s ("GS&"I) when appropriate in accordance with **applicable policy requirements.** ICA/BQC will facilitate the Elder and Vulnerable Client Forum meetings to discuss this escalation item.

4) Copies of completed forms are to be maintained by the Supervisory Manager in Branch files and scanned in Citadel/Document Archive. Additionally the form is to be maintained by the ICA and BQC teams.

1. Client Information

Client Name: Peter Doelger	Client Date of Birth: [redacted][84]	Client State/Country of Residence: Florida, USA
ECI #: 9710607408	Banker/Investor/FA Name: Trey Eppes/James Baker	Branch Location (if applicable): Boston, MA
Market/Region: Boston	Manager (e.g., Market Manager, RD, Client Service Manager): Daniel J. Curtin	

Account Types:

☒ Brokerage	☐ Fiduciary (Trusts & Estates)	☐ Discretionary Investment Management: Program	☐ Other/Describe: AccountData.xlsx
☐ Mortgage related	☐ Credit/Loan	☒ Deposit Products and Services	

If a third party involved in the activity, does this person have authority over the account? ☐ Yes ☐ No

2. Activity or Behavior Observed

Approximate date/period of time the activity or behavior occurred: **February 2021**

Indicate behavior observed (check all that apply):

Signs of Potential Diminished Capacity

- ☐ Memory loss
- ☐ Disorientation
- ☐ Difficulty performing simple tasks
- ☐ Poor judgment
- ☐ Unusual mood swings
- ☐ Difficulty with abstract thinking

Signs of Potential Financial Exploitation

- ☐ Sudden reluctance to discuss financial matter
- ☐ Sudden atypical or unexplained withdrawals, wire transfers or other changes in financial situation
- ☐ Unusual shifts in investment style
- ☐ Abrupt changes in wills, trusts, POAs or beneficiaries
- ☐ Concern or confusion about account holdings (e.g., missing funds, trade instructions)
- ☐ Appearance of insufficient care despite significant wealth

☒ Other – Specify: **None observed. Client's lawyer claimed in a Demand Letter dated 2/18/2021 that Client's mental health was "in decline". No further details were provided**