SUPERIOR COURT OF CALIFORNIA, COUNTY OF SAN JOAQUIN

STOCKTON DIVISION

MICHAEL R. SMITH, an individual, and CAROLE SMITH, an individual,

Plaintiffs,

vs.

BERTHEL, FISHER & COMPANY FINANCIAL SERVICES, INC. an Iowa Corporation; JOHN SHAW NOTMAN, an individual, and DOES 1 through 20 inclusive,

Defendants.

Case No. STK CV-UF-2015-6952

ORDER

Defendants, BERTHEL, FISHER & COMPANY ["Berthel"] and JOHN SHAW NOTMAN, brought a motion for summary judgment/summary adjudication in the above-entitled action. The motion challenges all causes of action in the First Amended Complaint filed by Plaintiffs,

MICHAEL R. SMITH and CAROLE SMITH. The motion came on regularly for hearing on January 29, 2018 before the Honorable Carter P. Holly in Department 10B.

OVERVIEW OF THE CASE

Plaintiffs owned residential real property (apartment complex, rental homes, etc.); Plaintiffs owned the property free and clear. Plaintiffs were looking to get away from the day-to-day management of their rental properties. According to Plaintiffs, Mr. Notman recommended that they sell their rental properties and, as part of a 1031 exchange, invest in "DPP/TIC[1] investments that would eliminate the Plaintiffs' management headaches ..., provide professional management and predictable returns in the range of 7-8% per year on equity." First Amended Complaint, para. 28. Ultimately, Plaintiffs lost their entire investment; they are suing to recover $3,000,000.

The First Amended Complaint (FAC) consists of nine causes of action:

1st cause	Breach of Fiduciary Duty;
2nd cause	Constructive Fraud;
3rd cause	Breach of DDP Contract;
4th cause	Third Party Beneficiary of Breach of Contract;
5th cause	Breach of Covenant of Good Faith/Fair Dealing;
6th cause	Fraud & Deceit;
7th cause	Negligent Misrepresentation;

1 DDP stands for "Direct Private Placement;" TIC stands for "Tenants in Common." The investment was the purchase of a fractional interest in commercial real estate and there was a purchase of some common stock in the companies as well. Plaintiffs' investment was in two commercial properties: 1) Scotts Valley Enterprise Way property which was foreclosed upon in 2011; and Parkway in Roseville which was subject to a judicial foreclosure. See, FAC, para. 1-3. Another investment was G-REIT; G-REIT is a real estate investment trust.

8th cause	Negligence; and,
9th cause	Negligent Failure to Supervise.

OVERVIEW OF ARGUMENTS

Defendants assert two arguments to challenge each cause of action. The first argument is that the applicable statute of limitations bars the cause of action, even with consideration of the delayed discovery rule. The second argument is that there is no evidence to support each cause of action.

EVIDENTIARY RULINGS

Plaintiffs' Request for Judicial Notice- The Request is granted as to Requests # 1, 4-12, 14-21, and 23-29. The remaining requests are denied.

Defendants' Objections-

1. **Declaration of Kenneth Catanzarite:** All objections are overruled. The statements are made of personal knowledge or otherwise authenticated; the statements are relevant.
2. **Declaration of Michael Smith:** All objections are overruled. The statements are of made of personal knowledge and are relevant to this action.
3. **Declaration of Carole Smith:** All objections are overruled. The statements are made of personal knowledge and are relevant to this action.
4. **Declaration of Mason Dinehart:** All objections are overruled. The statements are relevant to this action. The statements made are not legal conclusions, but expert opinion about the industry requirements and standards.

Plaintiff's Objections to Defendants' Responses to the Statements of

Undisputed Facts – All objections are overruled.

DISCUSSION

The Court will take Defendants' arguments in order.

A. **Statute of Limitations**

Defendants' Arguments. Defendants explain that the transactions at issue took place in 2003 and 2004. This lawsuit was not filed until August 3, 2015. Defendants maintain that all causes of action are barred by the statute of limitations.[2]

In support of their argument, Defendants submit that Plaintiffs admit to executing purchase agreements and escrow instructions for the Parkway TIC Purchase and the Enterprise TIC purchase. Each agreement referred to the Private Placement Memoranda (the PPM)[3] for each investment. Defendants also point to the "Buyers Representations and Warranties" provision in the agreements which read, in pertinent part:

> "Buyer acknowledges that it has received, read and fully understands the Addendum, the Memorandum [PPM] and all attachments and exhibits thereto. Buyer acknowledges that it is basing its decision to invest in the Interest on the Addendum, the Memorandum and all attachments and exhibits thereto and Buyer has only relied on the information contained in said materials and have not relied on any representations made by any other person. Buyer recognizes that an investment in the Interest involves substantial risk and Buyer is fully cognizant of and understands all of the risk factors

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2 The breach of the written contract claims have a 4-year statute of limitations; the fraud causes of action have a 3-year statute of limitations; the negligence causes of action have a 2-year statute of limitations. See, Code of Civil Procedure, §§ 337; 338; and 339, respectively.

3 The PPMs are offering documents concerning an investment. The PPMs provides detailed information about the investment and its risks.

> related to the purchase of the Interest, including, but not limited to, those risks set forth in the section of the Addendum entitled 'RISK FACTORS.'"

Thus, Defendants argue that the Purchase Agreements and PPMs made full disclosure to Plaintiffs about the nature of the investments.

Defendants add that Plaintiffs also received information from the investment sponsors that put them on inquiry notice of problems with the investments. More particularly, Defendants explain that Plaintiffs received written updates throughout their ownership of the investments; Plaintiffs received distributions from the investments and in 2005, distributions from Enterprise TIC were cut in half and in 2007, distributions from Enterprise TIC were stopped altogether; and in 2007-2008, the TIC Investments did not sell for a profit as originally anticipated. Thus, according to Defendants, this information should have alerted Plaintiffs of problems with the investments and so, the delayed discovery rule does not save Plaintiffs from the statute of limitations.

Plaintiffs' Opposition. Plaintiffs' argue that Defendants misconstrue the nature of the FAC. Plaintiffs are not complaining that the investments didn't perform; Plaintiffs are complaining that Defendants breached duties owed to them in their relationship (more specifically, Defendants breached securities regulations and rules aimed at protecting investor clients) and those breaches caused the losses. Thus, Defendants' focus on the investments and their performance is misplaced.

The Delayed Discovery Rule, as applied in this case, asks when did Plaintiffs know, or when should they have known, that Mr. Notman breached his fiduciary duties to them and/or misrepresented the suitability of the recommended investments. In the case of Berthel, when did

Plaintiffs know, or when should they have known, that Berthel breached its obligation to supervise Mr. Notman and/or to do an independent suitability review for the types of investments Mr. Notman recommended to Plaintiffs.

Plaintiffs submit that they discovered the misrepresentations and fraud in November of 2012 when a group of Parkway TIC owners hired Plaintiffs' counsel to remove the property manager for misconduct. In the course of their investigation of that issue, counsel learned and advised Plaintiffs that Defendants "had not conducted adequate due diligence prior to the sale including, without limitation, that the projections were not reasonably based, undisclosed loads or costs, statements that were not fair and balanced, and the lack of sustainability of the promoters' business model." Opposition, page 8:23-9:3. At that point, Plaintiffs learned that the investments they had purchased were unsuitable. PUMF 125 & 128.

Up until that time, Plaintiffs maintain that they reasonably relied upon Defendants who owed them a fiduciary duty to make recommendations consistent with their investment plans and goals.

As to the facts which Defendants claim "should have" alerted Plaintiffs to problems, Plaintiffs re-iterate that it is not the performance of the investments that is at issue. The fact that distributions weren't made is not an indication that fraud or breaches are occurring.

Thus, Plaintiffs submit that the causes are each timely.

Court's Findings. The Court finds that Defendants have not established that Plaintiffs' causes of action are barred by the statute of limitations as a matter of law.

In arguing this motion for summary judgment, Defendants try to characterize the lawsuit as one in which Plaintiffs are complaining about the performance of the investments. But, as Plaintiffs point out, the FAC

alleges that Defendants agreed to conduct business in accordance with all rules, regulations and laws of the Securities Exchange Commission, the National Association of Securities Dealers, and various other applicable government entities. See, FAC, para 17-18; para. 63-64. Plaintiffs allege that Defendants violated those laws, regulations, or rules. Thus, at the heart of the lawsuit is the suitability of the recommended investments and Defendants' alleged violation of securities rules and regulations. FAC, para. 46.

The Court agrees with Plaintiffs that this lawsuit is not about the performance of the investments but, rather, about Defendants' breach of their fiduciary duties during the time when Defendants were Plaintiffs' broker and broker-dealer. There is no dispute that a fiduciary relationship existed between Plaintiffs and Defendants. And, it is well-settled that "where a fiduciary obligation is present, the courts have recognized a postponement of the accrual of the cause of action until the beneficiary has knowledge or notice of the act constituting a breach of fidelity." *WA Southwest 2, LLC v. First American Title Insurance Company* (2015) 240 C.A.4th 148, 157.

Thus, the test is when did Plaintiff know (or when should they have known) that Mr. Notman and/or Berthel breached their fiduciary duties to them, that is, failed to follow the securities rules and regulations to their detriment; failed to do the analysis required, failed to communicate fully and fairly about the nature of the investments, their risks and their suitability.

Defendants have put no facts forward on those issues. Rather, the submitted evidence is focused on the transactions and the performance of the investments, and focused on establishing that Defendants did not

manage the investments and did not do further investment work for Plaintiffs beyond 2004. See, Defendants' Separate Statement of Undisputed Facts, # 1-63 [the investment transactions; the language and disclosures of the purchase agreements; Plaintiffs' signing of the purchase agreements; the receipt of updates on the properties from investment sponsors or property managers; Plaintiffs' participation in conference calls regarding the investments; disclosures of problems in the Enterprise TIC investment; the reduction and finally cessation of distributions from the Enterprise TIC investment; a new company took over the management of the Enterprise TIC investment; the Parkway TIC investment did not sell for a profit in 2007 or 2008; in 2011, Plaintiffs were aware that the Enterprise TIC investment was at risk of foreclosure; Plaintiffs understood that the property manager and sponsor managed the TIC investments; Plaintiffs understood that Defendants are not the property manager or sponsors of the investments; Plaintiffs did not compensate Notman for professional services after 2007; Plaintiffs did not compensate Berthel for professional services after 2008; Defendants performed no other services for Plaintiffs than selling them the investments; Plaintiffs understood the term, "illiquid"; Plaintiffs did not believe Notman engaged in sales pressure tactics; Plaintiffs were not intimidated to sign documents; Plaintiffs did not believe it was Notman's fault that the investments performed poorly; Plaintiffs understood that the economy downturn was the reason behind the poor performance of the investments; Notman told Plaintiff that the Parkway TIC was a "good" investment.].

Defendants did not submit any evidence to establish that all duties and obligations under the securities laws, rules and regulations were complied with and followed by them. Moreover, and more importantly

for this argument, Defendants did not submit any evidence to establish that Plaintiffs became aware of, or should have become aware of, Defendants' actions which Plaintiffs claim constitute violations of securities laws, rules or regulations and that awareness occurred on a date which would bring Plaintiffs' claims beyond the statute of limitations.

Accordingly, Defendants have failed to carry their burden on the statute of limitations arguments as to each cause of action and the motion is denied on those grounds.

B. **No Evidence to Support Causes**

Defendants' Arguments. In arguing that there is no evidence to support any of the causes of action, Defendants, again, focus upon the investment transactions and argue that there is no evidence that Defendants caused the investments to perform poorly or to go bad. Defendants state that Plaintiffs have repeatedly admitted that Defendants did not cause their losses. SSUF 58, 59. Plaintiffs admit the economy had an impact on the Investments. SSUF 58, 59. Plaintiffs admit that Mr. Notman had no role or involvement with the investments after he sold them to Plaintiffs. SSUF 42-50.

Defendants further urge that Plaintiffs have failed to identify any specific misrepresentations by Defendants and so, all causes of action fail. Defendants maintain that Mr. Notman's representation that the investments were "good" was merely an opinion; it is considered "puffing" and cannot be considered actionable misrepresentation.

Moreover, Defendants submit that the recommended investments were consistent with Plaintiffs' objectives; that is, 1) to generate income; and 2) to avoid managing properties themselves.

Finally, Defendants argue that Plaintiffs admitted that Mr. Notman

did not pressure them to purchase the investments and was not dishonest with them. SSUF 51, 52, 57. Defendants stress that they "are not obligated to guarantee the success of the Plaintiffs' investments. What Defendants are required to do is offer investments which they reasonably believe were suitable for Plaintiffs." Defendants maintain that "the investments comported precisely with Plaintiffs' investment objectives." SSUF 35-37, 39; see also Motion, page 16:13-16.

Plaintiffs' Opposition. Plaintiffs again argue that Defendants misconstrue the FAC. The lawsuit is not about investments that did not perform; the lawsuit is about Defendants' breach of their fiduciary duties to Plaintiffs.

Significantly, Plaintiffs have submitted the expert opinion of Mason Dinehart[4] to establish that Mr. Notman's recommended investments were *not* suitable for Plaintiffs and *not* consistent with Plaintiffs' investment objectives and so, the Defendants' respective duties were breached, and damages were caused.

Here are some excerpts of Mr. Dinehart's testimony:

- The Financial Industry Regulatory Authority (FINRA) (formerly known as National Association of Securities Dealers (NASD)) establishes rules governing the conduct of, and the duties owed by, broker-dealers (Berthel) and brokers (Mr. Notman). The rules establish the standard of care and duties of broker-dealers and brokers when dealing with customers. ¶ 7.

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4 Mason Dinehart submits his declaration as "Plaintiffs' securities industry standard of care expert." Mr. Dinehart has been an expert witness/consultant in arbitrations/litigation since 1991 involving securities, insurance and annuities, nationwide. He has been qualified and testified as a Securities Industry Expert Witness before Federal and State Courts in California. See, Omnibus Compendium of Exhibits # 90.

- The industry practice of "knowing your customer" is derived from NYSDE Rule 405, the "Know Your Customer Rule." It sets out the responsibility of a due diligence investigation of the essential facts concerning your customer, the trades involved and the separate securities accounts. NASD Conduct Rule 2310 explains that "suitability" means that "every recommendation must have reasonable grounds." ¶ 8.
- NASD Rule 2310 (which was in effect during 2003-2004 and is now known as FINRA Rule 2111) requires that when a broker recommends the purchase, or exchange of any security, the broker shall have a reasonable basis for believing that the recommendation is suitable for the customer based upon the customer's investment objectives, experience, liquidity needs and risk tolerance. A transaction is considered "recommended" when the broker "brings a specific security to the attention of the customer through any means." This rule also recognizes that customers may rely on brokers and broker-dealers investment expertise and knowledge, "and it is thus appropriate to hold firms and associated persons responsible for the recommendations that they make to customers." ¶ 9.
- Based on his review of the facts, Mr. Dinehart opines that Mr. Notman (while a broker of Berthel) made the recommendations that Plaintiffs sell their debt-free Whitman and Thomas residential rental properties and add post-tax cash savings to acquire the Parkway and Enterprise TICs, and membership interests in G-REIT, and Plaintiffs followed those recommendations. ¶ 10.
- Because Defendants recommended to Plaintiffs that they purchase Parkway and Enterprise TICs and G-REIT, Defendants had a duty to have a reasonable basis to believe the recommendations were suitable for Plaintiffs based on reasonable due diligence. ¶ 11.
- Each of the securities was a speculative investment with very high risk requiring an investment objective of

"Speculation." The investments carried a risk factor of "Aggressive." Each of the three investments carried high sales commissions such that the total loads exceeded Plaintiffs' tax deferral benefit from a 1031 exchange recommendation to purchase the investments. ¶11.

- "Notice to Members 03-71" concerning non-conventional investments which includes TIC investments requires that a broker-dealer and broker analyze the "costs and fees associated with purchasing and selling the product," commonly referred to as the total loads compared to "the tax consequences of the product;" that is, the tax deferral benefit from a 1031 exchange. The costs or total loads exceeded the tax deferral benefit. ¶11.
- In the expert opinion of Mr. Dinehart, "there could be no reasonable basis to recommend such investments." ¶ 11.
- Further, the rules on suitability prohibit undue concentration into speculative securities or a single asset class. ¶ 11.
- NASD Rule 3010, applicable in 2003-2004, required broker-dealer firms to establish and maintain a system to supervise the activities of each registered representative and associated person. The Rule is designed to achieve compliance with applicable securities laws, regulations and NASD rules. The Rule requires the assignment of each registered representative to a principal responsible for supervision. The principal would be responsible to review and endorse all transactions by a representative and also does an internal review of each representative at least annually. The Rule further requires procedures for the review of a registered representative's incoming and outgoing communications relating to securities business. ¶12.
- The lack of an understanding of the above rules and the "Notice to Members" when recommending a security is below the standard of care and also violates the duty to ensure a recommended security is suitable for the client. ¶13.

- Defendants' conduct with regard to the three recommendations involved here was below the applicable standard of care set out in NASD Rules 2310 and 3010. ¶14. Defendants could not have engaged in any reasonable-basis customer-specific suitability analysis because the recommended Parkway and Enterprise TICs and G-REIT are fundamentally unsuitable for the Plaintiffs. ¶ 14.
- Nor could Berthel have met its supervision standards of care based upon the disclosure events and conduct. ¶14.
- None of the Notman and Berthel recommendations were suitable because they did not meet the standard of care imposed under Rule 2310 causing Plaintiffs substantial losses. These failures to abide by the applicable standards of care were the cause or reason Plaintiffs suffered the investment losses. ¶15.
- The securities could not have even been presented to the Plaintiffs because objectively they were all unsuitable. ¶ 16.
- Defendants did not meet the standard of care in its/his/their communications with Plaintiffs. That standard required that all communications by Defendants to Plaintiffs were not false or exaggerated, and that the statements were clear and not misleading, and further required a balanced treatment of risks and potential benefits. ¶17.
- Defendants were further bound by the standard of care not to "publish, circulate or distribute any communication [it] knows or has reason to know contains any untrue statement of material fact or is otherwise false or misleading." Mr. Notman's statements to Plaintiffs regarding the recommendations were not full and complete; they were not fair and balanced. And Berthel failed to supervise Mr. Notman to prevent such non-complying communications. ¶17.
- Berthel has a Compliance Manual applicable to the 2003-2004 period. The Manual required:

- Account Suitability Forms
- All Berthel business is to be conducted "under high standards and principles of rules governing our industry."
- Reportable Matters includes any suspected violation of securities laws or rules or standard of conduct.
- Private Placement (which is at issue in this case) Customer Suitability forms are required to be completed and executed for each customer who wishes to purchase the securities offered and the completed documents are turned into Corporate Office to determine suitability.
- All communications need to be truthful and fully discuss the securities described or services offered and should always fully explain any risks associated with the specific investment.
- All registered representatives shall be investigated as to their character, business reputation and experience. ¶22.

• Mr. Notman did not comply with the above provisions of the Berthel Compliance Manual.

- No account suitability forms were produced for the three new accounts and were required.
- Mr. Notman did not sent the TIC private placement subscription documents to the Home Office for review for suitability and approval but, instead, sent them to the sponsor directly.

- Had an audit been done of Mr. Notman as required, one would see a large ticket activity and no log of delivering any PPMs or Account Suitability Forms to the Home Office and that the transactions had not been principal reviewed; those transactions would have been stopped as unsuitable.
- The communications sent to Plaintiffs did not include the required PPMs; it did not include a full explanation of the risks associated with the investment; it did not report a cost/benefit analysis; it did not advise that the investments were unsuitable.
- Mr. Notman was not supervised or otherwise investigated. He began work for Berthel on March 1, 2003; his first face-to-face contact with Bethel management was November 4, 2003. He worked alone. His disclosure history (problems/claims concerning other clients) required a heightened supervision. ¶ 22.

• The audits of Mr. Notman reflect and confirm a lack of supervision and the lack of testing and vetting customer-specific suitability. ¶ 24.

• Based upon the facts and circumstances of this case, Mr. Dinehart concludes that the three investment transactions were solicited by Mr. Notman; they were not "unsolicited" as marked in the Commission Runs. Experience suggests that the transactions were marked as "unsolicited" because a lesser standard of review of transactions is afforded to those transactions. The facts pointing to the fact that the investments were solicited and the fact that they were

marked "unsolicited" is another red-flag demonstrating lack of suitability review and lack of supervision. ¶ 24.

- There is no log of any PPM delivery to Plaintiffs on the three transactions because Mr. Notman claims to have relied upon the sponsor to send the PPMs, yet the Selling Agreements require Berthel to request PPM copies for delivery, logging and control. Nothing in Berthel files or sponsor files indicates PPMs were delivered to Plaintiffs. Moreover, Rule 2310 requires that broker and broker-dealer objectively confirm that the investor "understands" the investment and related risks. ¶ 24.
- Mr. Notman had five disclosure events when he began at Berthel and another was added by the time he had his first face-to-face with Berthel management in November of 2003. That fact, coupled with his product sales which involve predominantly high commission annuities and private placements created a duty by Berthel to engage in heightened supervision of Mr. Notman to determine if he is complying with securities laws and NASD Rules and Berthel policies and procedures. ¶ 29
- Mr. Notman was improperly retained in March 2003 without putting him on heightened supervision. ¶30.
- Berthel's supervisory review of Mr. Notman and his conduct with regard to Plaintiffs and the three transactions was below the standard of care in that they failed to properly supervise, review and stop Mr. Notman's unsuitable recommendations to Plaintiffs. Proper supervision would have prevented these transactions. ¶ 31.
- In substance and effect, Mr. Notman was not supervised. ¶ 31.
- None of the recommendations made to Plaintiffs would have been permitted if Mr. Notman were properly supervised. ¶ 31.
- Even if PPMs were delivered, it would make no difference in Mr. Dinehart's analysis. "Under the standards of

care, suitability is the broker and broker-dealer's responsibility, not that of Plaintiffs. As set out in NASD 'Notice to Members 03-68' at fn. 7, 'customer consent is not a defense to an otherwise unsuitable recommendation pursuant to Rule 2310 and therefore would be irrelevant if the facts establish a suitability violation.'" ¶ 33.

- Given the totality of the circumstances including without limitation the manner in which Mr. Notman processed the securities sales by sending the Purchase Questionnaires and Purchase Agreements directly to the sponsor without review, approval and endorsement by a Berthel principal, the absence of any customer-specific suitability approval by a Berthel principal, the lack of supervisory review, the lack of heightened supervision, the lack of Direct Account Applications and considering that Mr. Notman was alone in a remote branch, Mr. Dinehart opines that Mr. Notman was approving his own transactions which is prohibited under Rule 3010. ¶ 36.

Court's Findings. The Court finds that there are several triable issues of material fact in this dispute which preclude summary judgment and/or summary adjudication. See, *Aguilar v. Atlantic Richfield Co.* (2001) 25 C.4th 826.

Among the many triable factual issues are the following:

1. Whether the investments recommended to Plaintiffs by Mr. Notman were consistent with Plaintiff's investment objectives? The conflicting evidence is set forth below:

> **Defendants** submit evidence to show that Plaintiffs desired capital preservation. Defendants' SSUF 35 [FAC, ¶ 22; Reif Decl., ¶2, Exhibit A, pp 9:9-11]. Defendants maintain that

Plaintiffs had two primary objectives in connection with their TIC Investments – to receive monthly distributions and to avoid managing the properties themselves. Defendants' SSUF 36 [Reif Decl., ¶2, Exhibit A, pp 39:20-24], 37 [Reif Decl., ¶2, Exhibit A, pp 39:24; 40:1-5], and 39 [Reif Decl., ¶2, Exhibit A, pp 95:22-23]. Defendants state that Plaintiffs' investment goals were met – they received monthly distributions (Defendants' SSUF 40 [Reif Decl., ¶2, Exhibit A, pp 251:18-25]) and third party managers managed the properties (Defendants' SSUF 41 [Reif Decl., ¶2, Exhibit A, pp 202:18-22]).

Plaintiffs submit the Declaration of Mason Dinehart in which Mr. Dinehart opines:

> "Each of the securities [recommended by Mr. Notman] was a speculative investment with very high risk requiring an investment objective of 'Speculation' and a risk factor of 'Aggressive.' [Declaration of Dinehart ¶11.]
>
> ...
>
> Plaintiffs' investment objectives and risk tolerance were objectively and credibly 'Investment Objectives: 1 Preservation of Capital/Conservative, 2 Capital

> Appreciation/Growth as confirmed by the December 2004 Direct Account Application and suggested to me by their overall financial status given their retirement and expressed concerns for their autistic son who was and would remain unable to hold a meaningful job, ... [Declaration of Dinehart ¶ 15c.]
>
> ...
>
> The required 'investment objective/risk tolerance' for customers investing in these three securities would have to have been selected on a ...Direct Account Application as 'Speculation/Aggressive in that they would have had to be willing to lose of all of their principal. In contrast, everything in Plaintiffs' financial status and other circumstances ... indicated a contradictory objective of 'Preservation of Capital/Conservative.'" [Declaration of Dinehart ¶15e.]

2. Whether Defendants caused any damages to Plaintiffs? The conflicting evidence is set forth below:

> **Defendants** focus upon the investment transactions and argue that there is no evidence that Defendants *caused* the

Investments to perform poorly or to go bad. Defendants state that "Plaintiffs have repeatedly admitted that Defendants did not cause their losses. Defendants' SSUF 58 [Reif Decl., ¶2, Exhibit A, pp 200:18-24] and 59 [Reif Decl., ¶2, Exhibit A, pp14:7-9; 345:28]. Plaintiffs admit the economy had an impact on the Investments. Defendants' SSUF 58, 59 [and cited evidence therein, noted above]. Plaintiffs admit that Notman had no role or involvement with the investments after he sold them to Plaintiffs. Defendants' SSUF 42-50 [and all cited evidence therein].

Plaintiffs, however, submit the expert testimony of Mason Dinehart who opines, "NOTMAN and BERTHEL's conduct with regard to the three recommendations here involved was below the applicable standard of care set out in NASD Rules 2310 and 3010. NOTMAN and BERTHEL could not have engaged in any reasonable-basis customer-specific suitability analysis because the recommended Parkway and Enterprise TICs and G-REIT are fundamentally unsuitable for the Plaintiffs.

> Nor could BERTHEL have met its supervision standards of care vis a vis NOTMAN based upon his disclosure event and conduct .... Those failures to abide by the applicable standards of care were in my opinion the cause or reason Plaintiffs suffered the investment losses ...." Declaration of Dinehart, ¶ 14.
>
> Further in the declaration, Mr. Dinehart states, "[P]roper supervision would in my opinion have prevented the three unsuitable sales. It is my opinion that in substance and effect NOTMAN was not supervised. It is also my opinion that had BERTHEL properly supervised NOTMAN then none of the recommendations made to Plaintiffs would have been permitted and Plaintiffs would not have suffered those losses from unsuitable investment recommendations and the abject failure to supervise." Declaration of Dinehart, ¶ 31.

CONCLUSION

For the reasons set forth above, Defendants have not established that Plaintiffs' causes of action are barred by the applicable statutes of limitations as a matter of law. Further, Plaintiffs have submitted evidence which raises triable issues of material facts relating to the elements

necessary for each cause of action. The existence of these triable issues precludes summary judgment. See, *Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826.

Accordingly, **IT IS HEREBY ORDERED** that the motion for summary judgment/summary adjudication be denied.

Date: February 1, 2018

CARTER P. HOLLY
Judge of the Superior Court