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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES

ADAM DEVONE, MARIO FRANK VOCE AND JULIA VOCE, as co-trustees of the VOCE FAMILY TRUST dated 8/17/1970, the VOCE RESIDUARY TRUST dated 8/17/1970 and the RESTATED VOCE MARITAL TRUST dated 8/17/1970, California trusts; et al.,

Plaintiffs,

vs.

MORGAN STANLEY & CO., LLC, et al.,

Defendants.

Case No. 19STCV14477

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

Judge: Hon. Randolph M. Hammock
Complaint Filed: April 25, 2019
Trial Date: January 18, 2021

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I. SUMMARY OF OPPOSITION

This action is about the predatory financial abuse and undue influence of an elderly customer, until death at age 93, by the brokerage industry defendants. Defendant John Privitelli ("Privitelli"), as financial advisor, and Defendant Morgan Stanley & Co., Inc. ("MSSB" or "Morgan Stanley", collectively, with Privitelli, the "Defendants), as brokerage firm, violated the securities laws and the securities industry standard of care. The evidence will show at trial that Defendants recommended an unduly speculative and active trading strategy without fully informing the customers of the risks and costs, charged excessive commissions, failed to keep the customers fully informed of ongoing risks and cumulative trading costs, failed to report and investigate the disclosed diminished capacity issues and cognitive impairment diagnosis of their elderly customer, engaged in prohibited discretionary trading and made trades without customer authorization. Defendants put their profiteering before Plaintiffs' best interest.

Charles R. Hartman ("Hartman"), Plaintiffs' distinguished securities expert, opined on these violations of securities laws and of the securities industry's standard of care. (*See* Hartman Declaration dated June 29, 2020 ("Hartman Decl.")). MSSB's corporate witness conceded many of Hartman's opinions when confronted with the evidence.

Summary judgment or adjudication is only appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Defendants' MSJ falls woefully short of this exacting burden:

1) Replete material defects in Defendants' moving papers;
2) Distorted factual interpretations, argument and outright misstatements of evidence in Defendants' Separate Statement of Undisputed Facts ("SSUF");
3) Misrepresentation of the law, such as the scope of the fiduciary duty and the postponed accrual date based on the fiduciary duty in Defendants' Memorandum ("Memo").

Defendants' MSJ is not the compelling submission needed to prove that no genuine issue of material fact exists and that they are entitled to judgment as a matter of law.

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II. STATEMENT OF MATERIAL FACTS

2 Maurice Voce was born on July 27, 1919 and died on August 13, 2012 at the age of 93
3 (SSUF 7). In 1970, Maurice established three trusts (collectively, the "Voce Trusts) (*id*. 6).
4 Defendants were the Voce Trusts' financial advisors from 1993 to August 2012 and owed a
5 continuous and ongoing fiduciary duty to the Voce Trusts and its representatives (Plaintiffs'
6 Separate Statement of Undisputed Facts ("Pl's SSUF") 78). Defendants' fiduciary duties
7 included acting in the Plaintiffs' best interest (*id*. 79).

8 Privitelli developed an active and risky uncovered options trading strategy (*id*. 80).
9 Uncovered or "naked" options are "the most speculative" out of all levels of options investments
10 and must be pre-approved by Morgan Stanley (*id*. 81).

11 Plaintiffs' attorneys first discovered in 2014 that Defendants cumulatively entered 21,124
12 trades, bought and sold $17,160,606 in options contracts and earned for themselves $1,506,754
13 in trading costs in years 1993-1998 (FAC, ¶¶ 14, 27, 54). Maurice was one of Privitelli's most
14 lucrative clients in terms of gross commissions (P's SSUF 82). MSSB 's corporate officer,
15 Barbara Rader ("Rader"), testified that assuming the previous statistics of Defendants' trading
16 activity are correct, Morgan Stanley should have conducted an investigation into possible
17 churning (*id*. 83) Rader testified that MSSB's failure to investigate would constitute a breach of
18 MSSB's corporate policies and a violation of securities laws (*id*. 84).

19 Defendants never offered Maurice discount or flat-fee charges on his trades despite the
20 level of activity and commissions (*id*. 85, 86). Maurice never received any monthly, quarterly or
21 annual reports disclosing the cumulative commissions charged to him (*id*. 87). Rader admitted
22 that it is important that a client be informed of the commissions charged on a cumulative basis,
23 and that cumulative commissions were an important disclosure to make to Maurice (*id*. 88).
24 MSSB had the ability and accessibility to report cumulative commissions charged to a client
25 since before 1993 and provides such reports to supervisors, but not to clients. (*id*. 89).

26 In November 2006, Maurice went on a week-long cruise vacation out of the country and
27 MSSB's business records show that Privitelli made prohibited discretionary trades and broke
28

1 client confidentiality rules by disclosing nonpublic account information to the cruise ship's
2 Purser (*id*. 91, 92, 93).
3 In 2007, Maurice named Stella Voce ("Stella") as successor trustee of the Voce Trusts;
4 Maurice retained trading authority yet Privitelli did not keep Stella fully informed of the account.
5 (*id*. 95). Privitelli and MSSB comingled the investor profile data and characteristics of Stella
6 Voce and Maurice Voce, *e.g.* MSSB's business records falsely reported that Stella had been
7 trading securities as a minor child (*id*. 94.)
8 On January 27, 2009, MSSB's surveillance system generated a "LARGE LOSS" notice
9 for the Voce Trusts accounts due to unrealized losses of $6,557,743 (between 38% and 56%
10 declines) and $942,110 in margin debt (*id*. 96.) Defendants' business records do not show they
11 fully informed Maurice and Stella (*id*. 97). Rader testified that Defendants should have promptly
12 contacted the clients (*id*. 98.)
13 In May 2009, Privitelli recommended that Stella apply for MSSB's Pledge Loan Account
14 ("PLA"), a loan secured by the assets of the Voce Trusts accounts (*id*. 99, 100.) The PLA loan
15 was approved, and funds were wired to Bank of America before transferring back to the MSSB
16 account (*id*. 101). Privitelli knew that the PLA loan's purpose was to trade securities and to pay
17 off the margin debt (*id*. 102-105). Rader testified that MSSB was obligated to investigate
18 Privitelli's involvement in the PLA loan, even after it was uncovered in this lawsuit, but no
19 investigation or discipline resulted (*id*. 106, 107).
20 Privitelli was <u>first</u> <u>informed</u> of Maurice's diminished capacity in January 2002 when
21 Maurice asked a nonparty to rescind a vacation timeshare due to his age (82) and becoming dizzy
22 and confused during the sale (*id*. 108). Privitelli was aware, but did not notify his supervisors,
23 the elder client unit and no investigation into Maurice's state of mind occurred (*id*. 116, 117).
24 In July 2010, Privitelli recommended an <u>increase</u> to Maurice's limits on naked options
25 and that Privitelli had been repeatedly violating the set limits. (*id*. 90, 109, 111.) Privitelli's
26 recommended increase and violations were contrary to the limits' purpose (*id*. 110, 111).
27 Privitelli had <u>actual</u> <u>notice</u> of Maurice's <u>escalated</u> diminished capacity and cognitive
28 impairment in 2010, 2011 and on: (1) <u>December 31, 2010</u>, Stella's email to Privitelli illustrated

Maurice's diminished capacity or cognitive decline, including: "starting fires in the kitchen and not knowing it," and "doing more and more dangerous stuff that he can't even remember!" (*id*. 112); (2) February 13, 2011, Julia Voce ("Julia") emailed Privitelli stating that Maurice was diagnosed with cognitive impairment and was moved into an assisted living facility (*id*. 113); (3) March 19, 2011, Julia emailed Privitelli: "I am concerned that [Maurice's] cognitive abilities seem to be declining further. Have you noticed changes in him lately? I value your counsel." Privitelli responded that he wanted Maurice to continue trading to "give[] him a little something to keep his thoughts going on business." (*id*. 114); and (4) August 31, 2011, Privitelli emailed Stella stating that he "noticed a difference in your Dad's clarity of thinking" and that Maurice "was obviously malnourished and I believe that had an effect on his thinking ability." (*id*. 115).

In 2011, Privitelli facilitated installation of a hard telephone line in Maurice's assisted living facility room to ensure continued active trading and ongoing fees (*id*. 119).

Despite being fully informed of his elderly customer's diminished capacity and cognitive impairment, Privitelli could not recall any instance where he made a report or disclosure to MSSB supervisors or its elder care unit (*id*. 116). MSSB's business records contain no reports or investigation records either (*id*. 117). Rader testified that Privitelli was annually trained to detect these issues, required to report each instance and that MSSB should have suspended Maurice's trading each time to investigate (*id*. 118, 120). Rader admitted that the communications show a realistic vulnerability for financial abuse (*id*. 121.)

When Stella was replaced as trustee in 2011, Defendants neglected to get written trading authority for Maurice from the new trustees, therefore Privitelli's trading activities with Maurice were unauthorized trades (*id*. 122). In April to May 2012, the Voce Trusts' accounts declined in value by over $700,000 (*id*. 123). In 2012, the Voce Trusts incurred at least $500,000 in costs to correct negligent tax and estate planning advice rendered by Privitelli (*id*. 124).

III. ARGUMENT

A. Applicable Legal Standards

Summary judgment or adjudication is only appropriate when no material issue fact exists and where the record establishes as a matter of law that a cause of action asserted cannot prevail.

See Code Civ. Proc. § 437c(c); *Avila v. Standard Oil Co.,* 167 Cal.App.3d 441, 446 (1985). The burden is on the moving party to "conclusively negate" a necessary element on the nonmoving party's case or demonstrate "that under no hypothesis is there a material issue of fact" that would "require a reasonable trier of fact not to find any underlying material fact more likely than not." *Saelzler v. Advanced Group 400*, 6 Cal.4th 666, 673-674 (1993); *Aguilar v. Atlantic Richfield Co.*, 35 Cal.4th 826, 851 (2001). Defendants must "present evidence, and not simply point out through argument, that the plaintiff does not possess, and cannot reasonably obtain, needed evidence." *Aguilar, supra*, at 854; *Pisaro v. Brantley,* 42 Cal.App.4th 1591, 1601 (1996). This burden-shifting statute requires the Court to strictly construe the moving party's papers, while liberally construing the Plaintiffs' papers, resolving "all doubts" against the Defendants and viewing all the evidence and all the inferences in the light most favorable to the Plaintiffs. *Aguilar, supra*, at 843; *Amico v. Bd. of Medical Examiners*, 11 Cal.3d 1, 20 (1974); *Eagle Oil & Ref. Co. v. Prentice,* 19 Cal.2d 553, 556 (1942) ("The summary judgment procedure, inasmuch as it denies the right of the adverse party to a trial, is drastic and should be used with caution.").

B. Defendants' Moving Papers Are Defective

A defective motion under Code of Civ. Proc. §437c and Cal. Rules of Court 3.1350 should not be granted. *See Code of Civ. Proc.* §437c(b)(1) ("The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denying the motion.").

California law provides that the issues that form the basis of a motion for summary adjudication "…must be stated specifically in the notice of motion and be repeated, verbatim, in the separate statement." Cal. Rules of Court 3.1350(b). "This the Golden Rule of Summary Adjudication: If it is not set forth in the separate statement, it does not exist." *United Community Church v. Garcin* (1991) 231 Cal.App.3d 327, 337. This doctrine has enhanced force and effect where the MSJ is replete with statutory violations and the internal contradictions render it materially defective, individually and in the totality.

First, the Notice neglects to specifically state the issues for which Defendants seek summary adjudication and the SSUF suffers from the same material defect. *See* Cal. Rules of

Court 3.1350(b) and 3.1350(d)(1). Still further, the SSUF does not specifically state "verbatim" the grounds for summary judgment or adjudication identified in the Notice *Id*.

Second, the Notice does not specifically state all the grounds for relief argued in the Memo or disclosed in the SSUF. *See* Cal. Code of Civ. Proc. §437c(f)(1); Cal. Rules of Court 3.1350(b). Significantly, the Notice does not disclose "issue preclusion" as a ground for relief. The SSUF does not disclose that the second cause of action for financial elder abuse is barred by the statute of limitations as a ground for relief. And, the SSUF does not disclose that "tolling is not available to revive either cause of action" as a ground for relief.

Third, the SSUF and Notice fail to prove that no genuine issue of material fact exists (Cal. Code of Civ. Proc. §437c(c). Fourth, the Notice falsely contends that Plaintiffs bear the burden of proof "… to state actionable claims…" (Notice 2:12-13).

Motions brought under Code of Civ. Proc. §437c have been denied for isolated and lesser offenses. The collective violations by Defendants who seek the harshest of remedies, a dismissal without a jury trial, must be strictly construed against them. Plaintiffs respectfully request that Defendants' MSJ be denied for the individual or the collective defects.[1]

C. Defendants' Issue Preclusion Defense Does Not Support Summary Judgment

Defendants' MSJ's issue preclusion argument was not disclosed in the Notice and therefore is not properly before the Court. *See* Cal. Code of Civ. Proc. §437c(f)(1); Cal. Rules of Court 3.1350(b). A related contributing defect is that issue preclusion was not disclosed in the SSUF, which violates Cal. Rules of Court 3.1350(d)(1)(A).

Preliminarily, it is axiomatic that Defendants bear the burden of proof on an affirmative defense. Issue preclusion is Defendants' third affirmative defense.[2] Defendants' MSJ does not acknowledge they bear the burden, nor do they attempt to carry the burden. (Memo 9-10). Despite these material defects, Defendants' MSJ's lead argument is issue preclusion: that the FINRA Order granting the FINRA Rule 12206(b) motion "bars" Plaintiffs' action. (Memo 9-10). Defendants describes visual similarities in "[case] captions", "claims" and "causes of

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[1] Out of abundance of caution, Plaintiffs oppose the MSJ substantively, below.

[2] Defendants' Answer to Plaintiffs' First Amended Complaint ("FAC"), filed October 15, 2019, is incorporated by reference pursuant to Cal. Code of Civ. Proc. §437c(b)(7).

action" between the FINRA arbitration and this civil action (Memo 9:14-25), which has no substantive value.

Defendants' legal argument relies exclusively on the FINRA Order and FINRA Rule 12206. But, FINRA Order and FINRA Rule 12206 unequivocally contradict Defendants' argument. FINRA Rule 12206 states: "Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court." FINRA Rule 12206(b); *see also Clark v. First Union Sec., Inc.,* 153 Cal.App.4th 1595, 1609 (2007) (holding arbitrators' ruling that claims were "ineligible" for NASD arbitration "did not dispose of the two claims nor foreclose the trial court from considering them"). (Pl's SSUF 4, 5). The FINRA Order stated that Plaintiffs are "…not prohibited from pursuing their claims in a court." (Pl's SSUF 4, 5). FINRA prohibits parties from making a pre-hearing statute of limitations defense motion. *See* FINRA Rule 12504 (pre-hearing dismissal grounds are limited to three situations, none of which is a statute of limitations defense). (Pl's SSUF 4, 5). The FINRA Order and the rule debunk Defendants' argument.[3]

Next, the Court previously rejected Defendants' issue preclusion defense at the demurrer hearing. (P's SSUF 4). The Court correctly ruled "the arbitration decision was based on FINRA rules and equitable tolling principles, and Defendants have not shown that those are 'identical' to the issues in this case." (*Id.*) The Court's ruling was correct then, and Defendants advance no new or better argument now.

Finally, Defendants' MSJ does not prove that the statute of limitations defense was "actually litigated" in the FINRA arbitration. Defendants' record offers no proof of an evidentiary hearing on the merits. (P's SSUF 58). Rather, the FINRA Order and the FINRA rule invited Plaintiffs to file this civil action. (P's SSUF 4, 5, 58). Had the FINRA rule or the FINRA Order intended to serve as a statute of limitations bar on the merits, it would not have expressly authorized Plaintiffs to prosecute a civil court action. Simply stated, the issue preclusion affirmative defense is not a sustainable MSJ ground for relief.

[3] Defendants provide no law to support the theory that a FINRA Rule 12206(b) motion is a substantive bar based on a statute of limitations defense.

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D. Defendants Owe Plaintiffs a Fiduciary Duty

It is settled law that the fiduciary duty exists in a brokerage firm/customer relationship. *Brown v. Wells Fargo Bank, N.A.*, 168 Cal.App.4th 938, 960 (2d App. Dist. 2008) ("An agent is a fiduciary as a matter of law"); *Twomey v. Mitchum, Jones & Templeton, Inc*., 262 Cal.App.2d 690, 709 (1968) (an agent is a fiduciary and the relationship between a stockbroker and principal is fiduciary and "…imposes on the broker of acting in the highest good faith toward the principal"); *Duffy v. Cavalier,* 215 Cal.App.3d 1517, 1534 (1989) (every broker-customer relationship is a fiduciary relationship); *Stella v. Asset Management Consultants, Inc*., 8 Cal.App.5th 181 (2d App. Dist. 2017) (investment offering's general manage owed a fiduciary duty to investors under California law); *Oravecz v. New York Life Ins. Co.,* 174 Cal.App.4th 1114, 1123 (2d App. Dist. 2009) ("It is well established in this state that the relationship between a stockbroker or investment advisor and his/her customer is fiduciary in nature, imposing on the former the duty to act in the highest good faith toward the customer."); *Mihara v. Dean Witter and Co., Inc*., 619 F.2d 814 (9th Cir. 1980) (a stockbroker was in a fiduciary relationship to a customer and had a "continuing duty" to advise the customer of the nature and risks of a particular investment); *Vucinich v. Paine Webber, Jackson & Curtis, Inc.,* 803 F.2d 454, 460-461 (9th Cir. 1986) (holding broker had fiduciary duty to fully inform client of nature and risks of selling short, "in terms capable of being understood by someone of [client's] education and experience"); *Sakai v. Merrill Lynch Life Ins. Co*., 2008 U.S. Dist. LEXIS 69420, *7-8 (N. D. Cal. Sept. 10, 2008) ("Where a financial advisor or broker provides advice about investments, a fiduciary duty is breached when the client is encouraged to purchase an investment with a level of risk that is not appropriate for the client, or is not properly informed of the speculative nature of an investment.").

Defendants do not dispute the existence of the fiduciary duty in the brokerage firm/customer relationship (Memo 17:14-17) and Defendants do <u>not</u> move for summary judgment or adjudication for the essential elements of the breach of fiduciary cause of action. Nevertheless, Defendants' MSJ appears to contest the scope of the fiduciary duty, which is

within the duty element. (Memo 17:14 to 18:5)[4] even though the Notice and SSUF do not the disclose the duty element as a ground for relief. *See* Cal. Code of Civ. Proc. §437c(f)(1); Cal. Rules of Court 3.1350(b); Cal. Rules of Court 3.1350(d)(1)(A). Hence, Defendants' scope issue is not properly before the Court.

Nevertheless, the *Duffy* court explains that disputed factual controversies permeate the scope of the fiduciary duty. *Duffy* reasoned that a broker has a fiduciary duty: "(1) to ascertain that the investor understands the investment risks in the light of his or her actual financial situation; (2) to inform the customer that no speculative investments are suitable if the customer persists in wanting to engage in such speculative transactions without the stockbroker's being persuaded that the customer is able to bear the financial risks involved; and (3) to refrain completely from soliciting the customer's purchase of any speculative securities which the stockbroker considers to be beyond the customer's risk threshold") (emphasis in original). *See also Oravecz, supra,* at 1123 ("In the case of brokers engaged in trading speculative securities… the broker's fiduciary duty specifically requires the broker to (1) ensure the customer understands the investment risk in light of his or her actual financial situation; (2) inform the client that speculative investments are unsuitable if the broker believes the client is not able to bear the financial risks involved, and (3) refrain from soliciting the client's purchase of speculative securities if the broker considers them to be beyond the customer's risk threshold (citing *Duffy, supra*, at 1532) CACI 4105).") (emphasis added); *Sakai, supra,* at **7-9; *City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 68 Cal.App.4th 445, 484 (1998) (holding allegation that brokerage firm encouraged client to undertake "imprudent and unsuitable" investment program that included "speculative investments in extremely volatile securities, risky transactions in highly leveraged interest-bearing instruments, and excessive commissions" sufficient to state a claim for breach of fiduciary duty) [citation omitted].

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[4] Defendants bury their scope argument in a section entitled "Defendants' Fiduciary Relationship Does Not Provide A Basis For Tolling"; nonetheless, the issue was not stated in the Notice and not specifically stated "verbatim" in the SSUF. *See* Cal. Rules of Court 3.1350(b).

E. The Fiduciary Duty Applies A Burden-Shifting Statute (Civ. Code §3372)

Defendants' MSJ argues that Plaintiffs "have no proof" to "carry *their burden*" in the action. (Memo 11:1-5 to 17:10). Defendants' argument is a misstatement of California law. Cal. *Civ. Code* §3372(a) entitled, "Liability; Burden of proof", provides in part:

> "[a]ny person engaged in the business of advising others for compensation as to the advisability of purchasing, holding or selling property for investment and who represents himself or herself to be an expert with respect to investment decisions … shall be liable to any person to whom such advisory services are furnished for compensation and who is damaged by reason of such person's reliance upon such services … unless the person rendering such services proves that such services were performed with the due care and skill reasonably to be expected of a person who is such an expert." (emphasis added).[5]

Section (b)'s definition of an "expert" includes a "financial adviser", "investment adviser" and similar categories, which aptly describes the Defendants, who rendered investment advice, their area of expertise, to Plaintiffs for compensation. Hence, this statute governs.

Section 3372 is a burden-shifting statute requiring Defendants to prove that they satisfied their fiduciary duty under the law, which Defendants failed to affirmatively establish here.[6]

F. Material Issues of Fact Exist, Even If Plaintiffs Carry the Burden at Trial

Assuming for the sake of argument that Plaintiffs carry the burden on the breach element, Defendants did not carry the burden that there are no genuine issues of material fact.

1. Plaintiffs' Breach of Fiduciary Duty Claim Is Not Untimely

Disputed material issues of fact predominate the action: (1) Defendants engaged in ongoing actionable breaches during the accrual period; and (2) delayed discovery and related tolling principles entitle Plaintiffs to recover damages for Defendants' wrongdoing prior to the accrual period. *See Romano v. Rockwell Intl., Inc.,* 14 Cal.4th 479, 487 (1996) ("resolution of the statute of limitations is normally a question of fact"; summary judgment on limitations grounds should only appropriate "where the uncontradicted facts established through discovery

[5] Plaintiffs cited and quoted this statute in the Complaint (¶75) and in the FAC (¶86), which are incorporated by reference pursuant to Cal. Code of Civ. Proc. §437c(b)(7).

[6] Expert testimony is generally required to establish the standard of care. *See Scott v. C.R. Bard, Inc.* (2014) 231 Cal.App.4th 763, 786 (required to "prove or disprove that the defendant performed in according with the prevailing standard of care."); *Unigard Ins. Group v. O'Flaherty & Belgum* (1995) 38 Cal.App.4th 1229, 1239. Defendants offered no expert declaration on the standard of care.

are susceptible of only one legitimate inference") (quotations, citation omitted); *Oravecz, supra,* at 1123 (regarding the fiduciary duty, "[t]he precise scope of that duty depends on the specific circumstances presented in a given case, and is typically a question of fact.") (emphasis added).

Following is an accrual timeline:

Date	Event
August 1, 2012	Fiduciary duty ends when accounts transferred away
	Accrual of 683 days
June 15, 2014	FINRA arbitration filed
	(Statute of Limitations Tolled)[7]
January 29, 2019	Arbitration dismissed, without prejudice
	Accrual of 83 days
April 23, 2019	Civil action filed
766 days / 365 days = 2 years, 36 days	

Defendants' MSJ only challenges the timeliness of Plaintiffs' breach of fiduciary duty claim; it does not challenge the elements. (Memo 10-18; SSUF 59 (limited to first cause of action)). As for financial elder abuse, Defendants' MSJ only challenges the elements; it does not challenge the timeliness of the financial elder abuse cause of action (SSUF 70, 71).

The statute of limitations for a fiduciary duty claim based on fraud is three years. *Amer. Master Lease LLC v. Idanta Partners, Ltd.* (2014) 225 Cal.App.4th 1451, 1479 (citations omitted). The limitations period for fiduciary duty based on negligence is four years. *Id*. The statute of limitations for the financial elder abuse claim is four years. Welf. & Inst. Code §15657.7. Thus, both causes of action were timely filed.

Defendants' last-ditch argument is that "the issue of excessive trading" may have arisen at the earliest possible date in December 2011. (Memo 16:24-25). It would add 274 days to the accrual (assumes December 1, 2011). The tally would be 1,010 days or 2 years, 280 days.

[7] Defendants concede, by omission, that Plaintiffs' claims are tolled while the FINRA arbitration was pending. FINRA Rule 12206(c) ("[] when a claimant files a statement of claim in arbitration, any time limits for the filing of the claim in court will be tolled while FINRA retains jurisdiction of the claim.").

2. Defendants Breaches Continued During the Accrual Period

Defendants' MSJ argues that "the latest transactions Plaintiffs allege give rise to any breach occurred in 1998…" (Memo 10:16-17). Defendants' argument ignores the continuing breaches, which is tantamount to an admission that material issues of disputed facts exist after 1998. *See Day v. Rosenthal,* 170 Cal.App.3d 1125, 1165 (2d App. Dist. 1985) ("A continuing relationship implies a continuing duty to remedy the error, and thus extends the period of limitation.").

Examples of ongoing breaches include, by way of example: 2002 notice of diminished capacity (Pl's SSUF 108); 2006 prohibited discretionary trades (*id.* 91-93), Jan. to Mar. 2009 failure to fully inform customers (*id.* 96-98), May 2009 prohibited loan activities (*id.* 99-107), 2010 recommendation to increase naked options with multiple limits violations (*id*. 109-111), 2010-2011 notice of diminished capacity and cognitive impairment without reports, investigation and continued trading (*id.* 112-121), 2011-2012 taking trades from Maurice without authorization (*id*. 122), 2009 to 2012 suitability data materially false (*id*. 2, 94), Apr./May 2012 over $700,000 in trading losses while Maurice was, for part of the time, at impatient care (SSUF 49, Pl's SSUF 123) and 2012, over $500,000 in negligent tax and estate planning advice (*id*. 124).

Defendants' SSUF addresses none of these breaches (SSUF ¶¶ 59, 71 ("last" transaction or taking in "1998")) and their Memo does not confront them (Memo 10:17, 15:21 (the "[last] breach occurred in 1998")). Defendants' MSJ neglected to proffer an expert witness to attest to the standard of care and that Defendants fulfilled their duties. Ignoring genuine issues of material fact (the 2002 to 2012 breaches) does not carry the burden; rather, Defendants' abject failure to confront the breaches is tantamount to an admission that material disputed facts exist.

G. Delayed Discovery Applies

1. Fiduciary Duty's Postponement of Accrual

The crux of the dispute is whether the accrual of a cause of action is postponed because of the fiduciary relationship. Defendants' MSJ says "no," assembling a charade of inapposite case law that the discovery rule does not apply and argues that Plaintiffs "have no proof … to support

tolling" (Memo 11:1 to 18:5), that "Plaintiffs have failed to meet their burden of bringing any evidence to support tolling the limitations period…" (Memo 10:19-26) and "…that the discovery rule does not apply" (Memo 16:5). It is a fundamental misapplication of California law.

It is well-settled California law that there is a postponement of the accrual of the cause of action, where a fiduciary duty exists, until the account holder or beneficiary has knowledge or notice of the act constituting a breach of fidelity.[8] *WA Southwest 2, LLC v. First American Title Insurance* held that:

> "[t]he existence of a trust relationship limits the duty of inquiry. 'Thus, when a potential plaintiff is in a fiduciary relationship with another individual, that plaintiff's burden of discovery is reduced and he is entitled to rely on the statements and advice provided by the fiduciary.'"

WA Southwest 2, LLC v. First American Title Insurance, 240 Cal.App.4th 148, 157 (2015).

Hobbs v. Bateman Eichler Hill Richards is a seminal case. 164 Cal.App.3d 174, 201-202 (2d App. Dist. 1985). The court held that the existence of a fiduciary relationship tolls the statute of limitations on a breach of fiduciary duty claim until either (a) the plaintiff had actual knowledge of the breach; or (b) "his failure to inquire would be negligent." *Hobbs, supra*, at 201-02. Mittie Hobbs, an elderly widow, asserted a breach of fiduciary duty claim against her stockbroker and brokerage firm based on unsuitable investing, churning, unauthorized transactions, submitting investment forms with false information and concealment of losses. *Id.* at 180. Mrs. Hobbs was defendants' most lucrative clients for generating trading commissions from active trading. *Id.* at 186, 189. The defendants' compliance supervisor "made no effort to contact Hobbs even though he received reports on a quarterly and yearly basis which showed the enormous commissions her $80,000 account was generating for the firm." *Id.* at 187. The defendants raised a statute of limitations defense, pointing to the confirmation slips that Hobbs received for each transaction, the monthly and quarterly statements showing every transaction,

[8] The tolling rules apply with equal force for the financial elder abuse claim. Welf. & Inst. Code §15657.7; *Gryczman v. 4550 Pico Partners, Ltd*. (2003) 107 Cal.App.4th 1, 5-6.

and the letters she signed (at defendants' request) stating she was "pleased" and "delighted" with defendants' handling of her account. *Id.* at 184.

The *Hobbs* court ruled that defendants' statute of limitations, estoppel and waiver defenses were properly rejected. *Hobbs* instructs that a fiduciary relationship relaxes tolling, discovery and inquiry rules:

> "The duty of a fiduciary embraces the obligation to render a full and fair disclosure to the beneficiary of all facts which materially affect his rights and interests. Where there is a duty to disclose, the disclosure must be full and complete, and any material concealment or misrepresentation will amount to fraud."

164 Cal.App.3d at 201. "[T]he plaintiff is entitled to rely upon the assumption that his fiduciary is acting on his behalf." *Id.* at 202 (citation omitted). Thus, "facts which ordinarily require investigation may not incite suspicion …." *Id.* at 201-02 (citations omitted).

Notwithstanding the evidence advanced by the defense (account statements, confirmation slips and 'happiness' letters), the *Hobbs* court held that Mrs. Hobbs was <u>never</u> under any duty to inquire or investigate the possibility of defendants' wrongdoing. *Id.* at 201-04.[9] Mrs. Hobbs won compensatory and punitive damages, which was affirmed.

Another instructive case is *Eisenbaum v. W. Energy Resources, Inc.*, 218 Cal.App.3d 314 (1990). Mr. Eisenbaum purchased an interest in a limited partnership from defendant, which transaction plaintiff learned years later (after consulting with an attorney) violated the securities laws. He sued to recover the investment. Defendant prevailed on summary judgment on statute of limitations grounds. The appellate court reversed finding that defendant owed a fiduciary duty to plaintiff. *Id.* at 321-22. Because of this fiduciary relationship, following *Hobbs*, the court held the statute of limitations did not start to run until plaintiff had "<u>actual</u> <u>notice of the illegality</u>." *Id.* at 326 (emphasis in original). The court reasoned, "Where a fiduciary obligation

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[9] The *Hobbs* court took particular issue with defendants' reliance on the letters signed by Mrs. Hobbs stating she was "pleased" and "delighted" with defendants' work. 164 Cal.App.3d at 203-04. Noting that such letters are referred to in the industry as "suicide letters" (because by "signing them clients give brokerage houses 'a foot in the door' to claim the client acquiesced in or ratified all of the transaction in his or her account until that point in time"), the court explained that barring Mrs. Hobbs' claims because she signed these letters "would do her and other innocents similarly situated a gross injustice." *Id.*

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." *Id*. at 324 (citations omitted). Instead, "a plaintiff need not establish that she exercised due diligence to discover the facts within the limitations period unless she is under a duty to inquire and the circumstances are such that failure to inquire would be negligent." *Id.* (citations omitted). "Where the plaintiff is not under such duty to inquire, the limitations period does not begin to run until she actually discovers the facts constituting the cause of action, even though the means for obtaining the information are available." *Id.* (citation omitted; emphasis original).

The *Day v. Rosenthal* court explained that "[a]pplied to a fiduciary the date-of-discovery rule is 'particularly appropriate when the defendant maintains custody and control of a plaintiff's property or interest.'" 170 Cal.App.3d 1125, 1165-66 (2d App. Dist. 1985) (citing *April Enterprises, Inc. v. KTTV,* 147 Cal.App.3d 805, 827 (1993) ("Such a relationship compels a rule of delayed accrual to avoid barring a victim of wrongful conduct from asserting a cause of action before he could reasonably be expected to discover its existence."); *Sanchez v. South Hoover Hospital,* 18 Cal.3d 93, 101 (1976) (the trust relationship between fiduciaries limits the duty of inquiry). Defendants' MSJ does not confront any of the fiduciary duty line of cases. Defendants' abject failure is tantamount to an admission that genuine issues of material fact as to the timeliness of Plaintiffs' action exist.

2. Defendants Failed To Prove Accrual Before 2012-2014

Defendants' MSJ presents no evidence that the account holder or beneficiary had actual knowledge or actual notice of the act constituting the breaches before at least August 2012. The only evidence in the record of actual knowledge or actual notice is pled in the FAC at paragraph 34, "The most precise date of the trace scent of potential malfeasance was in June 2014 when, after hiring an attorney, Plaintiffs filed a FINRA Statement of Claim.").

The scant, speculative evidence consisting of testimony from Mario and Julia Voce and Adam DeVone (Memo 11:23 to 12:16) do not carry Defendants' burden. (Pl's SSUF 60, 61). Rather, it supports Plaintiffs' theory that trusting a fiduciary – and relaxing your suspicions with

a trusted agent – illustrates the importance of California's settled law that inquiry notice is postponed when a fiduciary relationship exists.

Defendants try to pass off the account statements and confirmation slips as knowledge or notice of wrongdoing. (Memo 13:2-4). But the *Hobbs* court rejected those defenses, and so should the Court. *See Hobbs, supra*, at 203-204. More importantly, though, these documents demonstrate why summary judgment cannot be granted. MSSB's account statements and confirmation slips did <u>not</u> disclose the monthly or cumulative trading costs. Defendants offered no business record that quantified for Plaintiffs the cumulative trading costs on a weekly, monthly, quarterly or annual basis. (Hartman Decl., ¶¶33-37). Defendants' corporate witnesses <u>conceded</u> that Defendants never furnished Maurice with cumulative trading cost calculations at any time even when the trading raised concerns at MSSB, and the customers should have been fully informed (Pl's SSUF 15, 87-89). The cumulative trading costs were fully accessible to Defendants internally the entire time period (*id*. 89). Clearly, genuine issues of material facts exist regarding Defendants' failure to disclose the cumulative trading cost and commissions (*id*. 87-89).

In a March 2009 MSSB supervisory account review, trading costs and commissions were <u>not</u> discussed with Maurice nor was his advanced age (age 89) or his state of mind. It is a norm and custom in the securities industry that any important disclosure is noted in the file. (Hartman Decl., ¶¶35, 38, 39). These important issues were not noted in MSSB's business records (*id*.) Nor was any attempt to contact the trustee, Stella Voce, to discuss these concerns with her (Pl's SSUF 97, 98). Hartman opined that Defendants' failures both in whom was contacted and the lack of substance in the isolated contact fell below the industry standard of care. (Hartman Decl., ¶¶18, 19, 20, 21, 22, 35).

Defendants thinly argue that a year 1992 letter allegedly authored by Maurice supports summary judgment. (Memo 12:24-27). Assuming solely for the sake of argument that it is authentic and admissible, it was authored before the breaches at issue, which gives it little if any evidentiary weight. The letter did not contain important disclosures of <u>prospective</u> excessive trading costs, commissions and unduly risky trading activity. Nor could the letter prospectively

waive an intentional tort. *See* Civ. Code §1575; FINRA Rule 2010 ("A member, in the conduct of its business, shall observe high standards of commercial honor and just and equitable principles of trade."). (Hartman Decl., ¶13).

Defendants next thinly argue that the 2007 letter from Gary Sherwold provides notice of "actual and appreciable harm" in the accounts. (Memo 16:17-18). Hartman explains the <u>immateriality</u> of the Sherwold letter as a routine marketing pitch by a competitor. (Hartman Decl., ¶40). The Sherwold letter did not identify a breach or misconduct, and quantitative calculations of commissions and trade activity were noticeably absent. (SSUF 37, Pl's SSUF 65). This letter does not put a reasonable retail investor on inquiry notice to inquire about actionable conduct. (Hartman Decl., ¶ 40). Finally, the fact that the Sherwold letter was sourced from Privitelli's work file (Memo 16:14-15) draws a logical and reasonable inference that Maurice was <u>not</u> put on notice of wrongdoing and an "actual presumption" that Defendants "did not perceive it as a complaint from Maurice." (Hartman Decl., ¶41 (with rationale)). Defendants' argument that Maurice never complained (Memo 16:19-21) concedes that Maurice did not perceive it as knowledge or notice of breach or wrongdoing.

3. <u>The Continuous Accrual Doctrine Applies</u>

Generally, a "cause of action accrues 'when [it] is complete with all of its elements' – those elements being wrongdoing, harm, and causation." *Pooshs v. Phillip Morris USA, Inc*., 51 Cal.App.4th 788, 797 (2011); *Aryeh v. Canon Business Solutions, Inc.,* 55 Cal.4th 1185, 1191 (2013) (the "last element" rule.). One of the exceptions is the "theory of continuous accrual." *Aryeh, supra*, at 1192. The *Aryeh* court explained it is, "a response to the inequities that would arise if the expiration of the limitations period following a first breach of duty or instance of misconduct were treated as sufficient to bar suit for any subsequent breach or misconduct; parties engaged in long-standing misfeasance would thereby obtain immunity in perpetuity from suit even for recent and ongoing misfeasance. In addition, where misfeasance is ongoing, a defendant's claim to repose, the principal justification underlying the limitations defense, is vitiated. [¶] To address these concerns, we have long settled that separate, recurring invasions of the same right can each trigger their own statute of limitations." *Aryeh, supra*, at 1198 (citing

Dryden v. Bd. of Pension Comms., 6 Cal.2d 575 (1936) (permitted a widow to sue to enforce her "present and future" pension rights) *and Howard Jarvis Taxpayers Assoc. v. City of La Habra,* 25 Cal.App.4th 809 (2001) (permitted a lawsuit challenging the continuing monthly collection of the tax as an alleged ongoing breach of law).

Applying the continuous accrual rule to this action, the Court should find that the 1993-1998 claims are not untimely. Alternatively, as a last resort, the Court could find the 1993-1998 claims untimely yet find that the 2002-2012 claims not untimely. Plaintiffs vigorously contest the latter because: (1) Defendants failed to confront and distinguish seminal case law regarding the fiduciary duty and delayed accrual in a fiduciary relationship, among others; (2) Defendants wholesale ignored, without confrontation, all the 2002-2012 breaches and misconduct; and (3) all the evidence and all the inferences must favor the Plaintiffs, especially under California's well-established rule that statute of limitations are generally an issue of fact.

H. Plaintiffs' Financial Elder Abuse Claim Cannot Be Dismissed

Defendants' Notice and SSUF suffer more material defects than the first cause of action. Defendants' Notice states that the second cause of action "…fail[s] to state actionable claims supported by competent evidence…" and is "…otherwise inadequate as a matter of law." (Notice 2:11-13, 2:20-25). The SSUF is not stated "verbatim" from the Notice; rather, the SSUF has a single generic section entitled, "…fails as a matter of law." (SSUF 29). The SSUF does not disclose that the second cause of action is time-barred as a ground for relief. Defendants' Memo does not argue that the second cause of action is time-barred. Defendants' Notice and SSUF are so incongruent they do not give requisite notice of the grounds for relief. *See* Cal. Code of Civ. Proc. §437c(f)(1); Cal. Rules of Court 3.1350(b)). Nevertheless, the second cause of action is not untimely for the same reasons that the first cause of action is not untimely. [10]

Defendants' Memo raise two arguments in support of summary dismissal: (1) no standing exists because "the trusts, not Maurice, [] were harmed" and because a successor trustee did not

[10] The tolling rules for the fiduciary duty claim applies with equal force for the financial elder abuse claim. Welf. & Inst. Code §15657.7; *Gryczman, supra,* at 5-6.

meet the age requirement to bring the claim; and (2) Plaintiffs cannot rely on a version of the statute, as amended, for acts that took place under the prior version's purview.[11] (Memo 18).

Each of these issues are easily rebutted. Defendants' first argument misstates the action and the statute. Plaintiffs extensively state facts, evidence and law for the deluge of material facts and breaches in the 2002 to 2012 time period. (*See, infra,* at 12 for list of 2002 to 2012 breaches with Pl's SSUF cites). Defendants' abject failure to confront these breaches is tantamount to an admission that material issues of disputed facts exist. Defendants' second argument is a jury instruction issue,[12] not a dismissal ground.

As for the first argument, Plaintiffs' FAC's financial elder abuse claim is brought by Plaintiff Devone as a <u>personal</u> <u>representative</u> of Maurice. (FAC, ¶103). DeVone qualifies as a personal representative under Welf. & Inst. Code 15610.30(d)(1) ("representative" means "[a] conservator, trustee, or other representative of the estate of an elder or dependent adult."). Further debunking Defendants' standing issue, the Court need look no further than Welf. & Inst. Code §15610.30(c) which state that the elder's property can be held in a trust and be under a "representative" trustee's care. *Id*. Further, Welf. & Inst. Code § 15657.6 expressly states that a claim for financial elder abuse may be brought "upon demand by the elder … or a representative of the elder or dependent adult, as defined in subdivision (d) of Section 15610.30." And, a person representative has standing to bring this action on behalf of a deceased elder. Cal. Welf. & Inst. Code §§15657.3(d)(1). The standing for this claim is sound.

Maurice was over the age of <u>65</u> at all relevant times. (SSUF 7). Maurice was the settlor and trustee of the Voce Trusts (Pl's SSUF 6). Defendants always treated Maurice as the account holder (Hartman Decl., ¶21) and he was a victim of Defendants' financial elder abuse, undue influence and predatory acts. Maurice satisfies the age minimum to bring this claim.

Defendants' quibble over which version of the financial elder abuse statute applies.[13] (Memo 11-21). Significantly, Defendants do <u>not</u> contest that Plaintiffs' claims properly arise

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[11] These issues are not disclosed in the Notice or in the SSUF, and certainly not "verbatim."

[12] Perhaps a motion *in limine* is warranted, but not dismissal.

[13] Amendments to these statutes have strengthened in scope and enhanced in remedies, reflecting California Legislature's priority to protect elderly financial abuse victims.

under Welf. & Inst. Code §§ 15610.30 and 15657.5, *et seq.* The issue boils down to application of section 15610.30(b)'s presumption clause (added 2008) that Defendants "shall be deemed" to have breached the statute if "…the person or entity knew or should have known that this conduct is likely to be harmful to the elder …" *Id.* (emphasis added). Defendants cited *Lintz v. Bank of America, N.A.*, No. 5:13-cv-01757, 2013 U.S. Dist. LEXIS 13917, *25 (N.D. Cal. Sept. 27, 2013), but the issue is *dicta* because the court did not discuss or explain why a prior version of the statute was applied. *Lintz v. Lintz* (2014) 222 Cal.App.4th 1346, is more applicable: the "version of Welfare and Institutions Code section 15610.30 in effect at trial" was the version under which a liability finding was reached. *Id.* at 1355-56 (emphasis added). At bottom, this jury instruction issue ripens before or at trial, not now.[14] This issue was, again, not properly noticed in the Notice or in the SSUF and is not sustainable in the MSJ.

On the merits, there are material disputed issues of fact as to the "last time" financial elder abuse occurred, and Plaintiffs fully put forth evidence of breaches into 2012. (*See, infra,* at 12 for list of 2002 to 2012 breaches with Pl's SSUF cites).

Defendants also narrowly confront "[the] taking" clause (Memo 18:22), but wholly ignore the full scope of the statute's "taking, secreting, appropriating, obtaining, or retaining" clause and ignore the "assists in" scope of the clause. Defendants have waived these arguments.

IV. CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion for Summary Judgment or, in the Alternative, Summary Adjudication, in its entirety.

REIF LAW GROUP, P.C.

Dated: June 30, 2020 By: ______________________

Brandon S. Reif
Rebecca E. MacLaren
Attorneys for Plaintiffs

[14] Plaintiffs and Defendants should address this issue before the Final Status Conference per Dept. 47's Trial Preparation Order, §2(F) (Jury Instructions).

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PROOF OF SERVICE

I am employed in the County of Los Angeles, State of California. I am over the age of 18 years and not a party to within action; my business address is 1925 Century Park East., Suite 1700, Los Angeles, CA 90067. On June 30, 2020, I served true and correct copies of the following document(s) described as:

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT OR, IN THE ALTERNATIVE, SUMMARY ADJUDICATION

on the interested party in this action by placing a true and correct copy thereof enclosed in a sealed envelope, and/or by sending via email, addressed as follows:

John S. Worden Venable LLP jsworden@venable.com 101 California St., 38th Floor San Francisco, CA 94111	*Attorneys for Defendants Morgan Stanley & Co., LLC and John R. Privitelli*
Kyle Jacob Schiff Hardin LLP kjacob@schiffhardin.com 4 Embarcadero Center, Suite 1350 San Francisco, CA 94111	*Attorneys for Defendants Morgan Stanley & Co., LLC and John R. Privitelli*

☐ **[BY MAIL]** I caused such envelope to be deposited in the mail at Los Angeles, California. The enveloped was mailed with postage thereon fully prepaid. I placed such envelope with postage thereon prepaid in the United States mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. postal service on that same day with postage thereon fully prepaid in Los Angeles, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

[BY HAND] delivery, I caused such envelopes to be hand delivered to the attention of the persons listed below at their respective addresses.

☒ **[BY E-SERVICE]** Transmission to the parties with their expressed written consent to accept service via email transmission and, made pursuant to California Judicial Council Emergency Rule 12. I caused the document listed above to be sent to the person(s) listed above at their respective e-mail addresses.

☐ **[BY FAX]** I transmitted via facsimile the document to the party at their fax number listed below. The transmission was reported as complete and without error.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 30, 2020 in Los Angeles, California.

By: *Cian Williams*
CIAN WILLIAMS