ORIGINAL

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

- -X

HOWARD HAMMER, INDIVIDUALLY AND AS REPRESENTATIVE OF THE ESTATE OF SANDRA HAMMER, DECEASED, ANDREA HAMMER, DAVID HAMMER AND ZELKJO BRZAKOVIC,

Plaintiffs,

- against -

GARY J. REETZ, VANCLEEF, JORDAN & WOOD, INC. AND NILESH SALDANHA,

Defendants.

- -X

16 Civ. 6590 (LLS)

OPINION & ORDER

Defendants move under Fed. R. Civ. P. 9(b) and 12(b)(6), and the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. § 78u-4(b), to dismiss the complaint. The motion is granted.

BACKGROUND

The following facts are as alleged in the complaint (Dkt. No. 1).

A. The Parties

Plaintiffs are individuals who engaged defendant Van Cleef, Jordan & Wood, Inc. ("Van Cleef"), an investment advisor, to manage their retirement savings and investment accounts. Compl. ¶¶ 1, 11. Van Cleef is a New York corporation with its principal place of business in New York, wholly owned by defendant Mr. Gary J. Reetz, its President and CEO. Id. ¶¶ 13,

14. Defendant Mr. Nilesh Saldanha is Van Cleef's only employee. Id. Plaintiffs Sandra Hammer (now deceased) and Howard Hammer first began investing with Mr. Reetz in 2002. Id. ¶ 20. Their son, plaintiff David Hammer, began investing with Mr. Reetz in 2011. Id. ¶ 32. Plaintiffs Andrea Hammer and Jake Brzakovic, Howard and Sandra's daughter and son-in-law, began investing with Mr. Reetz in 2015. Id. ¶ 32.

B. Plaintiffs' Investment with Reetz

Howard and Sandra Hammer met Gary J. Reetz in 2002. Id. ¶ 16. Mr. Reetz assured Mr. and Mrs. Hammer that he could obtain a better return on their investments than their previous investment advisor. Id. ¶ 16. Persuaded by Mr. Reetz's solicitation, Mr. and Mrs. Hammer transferred their retirement savings to Regis Advisory Group, where Mr. Reetz was working at that time, and made Mr. Reetz their investment advisor. Id. ¶ 17, 20. In January 2005, Regis Advisory Group merged with Van Cleef. Id. ¶ 25. Plaintiffs allege that during the following years Van Cleef made a number of misstatements and assurances which they claim were "plainly intended to secure and maintain their patronage." The complaint alleges (Compl. ¶ 30) (alterations in original):

> a. A "Specimen Investment Policy Statement" ("Investment Policy") on Van Cleef letterhead, which states that the "central objective is to preserve real ... purchasing power" and Van Cleef is "providing for long-term growth of principal and income without undue

risk." A review of defendants' mode of investing in 2014 and 2015 demonstrates that defendants did not adhere to that approach.

b. The Investment Policy also stated that Van Cleef would provide regular performance reports and meet with clients "at least" twice per year. Defendants did not adhere to these guidelines.

c. An August 2009 "Cash and Security Contributions" breakdown. The cover letter refers to the firm's supposed "Branch offices: Troy, NY; San Francisco, CA." Recent investigation indicates that Van Cleef had no such branch offices in 2009.

d. Van Cleef's form ADV dated September 2010. This includes Reetz' biography in which it is indicated that he is a registered securities broker under registration number "CRD 1397317" and holds qualifications for "Series 24, 7, 63 & 65." But a search of the SEC's publicly available Central Registration Depository ("CRD") database shows no individual with that registration number. Moreover, there is no evidence of Reetz actually being a registered representative with any of those qualifications or that he is registered as an investment advisor.

e. Van Cleef's 2014 form ADV again states that the firm was supposedly founded in 1930, which is as stated above untrue. It goes on to state that Van Cleef has "principal offices in New York City," implying that Van Cleef has other offices. It introduces a reference to defendant Saldanha, who it claims serves as "lead analyst," implying that other analysts are employed. On information and belief, as of 2014, Van Cleef had no other analysts unless Reetz, the self-described CEO, would claim to be an analyst junior to Saldanha. And it asserts that "[w]hen selecting securities and determining amounts, [Van Cleef] observes the investment policies, limitation and restrictions of the clients for which it advises...", despite having at no time undertaken to obtain a written confirmation of the plaintiffs' objectives.

In or about 2011, David Hammer began investing with Van Cleef. Id. ¶ 32. During 2015, Andrea Hammer and Jake Brzakovic also began investing with Van Cleef. Id. On various dates in 2015, Mr. Reetz executed with all plaintiffs investment advisor agreements which superseded any previous arrangements between Reetz and the plaintiffs. Id. ¶ 33. The agreements were all executed on Van Cleef letterhead and were signed by one or more of the plaintiffs as "Client(s)" and Mr. Reetz as "CEO and President" of Van Cleef. D. Memo Exh. E, Exh. F, Exh. G. Each agreement granted Van Cleef the authority to buy, sell, invest, or otherwise manage funds and investments plaintiffs provided to it and contained a fee schedule which paid Van Cleef a percentage of the asset value in each account. Id.

At all relevant times, Van Cleef sent the plaintiffs monthly statements of all of the plaintiffs' accounts Mr. Reetz managed. Id. ¶ 35. Van Cleef did not send annual requests for confirmation of plaintiffs' investment objectives or their risk tolerance. Id. ¶ 36. Mr. Brzakovic and Ms. Andrea Hammer had one conversation with Mr. Reetz regarding their investment objectives, in which they "emphatically expressed a preference for a conservative portfolio to preserve their principal." Id. ¶ 36.

In 2015, plaintiffs' investment accounts experienced "extraordinary losses far beyond those that had occurred among

the standard investment indexes." Id. ¶ 39. Throughout 2015, Howard and Sandra Hammer expressed to Mr. Reetz their investment strategy was to "have principal preserved even at the expense of reduced earnings." Id. On October 9, 2015, Howard and Sandra met with Mr. Reetz and expressed concerns with their investing returns. In response (id. ¶ 40):

> Reetz stated that the investments in the Hammer's portfolio were solid investments and categorically promised that he and his firm had investment strategies that would promptly restore losses, through inter alia, investing in shipping and tanker securities. He claimed that the portfolio would be up by one million dollars by March 2016. To allow him to accomplish this, it was important that they continue to trust him and leave their retirement savings and investments under the existing management arrangements. He asserted that he was a "value investor" who pursued a risk averse and prudent investment strategy and that he intended to increase the Hammers' portfolio to ten million dollars.

As of January 2016, Howard and Sandra Hammer had lost approximately two million dollars in their combined retirement savings and investment accounts. Id. ¶ 41. The other plaintiffs also experienced large losses. Id. At the end of January 2016, the plaintiffs transferred all of their assets under management with Van Cleef to Wells Fargo. In a phone call with Andrea Hammer at some point after the plaintiffs moved their accounts to Wells Fargo, Mr. Saldanha commented that Van Cleef's "strategy just didn't work in this environment." Id.

Plaintiffs allege that the following investments were the major source of their losses (id. ¶ 42):

a. An International Bank for Reconstruction and Development Bond Coupon in the value of $58,000, which locked the plaintiffs into a low interest rate and suffered from an inability to be sold;

b. An airplanes pass through trust asset backed security in the value of $62,000, which is no longer negotiable and has negligible returns;

c. An investment in or around 2012 of originally over $178,000 in EXO Resources, an oil and gas company (symbol XCO) which from 2012 through 2015 received a "B1" rating from Moody's and was downgraded to "Caa2" thereafter and labelled as "non-investment grade," falling short of the guidelines set out in the Investment Policy; the plaintiffs' holdings in this investment have depreciated by two thirds;

d. Investments in or around 2011 of over $280,000 in Navios Maritime Holdings, Inc. (symbol NM), a tanker and shipping company which from 2012 through 2015 received a "B1" rating from Moody's and was downgraded to "Caa2" thereafter and labelled as "non-investment grade," falling short of the guidelines set out in the Investment Policy; the plaintiffs' holdings in this investment have depreciated by 72% to about $77,000;

e. Purchases after the October meeting amounting to almost $19,000 of stock in Potash Corp. of Saskatchewan (symbol POT) on October 15, 2015 and December 15, 2015; a security which Credit Suisse throughout 2014 and 2015 designated as "underperforming" and which had performed worse than the S&P 500 Index for the entirety of 2015;

f. Purchases after the October meeting in November and December of 2015 amounting to over $38,000 of various Kinder Morgan shares (symbol KMI), a company which Morningstar rated at the time as being of "medium" uncertainty and of only "moderate" financial health; the plaintiffs' holdings in this investment have depreciated by 96%;

g. Purchases after the October meeting in November of 2015 amounting to almost $10,000 of shares in Chemours Co. (symbol CC), a company which Morningstar rated at the time as having "very high" uncertainty and being of only "moderate" financial health;

h. Purchases after the October meeting in December 2015 amounting to over $58,000 of shares in Bed Bath & Beyond (symbol BBBY), which at the time received only a "neutral" rating from Credit Suisse and had underperformed the S&P 500 Index for the entirety of 2015;

i. Purchases after the October meeting in October and December 2015 amounting to over $22,000 of shares in Kansas City Southern (symbol KSU), which at the time received only a "neutral" rating from Credit Suisse and had underperformed the S&P 500 Index for the entirety of 2015; and

j. A purchase after the October meeting of a Puerto Rico G/O Bond on December 23, 2015, for over $12,000--a particularly risky security that defendants did not purchase from their usual broker State Street but rather from another entity. A publicly available report from Wells Fargo dated December 15, 2015, indicated significant risks to all Puerto Rico debt at that time, specifically to the risk of G/O bonds defaulting in the near future, which they did in mid-2016.

Plaintiffs claim their assets "had been heavily and disproportionately invested in energy-sector securities," problematic in light of risks posed to those investments by falling oil prices, and in "exceedingly risky" shipping and tanker securities. Id. ¶ 44. Plaintiffs argue defendants' "imprudent over-reliance on energy-sector and other risky securities" "caused large losses in plaintiffs' retirement

savings and investment accounts" and "violated a basic principle of portfolio diversification." Id.

Plaintiffs filed this action on August 19, 2016. They allege: (1) unsuitable investments in violation of the Securities Exchange Act of 1934 ("Exchange Act"), (2) fraud in violation of Exchange Act Section 10(b) (15 U.S.C. § 78j(b)) and SEC Rule 10b-5 (17 C.F.R. § 140.10b-5), (3) fraudulent misrepresentation in violation of the Exchange Act, (4) breach of fiduciary duty, (5) fraud, (6) rescission and restitution under Section 215(b) of the Investment Advisers Act (15 U.S.C. § 80b-15(b)), (7) unjust enrichment, (8) deceptive acts or practices in violation of Section 349 of the New York General Business Law, (9) gross negligence, (10) negligence, (11) professional negligence/malpractice, and (12) breach of contract. They seek damages in excess of $2,000,000 in lost retirement savings and investments, together with interest, costs, expenses, and attorney's fees.

DISCUSSION

A. Exchange Act Claims

Plaintiffs bring three claims pursuant to the Exchange Act: unsuitable investments, fraud in violation of Section 10(b) and SEC Rule 10b-5, and fraudulent misrepresentation.

1. Fraud in Violation of Exchange Act Section 10(b) and SEC Rule 10b-5

Plaintiffs' unsuitability claim is a subset of an ordinary Section 10(b) fraud claim. Section 10(b), 15 U.S.C. § 78j(b), makes it unlawful:

> To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, or any securities-based swap agreement any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may proscribe.

SEC Rule 10b-5, which implements the statute, states (17 C.F.R. § 240.10b-5):

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,
>
> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person,
>
> in connection with the purchase or sale of any security.

"In order to succeed on a claim, a 'plaintiff must establish that the defendant, in connection with the purchase or

sale of securities, made a materially false statement or omitted a material fact, with scienter[1], and that the plaintiff's reliance on the defendant's action caused injury to the plaintiff.'" ECA, Local 134 IBEW Joint Pension Trust of Chi. v. JP Morgan Chase Co., 553 F.3d 187, 197 (2d Cir. 2009), quoting Lawrence v. Cohn, 325 F.3d 141, 147 (2d Cir. 2003).

"A complaint asserting securities fraud must also satisfy the heightened pleading requirement of Federal Rule of Civil Procedure 9(b), which requires fraud to be alleged with particularity." Kalnit v. Eichler, 264 F.3d 131, 138 (2d Cir. 2001), citing Ganino v. Citizens Utils. Co., 228 F.3d 154, 168 (2d Cir. 2000). "While Rule 9(b) requires that 'the circumstances constituting fraud' be 'state[d] with particularity,' it does not require factual pleadings that demonstrate the probability of wrongdoing." Loreley Fin. (Jersey) No. 3 Ltd. v. Wells Fargo Sec., LLC, 797 F.3d 160, 174 (2d Cir. 2015) (brackets in original), quoting Fed. R. Civ. P. 9(b). "At the pleadings stage, the alleged fraud need only be plausible based on the complaint; it need not be more likely than other possibilities." Id. The PSLRA also requires a complaint alleging fraud to "state with particularity facts

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[1] "Scienter" means knowledge (or imputed knowledge) that it was false.

giving rise to a strong inference that the defendant acted with the required state of mind." 15 U.S.C. § 78u-4(b)(2).

Statute of Repose

The complaint describes events dating as far back as 2002. 28 U.S.C. § 1658(b) contains both a statute of limitations (1) and a statue of repose (2):

> . . . a private right of action that involves a claim of fraud, deceit, manipulation, or contrivance in contravention of a regulatory requirement concerning the securities laws, as defined in section 3(a)(47) of the Securities Exchange Act of 1934 (15 U.S.C. 78c(a)(47)), may be brought not later than the earlier of--
>
> (1) 2 years after the discovery of the facts constituting the violation; or
>
> (2) 5 years after such violation.

"In general, a statute of repose acts to define temporally the right to initiate suit against a defendant after a legislatively determined time period." P. Stolz Family P'ship L.P. v. Daum, 355 F.3d 92, 102 (2d Cir. 2004). "Unlike a statute of limitations, a statute of repose is not a limitation of a plaintiff's remedy, but rather defines the right involved in terms of the time allowed to bring suit." Id. "This conceptual distinction carries significant practical consequences. For instance, 'a statute of repose may bar a claim even before the plaintiff suffers injury, leaving her without any remedy.'" Police & Fire Ret. Sys. of City of

Detroit v. IndyMac MBS, Inc., 721 F.3d 95, 106 (2d Cir. 2013), quoting Fed. Hous. Fin. Agency v. UBS Ams. Inc., 712 F.3d 136, 140 (2d Cir. 2013).

In an unpublished decision, the Second Circuit held the "statute of repose in federal securities law claims 'starts to run on the date the parties have committed themselves to complete the purchase or sale transaction.'" Arnold v. KPMG LLP, 334 F. App'x 349, 351 (2d Cir. 2009), quoting Grondahl v. Merritt & Harris, Inc., 964 F.2d 1290, 1294 (2d Cir. 1992) (discussing statute of limitations tolling); see also Liana Carrier Ltd. v. Pure Biofuels Corp., 14 Civ. 3406 (VM), 2015 WL 10793422, at *5 (S.D.N.Y. Aug. 14, 2015) ("In the absence of binding authority contradicting Arnold, this Court will therefore continue to uphold Arnold's reasoning in addressing the timeliness of the claims before it."), aff'd, __ F. App'x __, 15 Civ. 3856, 2016 WL 7107481 (2d Cir. Dec. 6, 2016).[2]

Plaintiffs filed the complaint on August 19, 2016. Accordingly, all Exchange Act claims based on securities purchased or sold (or committed to be purchased or sold) prior

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[2] There have been differing approaches within this circuit determining when the period of repose begins. See, e.g., Kuwait Inv. Office v. Am. Intern. Grp., Inc., 128 F. Supp. 3d 792 (2015) ("Thus, because the statute of repose runs from the date of each relevant misstatement or omission. . . ."). That decision, which followed the Liana decision by approximately a month, did not distinguish its reasoning from that in Liana or Arnold. Accordingly, the timeliness of a Section 10(b) fraud claim is calculated from the date of commitment to the purchase or sale of security at issue, not when the misstatement or omission was made.

to the repose date of August 19, 2011 are barred by the five-year statute of repose, and are dismissed as untimely.

* * *

As Van Cleef's contact person and its representative in dealings with plaintiffs, Mr. Reetz was the maker of the statements which form the basis of plaintiffs' Section 10(b) claim and his statements are the basis of liability for both him and Van Cleef. In re J.P. Jeanneret Assocs., Inc., 769 F. Supp. 2d 340, 375 (S.D.N.Y. 2011).

1. Statements and Omissions

The complaint alleges two fraudulent schemes to support plaintiffs' Section 10(b) claim: first, statements about Van Cleef's longevity, size, and registration status in order to secure and maintain plaintiffs' patronage, and second, promises Mr. Reetz made to Howard and Sandra Hammer in an October 2015 meeting.

(a)

The documents which plaintiffs claim contained misrepresentations made to secure and maintain plaintiffs' patronage (Compl. ¶ 30) are not actionable as fraud under the Exchange Act. Section 10(b) does not make actionable any false or misleading statement or omission only tangentially related to the process of investing. In order for a misstatement to be

actionable under Section 10(b), it must be made in connection with the purchase or sale of a security. 15 U.S.C. § 78j(b).

> Those cases that have dismissed for failure to satisfy the "in connection with" requirement typically do so where "the alleged misrepresentations made by defendants were not in connection with the purchase or sale of securities, because they did not pertain to the value, nature or investment characteristics of the securities at issue."

S.E.C. v. Lee, 720 F. Supp. 2d 305, 337 (S.D.N.Y. 2010), quoting Prod. Res. Grp., LLC v. Stonebridge Ptns. Equity Fund, 6 F. Supp. 2d 236, 240 (S.D.N.Y. 1998); see also Saxe v. E.F. Hutton & Co., 789 F.2d 105, 109 (2d Cir. 1986) (affirming dismissal because complaint was devoid of "representations by Howard concerning the securities account").

The complaint does not allege that any of those statements relates to any particular security causing plaintiffs' losses.

(b)

Similarly, the complaint is devoid of any allegation (nor does it appear from the account of that conversation) that Mr. Reetz's October 2015 assurances (Compl. ¶ 40) pertained to the particular value, nature, or investment characteristics of specific securities whose purchases plaintiffs claim caused their losses.

2. Scienter

A complaint satisfies the strong inference of scienter required to survive a motion to dismiss: "(a) by alleging facts

to show that defendants had both motive and opportunity to commit fraud, or (b) by alleging facts that constitute strong circumstantial evidence of conscious misbehavior or recklessness." Acito v. IMCERA Grp., Inc., 47 F.3d 47, 52 (2d Cir. 1995).

Plaintiffs allege Mr. Reetz acted in conscious disregard of facts he knew to be contrary or of which he should have been aware when he assured plaintiffs his investing strategy was prudent, risk-averse, and that it would result in returns of one million dollars by March 2016, and eventually ten million dollars.

However, there is no allegation that either party had those specific securities in mind (other than a generic reference to shipping investments to restore losses) at the time of that conversation, or--since Van Cleef's fees were based on the portfolio's asset value--that he had a motive to purchase securities he knew would decline. The securities listed in Compl. ¶ 42 comprised an international reconstruction bank bond, an airplanes pass through trust asset, Canadian fertilizer company stock (P. Opp. Exh. K), and stock in a domestic merchandise retailer (id. Exh. N), in addition to investments in the energy, shipping, and tanker industries. The cited material regarding them describes them as having recently performed poorly, and having doubtful prospects, and buying them may have

involved bad judgment, but it does not establish either fraudulent, knowing misrepresentation or a motive to defraud. It may indicate an innocent misbelief that the investments were undervalued and thus an opportunity for purchase.

As stated in In re China Mobile Games & Entertainment Group, Ltd. Securities Litigation, No. 14 Civ. 4471 (KMW), 2016 WL 922711, at *3 (S.D.N.Y. Mar. 7, 2016), quoting In re Lululemon Securities Litigation, 14 F. Supp. 3d 553, 571 (S.D.N.Y. 2014), aff'd, 604 F. App'x 62 (2d Cir. 2015), "In addition, where a Plaintiff asserts the falsity of a statement, the plaintiff must plead that it 'was both objectively false and disbelieved by the defendant at the time it was expressed.'"

The complaint sets forth nothing to support either proposition.

2. Unsuitable Investments

Plaintiffs' claim defendants made unsuitable investments in violation of Section 10(b) of the Exchange Act. Compl. ¶¶ 45-51. To bring an unsuitability claim:

> A plaintiff must prove (1) that the securities purchased were unsuited to the buyer's needs; (2) that the defendant knew or reasonably believed the securities were unsuited to the buyer's needs; (3) that the defendant recommended or purchased the unsuitable securities for the buyer anyway; (4) that, with scienter, the defendant made material misrepresentations (or, owing a duty to the buyer, failed to disclose material information) relating to the suitability of the securities; and (5) that the

> buyer justifiably relied to its detriment on the defendant's fraudulent conduct.

Brown v. E.F. Hutton Grp., Inc., 991 F.2d 1020, 1031 (2d Cir. 1993), citing Clark v. John Lamula Investors, Inc., 583 F.2d 594, 600 (2d Cir. 1978). Further, "an unsuitability claim is a subset of the ordinary § 10(b) fraud claim in which a plaintiff must allege, inter alia, (1) material misstatements or omissions, (2) indicating an intent to deceive or defraud, (3) in connection with the purchase or sale of a security." Id.

The claims for unsuitability suffer from similar defects as the Section 10(b) claims.

3. Fraudulent Misrepresentation

In addition to their Section 10(b) fraud claim, plaintiffs bring a claim for fraudulent misrepresentation in violation of the Exchange Act. Compl. ¶¶ 59-64. The only private right of action under the Exchange Act is a Section 10(b)/SEC Rule 10b-5 claim for fraud in connection with the purchase or sale of a security. There is no separate claim for fraud generally, e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A., 511 U.S. 164, 173, 114 S. Ct. 1439, 1446 (1994), and the Supreme Court has explicitly rejected attempts to broaden the private cause of action under Section 10(b) to include a separate claim for "so-called 'scheme liability.'"

Stoneridge Inv. Partners, LLC v. Sci.-Atlanta, 552 U.S. 148, 149, 128 S. Ct. 761, 764 (2008).

Accordingly, for the reasons stated above, this claim is dismissed.

B. Investment Advisers Act Claim: Rescission and Restitution

Plaintiffs' sixth claim is for rescission and restitution under the Investment Advisers Act. Compl. ¶¶ 79-86. Section 215(b) of the Investment Advisers Act, 15 U.S.C. § 80b-15(b) states:

> Every contract made in violation of any provision of this subchapter and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of any provision of this subchapter, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision.

Section 215(b) of the Investment Advisors Act creates a limited private remedy to rescind and recover restitution under an illegal contract; it does not create a right to damages or allow recovery for the diminution in value of a plaintiff's investments. Transamerica Mort. Advisors, Inc. v. Lewis, 444 U.S. 11, 24, 100 S. Ct. 242, 249 (1979) ("we hold that there exists a limited private remedy under the Investment Advisers

Act of 1940 to void an investment advisers contract, but that the Act confers no other private causes of action, legal or equitable"). Nor does Section 215(b) grant the right to rescind a contract merely because an investment advisor misrepresented his registration status. It allows rescission only if a contract was illegal for having violated the Investment Advisers Act. Kassover v. UBS AG, 619 F. Supp. 2d 28, 34-35 (S.D.N.Y. 2008) ("'There is, however, a limited private right of action to have an investment advisory contract voided under section 215 of the Advisers Act if the formation or performance of the contract violates the Advisers Act.'"), quoting Clark v. Nevis Capital Mgmt., LLC, 04 Civ. 2702 (RWS), 2005 WL 488641, at *13 (S.D.N.Y. Mar. 2, 2005).

Plaintiffs allege the contracts executed after the statute of repose were illegal because (Compl. ¶ 84):

> a. They disclaim defendants' responsibility to ascertain the investment objectives and risk tolerances of the plaintiffs; and
>
> b. They permit defendants to choose brokers and dealers based on factors other than the best execution of trades for Defendants.

Neither of those clauses violates the Investment Advisors Act.

Accordingly, this claim is dismissed.

C. State Law Claims

All federal claims being dismissed, and there being no diversity in the parties' citizenship, there is no satisfactory basis for the exercise of supplemental jurisdiction over the state law claims, and I decline to do so, 28 U.S.C. § 1367(c)(3) (district court may decline supplemental jurisdiction if it "has dismissed all claims over which it has original jurisdiction"). The New York State courts may find merit in the remaining claims under the common law and New York statutes, which are best left to them.

CONCLUSION

The motion to dismiss (Dkt. No. 10) is granted as to the federal claims, and plaintiffs' state law claims are dismissed without prejudice for lack of jurisdiction. Plaintiffs may move for leave to replead within 30 days of the date of this order; a proposed Amended Complaint must be attached to the motion.

So ordered.

Dated: New York, New York
February 24, 2017

Louis L. Stanton

LOUIS L. STANTON
U.S.D.J.