IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

6694 DAWSON BLVD, LLC, Plaintiff, v. OPPENHEIMER & CO., INC., *et al.*, Defendants,	Civil Action No. 1:21-cv-03625-SDG

OPINION AND ORDER

This matter is before the Court on Defendant Oppenheimer & Co., Inc.'s (Oppenheimer) motion to dismiss [ECF 50] Plaintiff 6694 Dawson Blvd, LLC's (Dawson) class action complaint (the Complaint) [ECF 1]. With the benefit of oral argument and for the following reasons, Oppenheimer's motion to dismiss [ECF 50] is **GRANTED**. All other motions are **DENIED as moot**. Dawson's Complaint is **DISMISSED WITHOUT PREJUDICE**.

I. Background

The following well-pleaded facts are taken as true.[1] Dawson and a class of similarly situated plaintiffs were the victims of a decade-long Ponzi scheme,

[1] *Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1274 (11th Cir. 1999) ("At the motion to dismiss stage, all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff.").

purportedly masterminded by John J. Woods (Woods), who worked as an investment advisor at Oppenheimer from January 2003 to December 2016.[2] Woods ostensibly conned his clients into investing in a bogus security (the Horizon Security),[3] which he began marketing sometime in 2008 after founding his own venture—Horizon Private Equity, III, LLC—while registered as an investment advisor at Oppenheimer.[4] As a result of his deception, Woods's clients lost a staggering sum—$110 million. Woods, however, is not named as a defendant here. Instead, Dawson sues a host of others who allegedly worked in concert with Woods or turned a blind eye to the Ponzi scheme.[5]

From sometime in 2008 to December 31, 2016, Oppenheimer allegedly aided Woods in his execution of the scheme.[6] According to Dawson, beginning in December 2016, Oppenheimer "took steps to conceal the Ponzi scheme from the regulators and investing public by permitting Woods to quietly resign from

---

2 ECF 1, at 2, 4.

3 The Horizon Security, though not defined in detail in the Complaint, appears to have been a fund that would allegedly leverage investors' capital to collectively purchase or invest in "government bonds, stocks, or small real estate projects." *Id.* at 3. The Horizon Security was not registered with the Securities and Exchange Commission. *Id.* ¶ 44.

4 *Id.* at 2.

5 *See generally id.*

6 *Id.* at 2.

Oppenheimer without reporting the wrongdoing to regulators and the investing public, as required by law."[7] For approximately five more years after he left Oppenheimer, Woods allegedly continued to scam investors through Southport Capital, an entity not named in this lawsuit, which Woods created to market and sell the Horizon Security.[8] Dawson does not specify in the Complaint how Oppenheimer aided Woods's scheme during this time, if at all. However, Oppenheimer supposedly knew Woods had been accused of the Ponzi scheme and concealed and misrepresented that fact on the Financial Industry Regulatory Authority (FINRA) Form U5 it filed for Woods upon his termination. Dawson allegedly relied on information contained (or not contained, as is also alleged) in the U5 in deciding to purchase the Horizon Security.[9] Dawson also complains that Oppenheimer failed to amend Woods's U5 form while the scheme continued.[10]

Woods's brother James Wallace Woods, his cousin Michael J. Mooney, and Britt Wright (Wright) (collectively, the Adviser Defendants)—all of whom were advisors at Oppenheimer—were the "sales team" at Southport Capital.[11] By selling

---

7 *Id.*

8 *Id.* at 3.

9 *Id.* at ¶¶ 95–98.

10 *Id.* at ¶ 99.

11 *Id.* at 3–4.

the Horizon Security and allegedly participating in the Ponzi scheme, Dawson avers that the Advisor Defendants "violated a host of securities laws, [committed] wire and mail fraud, and . . . breach[ed] . . . the fiduciary duties owed to all of their customers."[12]

Dawson also claims that a collection of external accountants, including Defendants William V. Conn, Jr. (Conn), Conn & Co. Tax Practice, LLC (Conn Tax), Conn & Company Consulting, LLC (Conn Consulting), and Kathleen Lloyd (Lloyd) (collectively, the Accounting Defendants) actively participated in the fraud.[13] Broadly, the Accounting Defendants "authorized Woods to utilize their names as officers and registered agents of the various corporate entities" involved in selling the Horizon Security and perpetrating the Ponzi scheme.[14] Specifically, the Accounting Defendants are alleged to have prepared fraudulent Internal Revenue Service (IRS) forms for unsuspecting purchasers of the Horizon Security, created bogus accounting reconciliations, and contrived federal and state tax

---

12 *Id.* at 4.

13 *Id.* at 4–5.

14 *Id.* at 5.

returns and IRS Schedule K-1s for various corporations involved in Woods's shell game, among other acts of deception and chicanery.[15]

Altogether, Defendants' roles in Woods's purported fraud might have differed, but their alleged conduct boils down to one common transgression that is central to each of Dawson's claims in the Complaint: They misrepresented or concealed material facts that would have caused Woods's customers, had they known, not to purchase the Horizon Security.

On August 20, 2021, the Securities and Exchange Commission (SEC) brought a civil action against Woods, Horizon Private Equity, III, LLC, and other entities not named as defendants in this lawsuit (the SEC Action).[16] *See Sec. & Exch.*

---

15 *Id.*

16 In the Complaint, Dawson cites to and excerpts sections of the SEC's complaint (the SEC Complaint). ECF 1, ¶ 30. A district court can generally consider documents "attached to a complaint or incorporated in the complaint by reference . . . on a motion to dismiss under rule 12(b)(6)." *Saunders v. Duke*, 766 F.3d 1262, 1270 (11th Cir. 2014) (citing *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007)). *See La Grasta v. First Union Sec., Inc.*, 358 F.3d 840, 845 (11th Cir. 2004) (citing Fed. R. Civ. P. 10(c); *Harris v. Ivax*, 182 F.3d 799, 802 n. 2 (11th Cir. 1999)) ("In analyzing the sufficiency of the complaint, we limit our consideration to the well-pleaded factual allegations, documents central to or referenced in the complaint, and matters judicially noticed."). Oppenheimer also attached the SEC Complaint to its motion to dismiss. ECF 50-2. The contents of the SEC Complaint are central to Dawson's claim and are not in dispute, so it is incorporated into the Complaint by reference. *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002) (a document attached to a motion to

Comm'n v. Woods, Case No. 1:21-cv-03413-SDG (N.D. Ga.). Days later, on August 31, Dawson filed the Complaint against Oppenheimer, the Advisor Defendants, and the Accounting Defendants.[17] On November 22, Oppenheimer moved to dismiss this action.[18]

II. Discussion

To survive Oppenheimer's motion to dismiss, Dawson must have pleaded "sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Oppenheimer avers that: (1) the Securities Litigation Uniform Standards Act (SLUSA) bars the Complaint because it asserts a state law class action based on misrepresentations or omission in connection with the sale of a SLUSA-covered security, (2) Dawson fails to plead any basis to hold Oppenheimer derivatively liable for Woods's conduct, and (3) Dawson fails to adequately allege Oppenheimer's direct liability for the Ponzi scheme and sale of the Horizon Security.[19]

---

dismiss may be considered if "(1) central to the plaintiff's claim; and (2) undisputed"); *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) (same).

17 *See generally* ECF 1.

18 ECF 50.

19 ECF 50-1, at 10–11.

A. SLUSA Preclusion and Dawson's Claims Against Oppenheimer

SLUSA bars a plaintiff from asserting certain state law claims in a class action if "(1) the suit is a 'covered class action,' (2) the plaintiffs' claims are based on state law, (3) one or more 'covered securities' has been purchased or sold, and (4) the defendant [allegedly] misrepresented or omitted a material fact 'in connection with the purchase or sale of such security.'" *Cochran v. Penn Mut. Life Ins. Co.*, 35 F.4th 1310, 1315 (11th Cir. 2022) (quoting *Behlen v. Merrill Lynch*, 311 F.3d 1087, 1091-92 (11th Cir. 2002) (under SLUSA, "federal court, with limited exceptions, [is] the sole venue for class actions alleging fraud in the purchase and sale of covered securities")). Three of the four elements are not in dispute here.[20] As its counsel clarified at oral argument, Dawson only challenges the third SLUSA preclusion element—whether the securities implicated in the Complaint are "covered securities."

1. Dawson's Georgia RICO and Conspiracy/Procurement of Breach of Fiduciary Duty Claims Are Precluded.

Oppenheimer correctly points out that Dawson's "legal theory is that all Defendants conspired to fraudulently induce it to invest" in the Horizon

---

[20] *Id.* at 6–8.

Security.[21] Oppenheimer further contends that the Horizon Security was marketed as a covered security, and is therefore within "the ambit of SLUSA," *In re Herald*, 753 F.3d 110, 113 (2d Cir. 2014), regardless of whether the Horizon Security was actually "traded nationally and listed on a regulated national exchange," *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 83 (2006).[22] Dawson responds that (1) the Supreme Court rejected Oppenheimer's theory of SLUSA preclusion in *Chadbourne & Parke LLP v. Troice*, 571 U.S. 377 (2014), and (2) Oppenheimer does not argue that the Horizon Security is a "covered security."[23]

i. ***Troice* Is Inapposite.**

As an initial matter, Dawson insists that *Troice* controls this case.[24] It does not. The issue before the Supreme Court in *Troice* was whether SLUSA "encompasses a class action in which the plaintiffs allege (1) that they 'purchase[d]' ***uncovered*** securities (certificates of deposit that are ***not*** traded on any national exchange), but (2) that the defendants falsely told the victims that the ***uncovered*** securities were backed by ***covered*** securities." 571 U.S. at 381. The

---

21 *Id.* at 16.

22 *Id.*

23 ECF 64, at 9.

24 *Id.* at 3.

Supreme Court held under those circumstances that SLUSA did not preclude a state-law class action. *Id.*

The difference between *Troice* and this case is obvious. There, the bank issued certificates of deposit (CDs) to customers and misinformed them that the CDs were sound investments because the bank itself invested soundly "in a well-diversified portfolio of highly marketable securities." *Id.* at 396. In other words, the bank made misrepresentations or omissions of material fact about its ***own*** assets and investments and indicated that it would "use the victims' money to buy ***for itself*** shares of covered securities"—not that it would use the victims' money to purchase covered securities ***for the victims***. *Id. See also Leonard v. PeachCap Tax & Advisory, LLC*, No. 1:21-CV-2164-MHC, 2022 WL 774866 (N.D. Ga. Feb. 3, 2022) (interpreting the Supreme Court's holding in *Troice* as "premised on the fact that the plaintiffs only ever owned bank-issued CDs, and the bank never represented that it would purchase securities on behalf of the plaintiffs"), *appeal dismissed*, 2022 WL 1786504 (11th Cir. Apr. 15, 2022). The *Troice* court held that the bank's misrepresentations about its holdings in covered securities, which allegedly led its customers to buy uncovered securities, did not trigger SLUSA's "in connection with" element. 571 U.S. at 396.

At oral argument in this case, counsel for Dawson contended that investors were never told their money would be invested in stocks, and that, had they been so informed, they "would have run from the gates." But the Complaint belies counsel's representation. Investors were told exactly that they would be investing in stock.[25] Taking Dawson's allegations in the Complaint as true, *Bryant*, 187 F.3d at 1274, Woods and the Advisor Defendants allegedly "falsely and fraudulently represented to [investors] . . . that ***their money*** would be invested in 'government bonds, stocks, or small real estate projects.'"[26] That is, Defendants misrepresented to the investors how ***the investors'*** funds would be used.

At its core, *Troice* is a case about the fourth SLUSA preclusion element ("in connection with"), not the third preclusion element ("covered security"). The parties in that case did not dispute whether CDs were covered securities, so it is unfitting to this case, which—as Dawson's counsel conceded at oral argument—depends only on whether the Horizon Security was a covered security under the meaning of SLUSA.

At any rate, courts considering the "covered security" question after *Troice* have concluded that "[w]hat control[s] . . . [is] the product that was ***marketed*** to

---

25 ECF 1, ¶ 30. *See also* SEC Complaint, ¶ 2.

26 ECF 50, at 16–17 (emphasis added) (quoting ECF 1, ¶ 30 (citation omitted)).

the investor, not what the defendant actually did with the investor's money." *Instituto De Prevision Militar v. Merrill Lynch*, 546 F.3d 1340, 1352 (11th Cir. 2008). Here, the marketed product (the Horizon Security) was a share in a fund that promised to invest in a portfolio of covered securities—not, as in *Troice*, a CD (an uncovered security).

Thus, whether the Horizon Security was actually "a non-managing membership interest in Horizon Private Equity, III, LLC"—an allegation first put forward in Dawson's response brief—is not determinative.[27] Though, if that fact had any weight, it would be against Dawson. *Cf. In re Kingate Mgmt. Ltd. Litig.*, 784 F.3d 128, 142 (2d Cir. 2015) (SLUSA applies where plaintiffs "purchased the uncovered shares of the offshore Funds, expecting that the Funds were investing the proceeds in S&P 100 stocks, which are covered securities"). *Troice* is plainly inapposite, and Dawson unmistakably alleges that Defendants omitted or misrepresented material facts in connection with the sale of the Horizon Security to investors.

---

[27] ECF 64, at 9.

ii. The Horizon Security Is a "Covered Security."

What remains is whether the Horizon Security is a "covered security" under SLUSA. Dawson maintains that Oppenheimer failed to argue that the Horizon Security is a "covered security" under SLUSA.[28] That is both incorrect and neglects the fact that SLUSA is jurisdictional, *Cochran v. Penn Mut. Life Ins. Co.*, No. 1:19-CV-00564-JPB, 2020 WL 13328617, at *3 (N.D. Ga. Aug. 12, 2020), *aff'd*, 35 F.4th 1310 (11th Cir. 2022), and therefore cannot be waived. In any case, the Horizon Security is covered by SLUSA as a matter of law.

First, Oppenheimer argues that the Horizon Security is a covered security in its motion to dismiss, asserting that "Government bonds and stocks are generally covered securities, and [*Dawson*] does not allege that these stocks and government bonds were any exception."[29] Oppenheimer puts a finer point on this argument in its reply brief: "[Dawson's] allegation that Woods claimed [Dawson's] money would be directly invested in covered securities, even if not true, brings this case within SLUSA."[30]

---

28 *Id.*

29 ECF 50-1, at 17 (citation omitted).

30 ECF 70, at 9–10.

Other courts have recognized that government bonds and stocks are covered securities under SLUSA. *See, e.g.*, *Scala v. Citicorp Inc.*, No. C 10-03859 CRB, 2011 WL 900297, at *5 (N.D. Cal. Mar. 15, 2011) ("[T]here is no serious dispute as to whether stocks and bonds are 'covered securities," and . . . unless a [state law] claim relates solely to non-covered securities, it is subject to dismissal under SLUSA."); *Premium Plus Partners, L.P. v. Davis*, No. 04 C 1851, 2005 WL 711591, at *19 (N.D. Ill. Mar. 28, 2005) (holding state law claims based on alleged trading in "government securities" were precluded under SLUSA). Dawson does not challenge this premise, but instead relies on the Supreme Court's broad, but unremarkable, proclamation in *Troice* that Congress defined "'covered security' narrowly to include only securities traded on a national exchange."[31] 571 U.S. at 380–81. Despite this, lower courts have found that government bonds and stocks are covered by SLUSA—even when purchased through feeder funds. *See Herald*, 753 F.3d at 113.

---

[31] ECF 64, at 3. *Troice*, in fact, recognizes that securities beyond those that are nationally traded may be "covered securities." 571 U.S. at 380–81 (citing 15 U.S.C. §§ 77r(b)(1)–(2), 78bb(f)(5)(E)). For instance, securities issued by an investment company that is registered or that has filed a registration statement under the Investment Company Act of 1940 are covered by SLUSA. *Id. See also* 15 U.S.C. § 77p(f)(3); *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 109 (2d Cir. 2001). The parties do not discuss whether the Horizon Security meets this definition.

At oral argument, Dawson's counsel analogized the Horizon Security to an annuity to distinguish it from the Madoff-related cases, *e.g.*, *Kingate*, 784 F.3d at 142, in which investors purchased shares in fictional feeder funds and the shares were nevertheless SLUSA-covered. Though such an allegation was absent from Dawson's Complaint, the Court observes that the SEC Complaint suggests at least some of Woods's victims were told that the Horizon Security was an annuity-style investment.[32] Even assuming *arguendo* that such victims would fall into the putative class in this case, variable annuities—despite their status as hybrid investment security-insurance products—are also "covered securities" under SLUSA. *Lander v. Hartford Life & Annuity Ins. Co.*, 251 F.3d 101, 110 (2d Cir. 2001). Oppenheimer raised this point in its motion to dismiss,[33] but Dawson neither addressed it in its response, nor distinguished Oppenheimer's supporting case law at oral argument.

Accordingly, the Horizon Security, as pled, is a SLUSA-covered security, and Dawson's fraud-based Georgia RICO and "conspiracy and/or procurement of breach of fiduciary duty" claims (Counts I and III) are precluded by SLUSA and dismissed as to Oppenheimer.

---

32 ECF 50-2, at 14.

33 ECF 50-1, at 17.

2. Dawson's Negligent Misrepresentation and Fraud Claims Are Likewise Precluded.

At oral argument Dawson's counsel maintained that, even if the Court found the Horizon Security was a SLUSA-covered security, its negligent misrepresentation and "aiding and abetting fraud" claims (Counts IV and V) are divisible from its Georgia RICO Act and "conspiracy and/or procurement of breach of fiduciary duty" claims (Counts I and III), and should survive Oppenheimer's motion to dismiss. Dawson's theory under Counts IV and V is that

> Oppenheimer negligently supplied false information to [Dawson] and the class when (1) Oppenheimer completed the [FINRA] Form U-5 [for Woods] stating . . . Woods was not under internal review for fraud or wrongful taking of property, or violating investment-related statutes, regulations, rules or industry standards of conduct; (2) Oppenheimer completed the Form U-5 stating positively that . . . Woods had not voluntarily resigned, or was permitted to resign, after allegations were made that he violated investment-related statutes, regulations, rules or industry standards of conduct; and . . . (3) Oppenheimer failed in its duty to amend and update Woods'[s] Form U-5, which would have publicly disclosed the wrongdoing to the regulators and the public.[34]

Oppenheimer moves to dismiss these counts, arguing that Dawson's allegations do not show that Oppenheimer made an affirmative misrepresentation

---

[34] ECF 64, at 26.

on Woods's Form U5, a Georgia negligent misrepresentation claim cannot be based on an omission, and Dawson is attempting to shoehorn Oppenheimer's purported violation of a FINRA rule into a private right of action where none exists.[35]

Though the parties quibble about whether Woods's Form U5 contained affirmative misrepresentations or deceptive omissions (and whether Dawson adequately pled that investors relied on such misrepresentations or omissions) sufficient to support a state-law negligent misrepresentation claim, this debate is a red herring. Counts IV and V fail because they: (*i*) are precluded under SLUSA per the Eleventh Circuit's opinion in *Cochran* and, therefore, fail for the same reason Counts I and III do; and (*ii*) attempt to create a private right of action where none exists.

i. The *Cochran* "Gravamen" Test Precludes Claims Premised upon Woods's Form U5.

The Eleventh Circuit recently addressed SLUSA's guiding principles in *Cochran*. 35 F.4th 1310. There, the Court of Appeals affirmed the district court's dismissal of a state-law class action on SLUSA preclusion grounds. *Id.* at 1312. Though *Cochran* dealt with the fourth SLUSA element—whether the defendant

---

35 ECF 50-1, at 11.

misrepresented or omitted a material fact, *id.* at 1315—*Cochran*'s import is sweeping. The Eleventh Circuit instructed that, when determining whether SLUSA applies, the "focus is on the substance of the complaint, and not on the artful way a plaintiff words his allegations." *Id.* In other words, "the SLUSA determination is not a formalistic search through the pages of the complaint for magic words[,] but a search to see whether the complaint covers . . . prohibited theories." *Id.* (cleaned up) (quoting *Segal v. Fifth Third Bank, N.A.*, 581 F.3d 305, 310–11 (6th Cir. 2009)). To the *Cochran* panel, it did not matter that the plaintiff did not label his state law claims as fraud because the complaint's gravamen hung on a material misrepresentation or omission in connection with a covered security. *Id.* at 1317.

At oral argument, Dawson's counsel shirked *Cochran*'s application to this case, focusing primarily on the different covered securities in contest there. Instead, counsel insisted that Dawson relied on information in Woods's U5, which Oppenheimer materially misrepresented and omitted in violation of financial regulatory rules, in deciding to invest in the Horizon Security. Because these alleged misrepresentations and omissions are Oppenheimer's, and they are separate from those Woods or the other Defendants made in perpetrating the Ponzi scheme, Dawson contends that they are independently actionable through

Counts IV and V. Oppenheimer's counsel responded that the only plausible way Woods's U5 could have been relevant to Dawson is in connection with its purchase of the Horizon Security, so Counts IV and V share the same essence as Dawson's other securities fraud-based claims. The Court is persuaded by Oppenheimer's position.

Dawson maintains that Oppenheimer was aware of a 2016 lawsuit against Woods related to the Horizon Security and the Ponzi scheme, and omitted mention of it and materially mispresented it in Woods's U5. Dawson further insists that it relied upon these misrepresentations and omissions in deciding to purchase the Horizon Security.[36] At bottom, Counts IV and V, like the rest of the Complaint, allege that Oppenheimer misrepresented or concealed material facts that would have caused Woods's customers, had they known, not to purchase the Horizon Security. This is as true for Dawson's negligent misrepresentation and "aiding and abetting fraud claims"[37] as it is for Dawson's other claims. So, Counts IV and V are due to be dismissed under SLUSA per *Cochran*'s "gravamen of the complaint" test.

---

36 ECF 1, ¶¶ 95, 97–98.

37 As Oppenheimer notes, there is no cause of action for "aiding and abetting fraud" under Georgia law. *Siavage v. Gandy*, 350 Ga. App. 562, 566 (2019) (rejecting the contention that the Georgia Court of Appeals implicitly recognized aiding and abetting fraud as a viable cause of action in other cases) (citations omitted).

ii. An Investor Has No Federal Private Right of Action or State Common Law Claim to Enforce Financial Regulatory Rules.

Even if a court decides that a plaintiff's claims survive SLUSA, it must then determine whether they should be dismissed based on state law principles for failure to state a claim. *Hauptman v. Interactive Brokers, LLC*, No. 17 CIV. 9382 (GBD), 2018 WL 4278345, at *7 (S.D.N.Y. June 12, 2018) (cleaned up). In Counts IV and V, Dawson claims that Oppenheimer violated FINRA's (and the SEC's) "rules requiring Oppenheimer to disclose [Woods's and the Advisor Defendants'] violations [of securities statutes] at the time [they] were permitted to resign from Oppenheimer."[38] Instead, Dawson argues, Oppenheimer "intentionally hid the fact that [it] had detected [Woods's] wrongdoing," and "failed to amend the Form U5 to accurately state the reasons for his resignation" in breach of its duty emanating from FINRA's disclosure rules.[39] Dawson avers that, had Oppenheimer followed FINRA's rules, FINRA would have investigated Woods and would have reported Woods's wrongdoing on his "publicly available 'broker check.'"[40] Oppenheimer responds that Congress did not intend a violation of any FINRA

---

38 ECF 1, ¶81; *see also id.* ¶¶ 35, 37.

39 *Id.*¶ 37.

40 *Id.* ¶ 91; *see also id.* ¶ 93.

rule to provide a private cause of action.[41] Dawson does not attempt to refute this point in its response to Oppenheimer's motion to dismiss, nor did it address this issue at oral argument. Without pointing to a specific FINRA rule that enshrines Oppenheimer's so-called duty to disclose, Dawson rests on its allegations in Counts IV and V.[42]

a. **FINRA Creates and Enforces Rules to Protect Investors.**

FINRA is a Self-Regulatory Organization authorized by the Securities Exchange Act of 1934 and registered with the SEC as a national securities association under the Maloney Act of 1938. 15 U.S.C. §§ 78f, 78o–3, *et seq.* It is "authorized by Congress to protect America's investors by making sure the broker-dealer industry operates fairly and honestly." *About FINRA*, FINRA, https://www.finra.org/about (last visited Aug. 11, 2022). Accordingly, FINRA regulates the financial services industry, in part, by promulgating rules "designed to prevent fraudulent and manipulative acts and practices . . . and, in general, to protect investors and the public interest." 15 U.S.C. § 78o-3(b)(6).

---

41 ECF 50-1, at 32–33.

42 ECF 1, ¶¶ 87–109.

Under this regulatory scheme, FINRA is required to discipline its members and their employees for violations of those rules and the Securities Exchange Act of 1934 (the Exchange Act), among other things. *See* 15 U.S.C. § 78o-3(b)(7); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nat'l Ass'n of Sec. Dealers, Inc.*, 616 F.2d 1363, 1367 (5th Cir. 1980) ("[FINRA] has been delegated governmental power . . . to enforce . . . the legal requirements laid down in the Exchange Act.") (cleaned up). Various FINRA departments may investigate a violation of the FINRA rules, and either FINRA or the SEC, which oversees FINRA, may enforce those rules. *Owens v. Stifel, Nicolaus & Co.*, No. 7:12-CV-144 HL, 2014 WL 2769044, at *5 (M.D. Ga. June 18, 2014), *aff'd in part, rev'd in part, and remanded*, 650 F. App'x 764 (11th Cir. 2016). *See also Empire Fin. Grp., Inc. v. Fin. Indus. Regul. Auth., Inc.*, No. 08-80534-CIV, 2009 WL 10644856, at *2 (S.D. Fla. Jan. 15, 2009) ("FINRA's authority to adjudicate actions against members and associated persons accused of unethical or illegal securities practices and the SEC's oversight of that authority is well defined.") (citations omitted). After the disciplinary process concludes, "[a] person aggrieved by a final order of the [SEC]" may then obtain judicial review in a United States Circuit Court of Appeals. 15 U.S.C. 78y(a); *Maschler v. Nat'l Ass'n of Sec. Dealers, Inc.*, 827 F. Supp. 131, 132 (E.D.N.Y. 1993)

("[T]he Exchange Act limits judicial review of final disciplinary order of the S.E.C. exclusively to the U.S. Courts of Appeals.").

Setting aside (1) the fact that Dawson failed to identify which FINRA rule Oppenheimer allegedly violated and (2) the Court's corresponding concerns about whether Dawson pleaded these claims with sufficient particularity, Fed. R. Civ. P. 9(b), this Court may take judicial notice of information on a government website. *R.S.B. Ventures, Inc. v. F.D.I.C.*, 514 F. App'x. 853, 856 n.2 (11th Cir. 2013) (taking judicial notice of information found on a government website); *accord Boyd v. Georgia*, 512 F. App'x. 915, 917 (11th Cir. 2013) (holding that the district court did not abuse its discretion in taking judicial notice of facts obtained from an online state government website). And FINRA's website explains that, under Article V, Section 3 of the FINRA bylaws, firms like Oppenheimer are required to file a Form U5 no later than 30 days after terminating a qualifying employee's (*i.e.*, a broker or investment advisor) Securities Industry Registration. FINRA, Regulatory Notice 10-39, OBLIGATION TO PROVIDE TIMELY, COMPLETE AND ACCURATE INFORMATION ON FORM U5 (2010), https://www.finra.org/rules-guidance/notices/10-39 (hereafter, Notice 10-39).

b. Investors Have No Federal Private Right of Action to Enforce FINRA Rules.

As Dawson points out, it is important that securities firms follow FINRA's rule to timely and correctly prepare a Form U5 upon a qualifying employee's termination. *See* Notice 10-39. ("[I]nvestors use the Form U5 information that is displayed through BrokerCheck when considering whether to do business with a registered (or formerly registered) person."). However, important as FINRA's Form U5 rule may be, there is no private right of action arising out of a violation of this or any other FINRA rule. *Owens,* No. 7:12-CV-144 HL, 2014 WL 2769044, at *5–*6 (holding there is no private right of action for the violation of a FINRA rule "[s]ince FINRA rules do not equate to law or public policy" and because their purpose is "to standardize the expectation of professionalism within the industry[,] not to protect the investor public") (citing *Cort v. Ash*, 422 U.S. 66, 80 (1975)); *see also Thompson v. Smith, Barney, Harris Upham & Co., Inc.*, 709 F.2d 1413, 1419 (11th Cir. 1983) (holding, on an appeal of an "omission-to-disclose" claim, that there is no private cause of action to enforce exchange rules).

Courts in other circuits agree. *See, e.g.*, *Hoxworth v. Blinder Robinson & Co.*, 903 F.2d 186, 200 (3d Cir. 1990) (NASD, now FINRA, regulations do not give rise to a private right of action); *Jablon v. Dean Witter & Co.*, 614 F.2d 677, 679–81 (9th Cir. 1980) (finding no private right of action for violation of any exchange

rule). And FINRA itself appears to acknowledge that only it or the SEC may discipline securities firms for violations of FINRA rules. Notice 10-39 (citing *DBCC v. Nichols,* Complaint No. C01950004, 1996 NASD Discip. LEXIS 30 at *30 (NASD NBCC Nov. 13, 1996)).

Absent an indication that Congress intended to establish a private right of action for the violation of a FINRA rule—or, more precisely, that Congress intended to delegate to FINRA the authority to create rules implying a private right of action, and FINRA has done so—this Court will not devise one. *See, e.g.*, *Transamerica Mortg. Advisors, Inc. (TAMA) v. Lewis*, 444 U.S. 11, 24 (1979) (reversing the Ninth Circuit and holding that Section 206 of the Investment Advisers Act of 1940, which makes it unlawful for any investment advisor "to . . . defraud . . . [or] engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client," does not create a private cause of action for damages absent a clear indication from Congress to the contrary); *Turbeville v. Fin. Indus. Regul. Auth.*, 874 F.3d 1268, 1276 (11th Cir. 2017) (affirming district court's dismissal of state tort law claim against FINRA for violation of its own internal rules, and noting that the Securities Exchange Act's "silence regarding the existence of a private right of action speaks

volumes, because Congress can simply say it is creating a private right of action if it wants to do so.") (citation omitted).

c. **Investors Have No State Common Law Cause of Action Predicated on a FINRA Rule Violation.**

Courts have consistently disallowed violations of FINRA and other exchange rules to be pled as state common law causes of action. *See e.g.*, *Luis v. RBC Cap. Markets*, LLC, 401 F. Supp. 3d 817, 832 (D. Minn. 2019) (citations omitted) (granting summary judgment for the defendant because "allowing [the] [p]laintiffs to enforce FINRA rules and guidance through [a] breach [of contract] action would vitiate Congress's intent not to allow private rights of action for violations of those rules and guidance, and would accordingly run against basic separation of powers principles") (cleaned up), *aff'd*, 984 F.3d 575 (8th Cir. 2020); *Interactive Brokers LLC v. Saroop*, No. 3:17-CV-127, 2018 WL 6683047, at *10 (E.D. Va. Dec. 19, 2018) (collecting cases and noting, in light of several state law claims, that FINRA "provides no private right of action"), *vacated on other grounds and remanded*, 969 F.3d 438 (4th Cir. 2020) (holding arbitration panel's reading of the disputed contract as incorporating FINRA rules was not a manifest disregard of the law); *Hauptman*, No. 17 CIV. 9382 (GBD), 2018 WL 4278345, at *7 (holding no private right of action exists for violations of FINRA rules and plaintiffs "cannot create such a right of action by styling their claim as a breach of

contract"). This is especially true where, as here, violation of the financial regulatory rule is the predicate for liability, not merely evidence of the scope of the defendant's common law duty. *See, e.g.*, *Gurfein v. Ameritrade, Inc.*, 312 Fed. Appx. 410, 412-14 (2d Cir. 2009) (Gurfein could not "creat[e] a private cause of action for violations of [financial regulatory] rules and regulations by fashioning her claim as one for breach of contract based on violations of rules and regulations impliedly incorporated into the agreement."); *Valelly v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 464 F. Supp. 3d 634, 645 (S.D.N.Y. 2020) ("Plaintiff cannot circumvent the lack of a private right of action for violations of industry rules merely by recasting her claim as a violation of a common law duty.") (citing *In re Series 7 Broker Qualification Exam Scoring Litig.*, 510 F. Supp. 2d 35, 47 (D.D.C. 2007), *aff'd*, 548 F.3d 110 (D.C. Cir. 2008) (rejecting Plaintiffs' argument that their claims were "distinctly derived from duties created at common law" because "courts have logically concluded that the Exchange Act preempts common-law claims that are nothing more than disguised actions to enforce regulatory duties")); *Rioseco v. GAMCO Asset Mgmt.*, No. 15862/10, Seq. No. 003, 2011 WL 4552544, at *79 (N.Y. Sup. Ct. Sept. 23, 2011) (FINRA rule violation was probative of "whether GAMCO committed malpractice" but did not itself "give rise to a private cause of action," because if a FINRA rule "gave rise to a private right of action, the

violation of the rule, standing alone, would be sufficient to impose liability."); *cf. Brink v. Raymond James & Assocs., Inc.*, 341 F. Supp. 3d 1314, 1325 (S.D. Fla. 2018) (denying summary judgment on the plaintiff's negligence claim for which a FINRA rule was provided as evidence of the industry standard of care, but warning that the claim "will ultimately fail if it is based solely and exclusively on the violation of a FINRA [r]ule").

More fundamentally, because FINRA's disciplinary processes for violations of its rules are well defined, "[r]ecognizing the second set of rights and remedies under state law [Dawson] seeks would undercut the distinctly federal nature of the [Securities Exchange Act of 1934]." *Turbeville*, F.3d at 1277. In *Turbeville*, the Eleventh Circuit considered whether FINRA members have private rights of action against FINRA for a violation of its rules. *Id.* In holding that no private right of action for damages against FINRA for violation of its own rules exists, the court reasoned that to hold otherwise would "lead to state-court supervision of the Exchange Act's securities-regulation regime writ large" and "disrupt the uniform federal character of the securities-regulation scheme Congress created." *Id.*

Here, Dawson's negligent misrepresentation and fraud claims are aimed at Oppenheimer, not FINRA. However, Dawson's claims are predicated entirely on Oppenheimer's alleged violation of FINRA rules not named in the Complaint,

which FINRA (or the SEC) is equipped by Congress to resolve through arbitration or mediation, disciplinary action, or other means it deems appropriate. Factual distinctions aside, the Eleventh Circuit's concerns in *Turbeville* persist in this case. The Court finds no basis to disrupt Congress' securities regulation scheme by allowing Dawson's state common law claims to proceed, and Dawson has provided none.

Strict violations of FINRA rules are FINRA's charge, and no federal or state common law private rights of action exist to supplant its enforcement authority. Therefore, even if Counts IV and V were not SLUSA-precluded under *Cochran*, they would fail as a matter of law.

B. Claims Against the Advisor Defendants and the Accounting Defendants

The Court also dismisses Dawson's fraud-based claims against the Advisor Defendants and the Accounting Defendants (Counts II and VI), as well as all claims that jointly implicate Oppenheimer and any other Defendant (Counts I, III, and V). These claims arise entirely out of the same brand of fraudulent conduct Oppenheimer allegedly engaged in, are integrally related to the sale of the Horizon Security and the Ponzi scheme, and thus warrant dismissal. *See Loman Dev. Co. v. Daytona Hotel & Motel Suppliers, Inc.*, 817 F.2d 1533, 1537 (11th Cir. 1987) ("A District Court may properly on its own motion dismiss an

action as to defendants . . . in a position similar to that of moving defendants or where claims against such defendants are integrally related.").

Briefly, in the case of Dawson's claim for breach of fiduciary duty against the Advisor Defendants (Count II), at least one other court has dismissed an analogous claim alleged in connection with the sale of a covered security under SLUSA. *See Cochran*, No. 1:19-CV-00564-JPB, 2020 WL 13328617, at *6. This Court finds *Cochran*'s reasoning persuasive. Dawson has not distinguished its breach of fiduciary duty claim from the claim in *Cochran*. Accordingly, this claim is dismissed.

Regarding its unjust enrichment claims against the Advisor Defendants and the Accounting Defendants (Count VI), Dawson alleges these Defendants—not Oppenheimer—were unjustly enriched by the receipt of fees from investors who believed they were investing in covered securities by purchasing the Horizon Security.[43] Lest any question remains about whether these claims sound in fraud, they incorporate by reference and are indivisible from the fraudulent conduct pleaded in each of the preceding five fraud-based claims in the Complaint that are precluded by SLUSA.[44] Consequently, they are due to be dismissed, too.

---

[43] ECF 1, ¶¶ 110–12.

[44] *Id.* ¶ 110.

C. Punitive Damages and Attorneys' Fees

That leaves Dawson's claims for punitive damages and attorneys' fees against all Defendants (Counts VII and VIII). It is well-settled that these sorts of claims are derivative in nature. *Cochran*, 2020 WL 13328617, at *6. Because Dawson's fraud-based claims are precluded under SLUSA as to all Defendants, these derivative claims are likewise precluded and dismissed as to all Defendants.

D. Leave to Amend the Complaint

In its response brief, Dawson informally requests that the Court grant it leave to amend "if necessary."[45] Granting leave to amend is neither necessary, nor was it properly requested here. *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009) ("Where a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly."). Further, it is difficult to see how Dawson could cure the Complaint's deficiencies without additional facts or allegations that could take it outside SLUSA's ambit. Considering Dawson's counsel's affirmation at oral argument that the Complaint's allegations are "what happened in the real world," the Court questions whether Dawson can allege plausible facts in good faith that would exempt its current claims from SLUSA preclusion. But SLUSA does not prevent Dawson from

---

[45] ECF 64, at 31.

"return[ing] to the district court (or depart[ing] for an appropriate state court) to replead . . . state-law claims on an individual basis, or to plead new federal securities claims either as an individual or as a class representative." *Hampton v. Pac. Inv. Mgmt. Co.*, 869 F.3d 844, 848 (9th Cir. 2017). Therefore, Dawson's informal request to amend the Complaint is denied without prejudice.

III. Conclusion

Oppenheimer's motion to dismiss [ECF 50] is **GRANTED**. All other motions are **DENIED as moot** [ECF 55; ECF 71; ECF 83]. The Complaint is **DISMISSED WITHOUT PREJUDICE** as to all Defendants. Within 14 days after entry of this Order, Dawson may file a motion for leave to amend its Complaint, along with the proposed amended pleading. If Dawson fails to timely do so, the Clerk is **DIRECTED** to close this case.

SO ORDERED this 17th day of August, 2022.

Steven D. Grimberg
United States District Court Judge