IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

RUSSELL D. KNOWLES, individually and as attorney in fact for Bernard A. Knowles, on behalf of himself and all others similarly situated; and BERNARD A. KNOWLES, through his attorney-in-fact Russell D. Knowles, on behalf of himself and all others similarly situated,

Plaintiffs,

v.

TD AMERITRADE HOLDING CORPORATION; TD AMERITRADE, INC.; TD AMERITRADE CLEARING, INC.; and TD AMERITRADE INVESTMENT MANAGEMENT, LLC,

Defendants.

**8:19CV47**

**MEMORANDUM AND ORDER**

This matter is before the Court on defendants TD Ameritrade Holding Corporation, TD Ameritrade, Inc., TD Ameritrade Clearing, Inc., and TD Ameritrade Investment Management, LLC's ("TDAIM" and collectively, "TD Ameritrade") Motion to Dismiss (Filing No. 30) plaintiffs Russell D. Knowles and Bernard A. Knowles's (collectively, "investors") Second Amended Complaint (Filing No. 24). *See* Fed. R. Civ. P. 12(b)(6). The questions before the Court are whether the investors' claims are precluded by the Securities Litigation Uniform Standards Act of 1998 ("SLUSA"), 15 U.S.C. §§ 77p and 78bb, and whether the investors have stated valid claims. For the reasons stated below, the Court finds the investors' putative class-action claims should be dismissed.

## I. BACKGROUND[1]

### A. The Parties' Relationship

TD Ameritrade, Inc., TD Ameritrade Clearing, Inc., and TDAIM are wholly-owned subsidiaries of TD Ameritrade Holding Corporation. TD Ameritrade, Inc. is a financial-services company which provides brokerage services to clients nationwide. TD Ameritrade Clearing, Inc. executes trades and provides clearing services, and TDAIM administers investment-advisory and management services for TD Ameritrade, Inc. and its clients.

The investors had a joint taxable-brokerage account with TD Ameritrade.[2] In exchange for an annual advisory fee from the investors, TD Ameritrade agreed to manage the investors' account on a discretionary basis. Numerous agreements governed the relationship between the investors and TD Ameritrade, including a TDAIM Service Agreement that incorporated a TD Ameritrade, Inc. Client Agreement and a TDAIM Disclosure Brochure (collectively, "agreements"). Under those agreements, TDAIM assumed all investment duties for the investors, and the investors authorized TDAIM to make investments and trades consistent with the investors' selected strategies. TDAIM held the investors' assets in a portfolio.

TDAIM used only exchange-traded funds ("ETFs") as investment vehicles for the investors' portfolio. The parties agreed TDAIM would "maintain a portion of [the

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[1]The Court has relied on the facts alleged in the Second Amended Complaint and its attached documents. *See Magee v. Tr. of Hamline Univ.*, 747 F.3d 532, 535-36 (8th Cir. 2014) (explaining that on a motion to dismiss the "court assumes as true all factual allegations in the pleadings, interpreting them most favorably to the nonmoving party"); *Brown v. Medtronic, Inc.*, 628 F.3d 451, 459-60 (8th Cir. 2010) (concluding documents attached to "a complaint are considered part of the pleadings"); *see also* Fed. R. Civ. P. 10(c).

[2]Although some inconsistent language in the Second Amended Complaint muddies the water on this point, the Court has assumed the investors held one account together. This fact does not affect the Court's analysis.

investors'] portfolio in cash, which generally [would] be 1% to 3% of the total portfolio. The cash buffer ensure[d] the availability of cash payment of [TDAIM's] advisory fee and provide[d] liquidity to cover potential price changes in market orders." The parties' agreements also warned "[t]he actual portfolio allocations from time to time may differ from the target allocations as a result of market movements or TD Ameritrade's adjustments."

Starting around November 15, 2017, TDAIM began offering a "tax-loss harvesting feature" ("TLH feature") in certain portfolios. As described in the Second Amended Complaint, the TLH feature is "a computerized trading feature . . . that is designed to sell securities at a loss to offset potential capital gains and also up to $3,000 per year on taxable income." TD Ameritrade designed the TLH feature to avoid violating the Internal Revenue Service wash-sale rule. *See* 26 U.S.C. § 1091. Under the wash-sale rule, if an investor repurchases a "substantially identical" security within thirty days of selling a security for a loss, the investor cannot claim a tax loss. *See id.*

The investors enrolled in the TLH feature, the terms of which were set forth in the agreements. The TDAIM Service Agreement explains:

> For clients who have enrolled in the TLH feature, each trading day, TDAIM will review your account for any investments that have unrealized losses. Specifically, we look at the individual tax lot to identify investment losses meeting or exceeding a specified loss threshold. If the threshold is met, that tax lot will be sold. To replace the sold security, we will buy shares of a replacement security that is closely correlated to the sold security to help maintain your portfolio's asset allocation and risk characteristics. TDAIM does not represent or guarantee that the objectives of the TLH feature will be met. The performance of the replacement security may be better or worse than the performance of the security that is sold for TLH purposes.

**B. The Breakdown**

From October 2018 to December 2018, TD Ameritrade sold and purchased securities for the investors using the TLH feature. On October 5, 2018, TD Ameritrade "purchased a position on Plaintiff's behalf in the iShares Core S&P US Stock Mkt ETF"

("iShares ETF"). On October 12, 2018, pursuant to the TLH feature, TD Ameritrade "sold Plaintiff's position in [the iShares ETF], having purchased an equivalent position in Vanguard Total Stock Market ETF" ("Vanguard ETF"). The TLH feature operated again on December 17, 2018, selling the Vanguard ETF and purchasing an equivalent position in iShares ETF. The TLH feature sold the iShares ETF position on December 24, 2018, but did not contemporaneously purchase a position in a comparable ETF. Instead, the proceeds from the December 24, 2018, TLH sale sat in cash or cash equivalents for eighteen days. During that eighteen-day period, approximately thirty-five percent of the investors' assets were in cash or cash equivalents.

The TLH feature purchased another ETF position on January 11, 2019. The investors allege that, because of the eighteen-day lapse, their "assets, which had dropped in value when sold on December 24, 2018, did not benefit from the subsequent market recovery and increase in value, thereby causing the investment to be worth substantially less as of January 11, 2019, when the funds were finally re-invested."

As alleged in the Second Amended Complaint, TD Ameritrade did not immediately reinvest the investors' assets on December 24, 2018, because TD Ameritrade "failed to cause a sufficient number of comparable broadly based US stock market ETFs to be made available in the pool of investments available" which could be purchased without running afoul of the wash-sale rule. For example, TD Ameritrade could not purchase the Vanguard ETF because only seven days had passed since the prior sale of that security.

### C. This Action

On January 31, 2019, the investors brought this putative class action against TD Ameritrade.[3] In their Second Amended Complaint, they assert breach-of-contract and

[3]The investors sued TD Ameritrade not only on behalf of themselves but also as representatives of a class action under Federal Rule of Civil Procedure 23, contending the TLH feature is offered in other TD Ameritrade portfolios "subject to the same contractual terms applicable to [the investors'] account." The investors, who have not yet sought class

negligence or gross-negligence claims under Nebraska law.[4] The investors argue TD Ameritrade must compensate them for "financial losses incurred from the improper management and administration of automatic [TLH] sales" because TD Ameritrade failed to (1) contemporaneously purchase a replacement security after the December 24, 2018, TLH sale and to have a sufficient number of replacement securities available, (2) prevent the TLH feature from operating when no replacement securities were available that would not violate the wash-sale rule, (3) keep the investors' assets continually invested with only the agreed portion in cash, and (4) execute trades daily. In short, the investors claim TD Ameritrade is liable because it did not create and manage the TLH feature as agreed.

TD Ameritrade argues the investors' claims are preempted by SLUSA, which "bars class actions brought under state law, whether styled in tort, contract or breach of fiduciary duty, that in essence claim misrepresentation or omission in connection with certain securities transactions." *Freeman Inv., L.P. v. Pac. Life Ins. Co.*, 704 F.3d 1110, 1114 (9th Cir. 2013). The investors repeatedly state in the Second Amended Complaint that they "do not allege that [TD Ameritrade] made any misrepresentation or omissions of material fact in connection with the purchase or sale of a security," but TD Ameritrade urges the Court to look past those self-serving disclaimers and other tactical language employed to sidestep SLUSA. Alternatively, TD Ameritrade asserts the investors have failed to state their claims.

## II. DISCUSSION

### A. Standard of Review

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to contain "a short and plain statement of the claim showing that the pleader is entitled to relief." A complaint

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certification, invoke subject-matter jurisdiction under 28 U.S.C. § 1332(d) (granting the Court original jurisdiction over certain class actions).

[4]The parties do not dispute that Nebraska law applies in accordance with the agreements.

survives a Rule 12(b)(6) motion if it contains "facts sufficient to state a claim that is plausible on its face." *Ash v. Anderson Merch., LLC*, 799 F.3d 957, 960 (8th Cir. 2015). "A claim has facial plausibility when the plaintiff pleads factual content that allows the [C]ourt to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Gomez v. Wells Fargo Bank, N.A.*, 676 F.3d 655, 660 (8th Cir. 2012) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). In making this determination, the Court must accept all factual allegations as true and draw all reasonable inferences in favor of the nonmoving party. *See Demien Constr. Co. v. O'Fallon Fire Protection Dist.*, 812 F.3d 654, 657 (8th Cir. 2016). "[A] complaint must 'give the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Huggins v. FedEx Ground Package Sys., Inc.*, 592 F.3d 853, 862 (8th Cir. 2010) (quoting *Tallabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 319 (2007)).

### B. SLUSA Preemption

#### 1. Securities Law

Recognizing "[t]he magnitude of the federal interest in protecting the integrity and efficient operation of the market for nationally traded securities," *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Dabit*, 547 U.S. 71, 78 (2006), Congress enacted legislation to stymie abusive class actions involving federal securities. First, Congress passed the Private Securities Litigation Reform Act of 1995 ("PSLRA"), 15 U.S.C. §§ 77z-1 and 78u-4, imposing heightened pleading standards on federal class-action securities litigation to curb abuse from "nuisance actions" targeting deep-pocket defendants. *Siepel v. Bank of Am., N.A.*, 526 F.3d 1122, 1126 (8th Cir. 2008). The PSLRA, however, drove plaintiffs to bring "'class actions under state law, often in state court,' in an attempt to 'avoid the federal forum altogether.'" *Zola v. TD Ameritrade, Inc.*, 889 F.3d 920, 923 (8th Cir. 2018) (quoting *Dabit*, 547 U.S. at 82).

In response, Congress enacted SLUSA, *see* 15 U.S.C. §§ 77p and 78bb, "to close the gap in PSLRA coverage and 'prevent certain State private securities class action lawsuits alleging fraud from being used to frustrate the objections of" the PSLRA." *Zola*,

889 F.3d at 923 (quoting *Dabit*, 547 U.S. at 82). As relevant here, SLUSA expressly preempts all state-law class actions based on allegations of "an untrue statement or omission of a material fact in connection with the purchase or sale of a covered security." 15 U.S.C. § 77p(b)(1); *accord id.* § 78bb(f)(1)(A) (barring claims of "a misrepresentation or omission of a material fact in connection with the purchase or sale of a covered security"). For SLUSA to apply, a party must show the following:

> (1) the action is a "covered class action" under SLUSA, (2) the action purports to be based on state law, (3) the defendant is alleged to have misrepresented or omitted a material fact . . . , and (4) the defendant is alleged to have engaged in conduct described by criterion (3) "in connection with" the purchase or sale of a "covered security."

*Green v. Ameritrade, Inc.*, 279 F.3d 590, 596 (8th Cir. 2002). The party seeking SLUSA preemption bears the burden of showing it applies. *See Sofonia v. Principal Life Ins. Co.*, 465 F.3d 873, 876 (8th Cir. 2006).

**2. The Gravamen of the Second Amended Complaint**

Here, the parties agree this action is a covered class action under SLUSA, is based on state law, and involves the purchase or sale of a security. The only dispute with respect to SLUSA preemption is whether the investors have alleged TD Ameritrade misrepresented or omitted a material fact.[5]

"To determine whether a plaintiff has alleged a misrepresentation or omission of a material fact, [the Court] 'look[s] at the substance of the allegations, based on a fair reading' of the complaint." *Zola*, 889 F.3d at 924 (quoting *Kutten v. Bank of Am., N.A.*, 530 F.3d 669, 670 (8th Cir. 2008)). The focus of this inquiry is "the conduct alleged, not the words used to describe the conduct." *Id.* (quoting *Kutten*, 530 F.3d at 671). "SLUSA applies if the gravamen of a state law claim involves an untrue statement or substantive

[5]"Material facts" are those "significant to an investment decision." *Holtz v. JPMorgan Chase Bank, N.A.*, 846 F.3d 928, 934 (7th Cir. 2017). The facts at issue here pertain to the operation of the TLH feature, and there is no dispute that those facts were material to the investment decisions in this case.

omission of a material fact." *Id.* (quoting *Lewis v. Scottrade, Inc.*, 879 F.3d 850, 854 (8th Cir. 2018)) (internal quotations omitted). In other words, SLUSA's bar applies even where a party cloaks allegations of misrepresentation or omissions of material fact in tort or breach-of-contract garb.

In TD Ameritrade's view, the investors "do not—because they cannot—identify any promise or source of any duty that supports their purposed breach of contract or negligence claims." Because the investors' allegations lack "any basis in the applicable contracts," TD Ameritrade says "the crux of the Second Amended Complaint is that [TD Ameritrade's] descriptions of the TLH feature were deceptive, in that they misrepresented or failed to sufficiently inform [the investors] how purchases and sales of securities under the TLH feature would operate." The investors, on the other hand, assert they "were fully and accurately informed about the parties' agreement and the operation of the [TLH] feature" and they "simply allege [TD Ameritrade] breached their contractual duty and were negligent by not keeping funds invested as directed and desired by [the investors] and Class members following [TLH] sales."

If the investors' factual allegations were able to so clearly establish that TD Ameritrade breached promises or duties, the Court might be convinced by the investors' argument. But the agreements and supporting allegations do not support the investors' position.

At its core, the Second Amended Complaint alleges TD Ameritrade misrepresented how the TLH feature would operate when a suitable replacement security is not immediately available after a TLH sale. The investors' (and the putative class) claims depend on an assertion that TD Ameritrade concealed or misled the investors as to the consequences of such a lapse.

Though genuine contract and negligence claims *are* outside the scope of SLUSA, *see Zola*, 889 F.3d at 924-25, the investors fault TD Ameritrade for not (1) reinvesting their

assets immediately after a TLH sale (and not having enough replacement securities available); (2) having a stop feature; (3) keeping their assets continually invested with only the agreed portion in cash; and (4) executing transactions daily. The investors' allegations (as is discussed more fully below) are devoid of any specific references to the contractual provisions or other sources of duty supporting those contentions.

Absent such specific references, the Court finds the investors have attempted "to enlarge the contractual [and other obligations] that the parties voluntarily adopted." *Holtz*, 846 F.3d at 931. Where a "state-law duty is independent of the contract[s'] terms, then it does not rest on contract." *Id.* Unlike a case where the parties merely dispute the meaning of a key contract term, *see*, *e.g.*, *Freeman*, 704 F.3d at 1115 (finding a dispute over what "cost of insurance" meant in a contract to be a genuine contract dispute outside of SLUSA's purview), the investors' claims here center on TD Ameritrade's failure to inform its clients of material information regarding how an entire investment feature could function. Whether framed as broken promises or negligence, nondisclosure is the linchpin of the investors' case. *See Holtz*, 846 F.3d at 931-32 (finding a claim rested on disclosure not contract where a party could not pinpoint any explicit term that was breached); *see also Kutten*, 530 F.3d at 671 (finding preempted a claim centered on deceiving or failing to disclose information to client).

TD Ameritrade asserts that the investors' prior pleadings reveal their attempts to scrub their Second Amended Complaint of problematic words. The investors balk at bringing these "prior pleadings back into the picture," but the Court finds them relevant to discerning the true nature of the investors' claims. *See Dudek v. Prudential Sec., Inc.*, 295 F.3d 875, 879-80 (8th Cir. 2002) (considering how allegations evolved to ascertain the overall target of the amended complaint). For example, in their original Complaint (Filing No. 1), the investors relied on alleged statements on TD Ameritrade's website explaining how the TLH feature would operate. In other words, the investors alleged TD Ameritrade was liable based, at least in part, on the misleading nature of TD Ameritrade's website. *See*

*Jaspers v. Prime Vest Fin. Servs., Inc.*, Civil No. 10-853 (DWF/RELE), 2010 WL 3463389, *2-3 (D. Minn. Aug. 30, 2010) (rejecting an attempt to say statements on a website were promises breached rather than misrepresentations). By the Second Amended Complaint, the investors not only removed all references to the website but also any potentially troublesome words, such as "as described" following "whether [TD Ameritrade] failed to properly create and establish the automatic [TLH] feature."

Despite their revisions, the investors' Second Amended Complaint still includes allegations which are, in essence, based on misrepresentations and omissions of material fact. This is not a case where a broker promised to do "X," but failed to do "X" (or negligently did "X"). This is instead a case where a broker agreed to manage an account and use a tax-savings feature, and the broker made investments and used that feature. Unfortunately, that feature simply had undesired—and perhaps unrevealed—side effects when market conditions soured. The investors' claims turn on TD Ameritrade's failure to disclose those side effects. SLUSA's wide reach preempts such claims when brought as a putative class action under state law.

### C. Failure to State a Claim

Even if SLUSA did not apply, the investors have failed to state plausible contract and negligence claims.

#### 1. Breach of Contract

Under Nebraska law, a plaintiff alleging a breach of contract "must plead the existence of a promise, its breach, damages, and compliance with any conditions precedent that activate the defendant's duty." *Kotrous v. Zerbe*, 846 N.W.2d 122, 126 (Neb. 2014). Every contract includes the implied covenant of good faith and fair dealing, which "requires that none of the parties to the contract do anything which will injure the right of another party to receive the benefit of the contract." *In re Application of Ne. Neb. Pub. Power Dist.*, 912 N.W.2d 884, 896 (Neb. 2018).

Similar to its position on SLUSA preemption, TD Ameritrade argues the Second Amended Complaint fails "to state a valid breach of contract claim because it does not allege any contractual provision that [TD Ameritrade] violated." Having carefully compared the investors' allegations with TD Ameritrade's obligations under the agreements, the Court agrees.

First, the investors allege TD Ameritrade breached the parties' agreements because TD Ameritrade did not (1) reinvest the investors' assets immediately after a TLH sale and (2) execute transactions daily. But none of the agreements promise immediate reinvestment after a TLH sale. Though the agreements mention daily trade executions, the TLH-feature provisions promise only that TDAIM will review accounts daily for potential TLH sales, not that reinvestment after a TLH sale will occur contemporaneously, daily, or even promptly.[6] And the provisions which do discuss daily trades warn that daily trading does "not include accounts with . . . unresolved investment restrictions."

Second, the investors complain about the lack of a stop feature or an adequate number of replacement securities. The agreements, however, do not promise a stop feature or a definite availability of securities and emphasize "TDAIM does not represent or guarantee that the objectives of the TLH feature will be met." In other words, the agreements warned the investors before they enrolled in the TLH feature that not all TLH sales are successful. To the extent the investors allege TD Ameritrade failed to sufficiently warn the investors of the TLH feature's limitations, such a claim depends on an omission and is preempted. *See Lewis*, 879 F.3d at 854-55 (finding a claim dependent on nondisclosures preempted).

[6]For the first time in their opposition brief, the investors contend the parties' course of dealing and industry standards necessarily dictate "contemporaneous" or "prompt" reinvestment after a TLH sale, but the investors made no such allegations in the Second Amended Complaint, relying instead on the language of the parties' agreements.

Finally, the investors contend TD Ameritrade failed to maintain a limited percentage (one to three percent) of the investors' assets in cash. The TLH-feature provisions do not promise how long or what percentage of assets will be held in cash following a TLH sale. Moreover, even in those provisions setting the target allocation for cash, the investors ignore important qualifiers which warn TDAIM will "generally" or "approximately" hold one to three percent of the investors' assets in cash, but that the actual allocation will vary due to market movements or TDAIM's adjustments.

In short, the investors may now regret how the TLH feature operated, yet they have neither alleged sufficient facts to show TD Ameritrade broke any promises as to how the TLH would function nor explained how TD Ameritrade acted unfairly or in bad faith. The investors' contract claim fails.

**2. Negligence**

"[T]o recover in a negligence action, a plaintiff must show a legal duty owed by the defendant to the plaintiff, a breach of such duty, causation, and damages." *Benard v. McDowall, LLC*, 904 N.W.2d 679, 687 (Neb. 2017). "Thus, the threshold inquiry in any negligence action is whether the defendant owed the plaintiff a duty." *Durre v. Wilkinson Dev., Inc.*, 830 N.W.2d 72, 80 (Neb. 2013). A "duty" is an obligation, recognized by the law, "to conform to a particular standard of conduct toward another." *Kimminau v. City of Hastings*, 864 N.W.2d 399, 411 (Neb. 2015). Where no duty is owed, "there can be no negligence." *Id.*

Relying largely on the same allegations as they asserted for their contract claim, the investors contend TD Ameritrade also acted negligently. Specifically, the investors allege TD Ameritrade owed them a duty to (1) properly create, establish, manage, and administer the TLH feature and (2) have an adequate number of replacement securities for the TLH feature or have a stop feature to prevent the TLH feature from operating when no replacement securities existed so TD Ameritrade could keep the investors' assets continually invested with only an agreed percentage in cash. The investors assert TD

Ameritrade was negligent for failing to do those things or for failing to use due care in performing its obligations.

TD Ameritrade argues the investors' negligence claim must be dismissed because the investors have identified "no viable duty to support" their claim. In TD Ameritrade's view, the duties identified by the investors "only arise[] (if at all) by virtue of the parties' contractual relationship." Accordingly, TD Ameritrade asserts the investors' negligence claim "is merely a repackaged breach of contract claim," in violation of the economic-loss rule. That rule maintains the line between tort and contract by barring tort remedies "where the damages caused were limited to economic losses"[7] and "the duty which was allegedly breached arose solely from the contractual relationship between the parties." *Lesiak v. Cent. Valley Ag Coop.*, 808 N.W.2d 67, 81 (Neb. 2012).

The investors respond by asserting for the first time in their opposition brief that TD Ameritrade owes them fiduciary duties. The investors point to the agreements which mention fiduciary duties. In the investors' view, their Second Amended Complaint "involve[s] allegations of professional negligence against fiduciary investment advisors" who "owe their customers duties of reasonable care." The investors argue the economic-loss rule does not bar their claims because that rule does not apply to professional-negligence and breach-of-fiduciary-duty claims. *See id.* at 82-83, 83 n.52 (recognizing an exception to the economic-loss rule for professional-negligence and breach-of-fiduciary-duty claims).

The Second Amended Complaint does not support the investors' attempt to recharacterize their claims. "To state a negligence claim, [the investors] must plead facts sufficient for [the Court] to reasonably infer [TD Ameritrade] had a legal duty" to perform the list of duties alleged in the Second Amended Complaint. *Farm Credit Servs. of Am. v.*

[7]"Economic losses" are "commercial losses, unaccompanied by personal injury or other property damage." *Lesiak*, 808 N.W.2d at 81. It is undisputed that the investors seek damages only for "financial losses."

*Haun*, 734 F.3d 800, 805 (8th Cir. 2013) (applying Nebraska law). The investors have failed to do so here.

The investors have not identified any Nebraska cases or other authority establishing TD Ameritrade owed them the duties alleged in the Second Amended Complaint. *See id.* The investors now attempt to claim breaches of fiduciary duties, but they cannot substitute arguments in their brief for allegations in their pleadings. The Second Amended Complaint never mentions or even suggests that TD Ameritrade are "fiduciaries" or that the duties TD Ameritrade allegedly owed them were derived from a fiduciary relationship. That the agreements mention fiduciary duties does nothing to inform TD Ameritrade of the nature and basis of the investors' claims. *See Huggins*, 592 F.3d at 862; *see also Adams v. Am. Family Mut. Ins. Co.*, 813 F.3d 1151, 1154 (8th Cir. 2016) ("A theory of liability that is not alleged or even suggested in the complaint would not put a defendant on fair notice and should be dismissed.").

Moreover, the investors have failed to allege facts showing TD Ameritrade breached any fiduciary duties. Investment advisors are generally required under Nebraska law to (1) avoid conflicts of interest, (2) not engage in fraud or deceit, and (3) act in their client's best interest. *See*, *e.g.*, Neb. Rev. Stat. § 8-1102; *Myers v. Neb. Inv. Council*, 724 N.W.2d 776, 801 (Neb. 2006). The investors make no conflict-of-interest allegations and expressly disclaim any assertion of fraud or deceit (which would likely be barred by SLUSA). As to any claim based on the investors' best interest, the investors again have not shown TD Ameritrade strayed from the agreements in operating the TLH feature, in which the investors voluntarily enrolled to serve their interest in recouping unrealized tax losses.

The Court also shares TD Ameritrade's concerns with the economic-loss rule, given that substantially similar allegations underlie the investors' contract and negligence claims. The investors cannot sidestep the economic-loss rule by now asserting professional-negligence or breach-of-fiduciary-duty claims when the Second Amended Complaint

makes no such allegations as to "fiduciaries" and "professionals."[8] The investors tort claim also fails.[9]

## III. CONCLUSION

For the foregoing reasons, the Court concludes the claims alleged in the investors' Second Amended Complaint are precluded by SLUSA. And even without SLUSA's bar, the investors have failed to state plausible claims for relief. Accordingly,

IT IS ORDERED:

1. Defendants TD Ameritrade Holding Corporation, TD Ameritrade, Inc., TD Ameritrade Clearing, Inc., and TD Ameritrade Investment Management, LLC's Motion to Dismiss (Filing No. 30) the Second Amended Complaint (Filing No. 24) is granted.
2. This case is dismissed with prejudice.
3. A separate judgment will issue.

Dated this 15th day of November 2019.

BY THE COURT:

Robert F. Rossiter, Jr.
United States District Judge

[8]Moreover, it is not clear this case involves "professionals" under Nebraska law. *See Parks v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 684 N.W.2d 543, 552-53 (Neb. 2004).

[9]The agreements state that TD Ameritrade is only liable for losses caused by gross negligence. TD Ameritrade therefore argues the investors must show gross negligence, to which the investors do not respond. *See Bennett v. Labenz*, 659 N.W.2d 339, 343 (Neb. 2003) ("Gross negligence is great or excessive negligence, which indicates the absence of even slight care in the performance of a duty."). Because the investors have not stated a plausible negligence claim, the Court need not consider the gross-negligence issue.