

**STATE OF MAINE**

**MAINE SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT**

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**Law Court Docket No. BCD-25-166**

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**BRUCE MACMILLAN, INDIVIDUALLY AND AS THE PERSONAL  
REPRESENTATIVE OF THE ESTATE OF LINDA MACMILLAN**

*Appellants*

**v.**

**R. M. DAVIS, INC.**

*Appellee/Cross-Appellant*

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**ON APPEAL FROM THE BUSINESS AND CONSUMER COURT**

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**BRIEF OF APPELLEE/CROSS-APPELLANT R.M. DAVIS, INC.**

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## TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	6
INTRODUCTION .....	10
STATEMENT OF FACTS & PROCEDURAL HISTORY .....	11
A. Statement of Facts .....	11
B. Procedural History .....	19
ISSUES PRESENTED.....	21
SUMMARY OF THE ARGUMENT .....	21
ARGUMENT .....	22
I. There are multiple grounds on which this Court should affirm summary judgment.....	22
II. RMD did not breach any fiduciary duty owed to the MacMillans .....	23
A. The Business Court correctly concluded that there was no applicable duty of care. ....	23
i. RMD’s fiduciary relationship with the MacMillans did not include the duty to detect, investigate, or prevent the third-party criminal fraud. ....	23
1. <i>RMD did not have a duty to prevent the economic harm perpetrated by the third-party criminals with whom only the MacMillans communicated.</i> ....	24
2. <i>The MacMillans’ expansive notion of duty ignores the context of the specific events at issue.</i> ....	26
3. <i>An investment advisor’s duty of care encompasses the investment advice it provides to a client, and it is undisputed that RMD did not provide investment advice that resulted in the</i>	

<i>MacMillans' harm</i> .....	28
4. <i>The "Know Your Client" concept does not support the MacMillans' claims</i> .....	29
5. <i>SEC guidance supports RMD's position.</i> .....	30
ii. The duty proposed by the MacMillans would have forced RMD to violate its well-established duties as fiduciary and agent .....	31
iii. RMD's awareness of the potential for third-party fraud did not impose the duty sought by the MacMillans .....	35
iv. Neither history, policy, nor social ideals support the MacMillans' contention that RMD had a duty to detect and prevent the fraud.....	37
B. The MacMillans' failure to put forth any evidence of a breach of duty is an alternative basis to affirm summary judgment .....	41
III. RMD did not breach a contract with the MacMillans.....	42
A. Bruce had actual authority to direct the liquidation of Linda's IRA.....	42
i. Bruce had express authority to direct the liquidation of Linda's IRA. ....	44
ii. Bruce also had implied authority to direct the liquidation.....	45
iii. There is no material dispute of fact about Bruce's actual authority ...	47
B. As a matter of law, Linda ratified the liquidation of her IRA. ....	49
IV. The MacMillans' failure to show causation is another basis to affirm judgment in favor of RMD on both counts .....	52
A. RMD's conduct was not the proximate cause of the harm. ....	52
B. The MacMillans cannot otherwise rely on speculation. ....	55
V. This Court need not reach the Second Motion for Summary Judgment..	56

CONCLUSION.....58  
CERTIFICATE OF SERVICE .....60

## TABLE OF AUTHORITIES

### Cases

<i>Alexander v. Mitchell</i> , 2007 ME 108, 930 A.2d 1016 .....	38
<i>Anderson v. Hannaford Bros. Co.</i> , 659 F.3d 151 (1st Cir. 2011) .....	41
<i>Atlas Glass &amp; Mirror, Inc. v. Tri-N. Builders, Inc.</i> , 997 F.3d 367 (1st Cir. 2021) .....	57
<i>Boivin v. Somatex, Inc.</i> , 2022 ME 44, 279 A.3d 393 .....	23
<i>Bryan R. v. Watchtower Bible and Tract Soc.</i> , 1999 ME 144, 738 A.2d 839 .....	<i>Passim</i>
<i>Budge v. Town of Millinocket</i> , 2012 ME 122, 55 A.3d 484 .....	43
<i>Cyr v. Adamar Associates Ltd. Partnership</i> , 2000 ME 110, 752 A.2d 603 .....	55
<i>Devine v. Roche Biomedical Laboratories, Inc.</i> , 637 A.2d 441 (Me. 1994) .....	36
<i>Est. of Frost</i> , 2016 ME 132, 146 A.3d 118 .....	49, 50, 51
<i>Estate of Cilley v. Lane</i> , 2009 ME 133, 985 A.2d 481 .....	40
<i>Fitzgerald v. Hutchins</i> , 2009 ME 115, 983 A.2d 382 .....	48
<i>Foster v. Oral Surgery Assocs</i> , 2008 ME 21, 940 A.2d 1102 .....	25, 43
<i>Gafner v. Down East Comm. Hosp.</i> , 1999 ME 130, 735 A.2d 969 .....	34
<i>Gniadek v. Camp Sunshine at Sebago Lake, Inc.</i> , 2011 ME 11, 11 A.3d 308 .....	23, 37
<i>Leighton v. Fleet Bank of Maine</i> , 634 A.2d 453 (Me. 1993) .....	41
<i>Libby v. Concord Gen. Mut. Ins. Co.</i> , 452 A.2d 979 (Me. 1982) .....	43, 44, 45, 46
<i>Lincoln v. Burbank II</i> , 2016 ME 138, 147 A.3d 1165 .....	42, 43, 47
<i>Marshall v. Burger King Corp.</i> , 856 N.E.2d 1048 (Ill. 2006) .....	27

<i>McCloud v. Save-A-Lot Knoxville, LLC</i> , 388 F.Supp.3d 954 (E.D. Tenn. 2019) ...	54
<i>Melhorn v. Derby</i> , 2006 ME 110, 905 A.2d 290.....	25
<i>Meridian Med. Sys. v. Epix Therapeutics, Inc.</i> , 2021 ME 24, 250 A.3d 122 .....	23
<i>Michalka v. Great Northern Paper Co.</i> , 151 Me. 98 (1955) .....	53
<i>Niehoff v. Shankman &amp; Assocs. Legal Ctr.</i> , 2000 ME 214, 763 A.2d 121.....	52
<i>Norfolk S. Ry. Co. v. Zeagler</i> , 748 S.E.2d 846 (Ga. 2013).....	27
<i>Oceanic Inn, Inc. v. Sloan’s Cove, LLC</i> , 2016 ME 34, 133 A.3d 1021 .....	36
<i>Page v. Amtrak, Inc.</i> , 168 F. Supp. 3d 337 (D. Me. 2016).....	55
<i>QAD Invs., Inc. v. Kelly</i> , 2001 ME 116, 776 A.2d 1244.....	50
<i>Rickett v. VIP Tour &amp; Charter Bus Co.</i> , No. CV-19-499, 2022 WL 17403413 (Me. Super. Ct. May 13, 2022) .....	27
<i>SEC v. Capital Gains Research Bureau, Inc.</i> , 375 U.S. 180 (1963).....	26, 38
<i>State Farm Mut. Auto. Ins. Co. v. Koshy</i> , 2010 ME 44, 995 A.2d 651.....	42
<i>State v. Salisbury</i> , 2017 ME 215, 173 A.3d 146 .....	47
<i>Toto v. Knowles</i> , 2021 ME 51, 261 A.3d 233.....	22, 52
<i>U.S. Bank Nat’l Ass’n. v. Gordon</i> , 2020 ME 33, 227 A.3d 577.....	50, 52
<i>Webb v. Haas</i> , 1999 ME 74, 728 A.2d 1261 .....	56
<i>Yankee Pride Transp. and Logistics, Inc., v. UIG</i> , 2021 ME 65, 264 A.3d 1248 .....	22, 52
<i>Zip Lube, Inc. v. Coastal Sav. Bank</i> , 1998 ME 81, 709 A.2d 733.....	47
<b>Statutes</b>	
12 U.S.C. § 3423 .....	34

14 M.R.S. § 156 .....	55
15 U.S.C. §§ 80b-1 to 80b-21 .....	32
32 M.R.S. § 16102 .....	32, 34
32 M.R.S. § 16802 .....	34
32 M.R.S. § 16803 .....	34
32 M.R.S. § 16806 .....	34
32 M.R.S. § 16807 .....	34
<b>Regulations</b>	
17 C.F.R. §§ 248.1-.30 .....	33
<b>Other Authorities</b>	
2A C.J.S. Agency § 72 .....	51
<i>Regulation of Investment Advisers</i> (March 2013), <a href="https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf">https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf</a> .....	32
Restatement (Second) of Agency § 22.....	46
Restatement (Third) Of Agency § 1.01.....	43, 48
Restatement (Third) of Agency § 2.01.....	43, 44, 46, 47
Restatement (Third) of Agency § 2.02.....	44, 46
Restatement (Third) Of Agency § 3.04.....	43
Restatement (Third) of Agency § 4.01.....	50, 52
Restatement (Third) of Agency § 8.08.....	33
Restatement (Third) of Agency § 8.15.....	39

Restatement (Second) of Torts § 302(B) .....	33, 37
Restatement (Second) of Torts § 314.....	24, 35
Restatement (Second) of Torts § 314A .....	25
Restatement (Second) of Torts § 323.....	36
Restatement (Second) of Torts § 324A.....	37
Restatement (Second) of Torts § 442.....	53, 55
Restatement (Second) of Torts § 447.....	54
Restatement (Second) of Torts § 448.....	54
Restatement (Second) of Torts § 453.....	53
Restatement (Third) of Torts: Liab. for Econ. Harm § 16 .....	28
Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. IA-5248, 2019 WL 3779889 (July 12, 2019).....	28
Suitability of Investment Advice, Investment Advisers Act Release No. 1406, 1994 WL 84902 (March 16, 1994) .....	30

## INTRODUCTION

Appellants seek to expand the contours of their fiduciary relationship with R.M. Davis, Inc. (“RMD”), an investment advisor, in an attempt to recover the losses they suffered after they transferred their savings to an international crime ring. The law does not support that expansion. Here, the MacMillans made the tragic decision on their own to transfer their life savings to criminal fraudsters. They never disclosed to RMD that they believed their Fidelity accounts had been compromised or that they planned to transfer their life savings to a cryptocurrency account, and they never sought RMD’s advice or guidance regarding their plans. As a matter of law, RMD cannot be liable on these undisputed facts.

The MacMillans’ opening brief is notable for its omissions. First, it never addresses one of the most important undisputed facts in this case: that the MacMillans intentionally misled RMD about their plans for their money when they directed RMD to liquidate their investment accounts. In fact, the undisputed record reveals that the MacMillans falsely told RMD that they were going to invest their money in an “exciting real estate opportunity” in order to ensure that they could transfer their money to Coinbase without delay. Second, it does not cite any controlling law in support of the novel fiduciary duty that the MacMillans seek, citing instead general negligence case law and an inapplicable FINRA arbitration panel decision. Third, it does not distinguish, or even address, the case law cited by

the Business Court in its Orders granting summary judgment. Fourth, it omits or misstates important uncontroverted facts. Finally, it ignores the practical fact that RMD’s clients can do what they want with their own money, and it is undisputed that the MacMillans, and not RMD, transferred their own money to criminals.

## **STATEMENT OF FACTS & PROCEDURAL HISTORY**

### **A. Statement of Facts**

The following facts are undisputed in the summary judgment records.<sup>1</sup> Throughout their fifty-year marriage, Linda MacMillan (“Linda”) permitted her husband, Bruce MacMillan (“Bruce”), to handle her finances and make financial decisions for her, including those about financial transactions. (A. 265, 279, 283, 287-88, 338 ¶¶ 1, 89-91, 93-94.)

RMD is an investment advisory firm registered with the United States Securities and Exchange Commission (“SEC”). (A. 59, 79 ¶ 3; A. 266, 283 ¶ 4.) As of February 2022, the MacMillans had four accounts custodied with Fidelity, and three of their four Fidelity accounts were managed by RMD: Bruce’s Individual Retirement Account (IRA), Linda’s IRA, and the MacMillans’ Joint Investment Account (JIA). (A. 61, 80 ¶¶ 16-18; A. 267-68, 284 ¶¶ 14-16.) The MacMillans’ fourth Fidelity account was a Joint Checking Account not managed by RMD. (A.

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<sup>1</sup> Many of the facts are the same in both the first summary judgment record, (A. 59-264), and the second summary judgment record, (A. 265-483). RMD parallel cites to both records where applicable in light of its arguments before the Business Court and herein.

62, 80 ¶ 18; A. 268, 284 ¶ 16.) RMD had no authority to, and never did, transfer the MacMillans' money to accounts outside of the MacMillans' Fidelity accounts. (A. 22-23, 81, 135 ¶¶ 22-23.) The MacMillans, on the other hand, had the ability to transfer money out of their Fidelity accounts through Fidelity's online system and customer service phone number. (A. 62, 80 ¶¶ 19-20.) In fact, in early 2022, Bruce was regularly using Fidelity's online system to check for unauthorized activity in both his and Linda's accounts. (A. 62, 80 ¶ 21; A. 279, 287 ¶ 92.) Linda allowed Bruce to be the "commander-in-chief" of their family finances, and for that reason he also opened and reviewed any statements from Fidelity, including those regarding Linda's IRA. (A. 279-80, 287-88, 338-39 ¶¶ 89-91, 93, 96, 98, 100-01.)

On February 1, 2022, the MacMillans were sitting at their computer when they received a pop-up message, purporting to be from Microsoft and warning that their computer and phone lines were compromised. (A. 63, 81 ¶ 26; A. 269, 284 ¶ 23.) The MacMillans called the 800-number on that pop-up and spoke to "Adam Smith," who purported to be a Microsoft senior security analyst and put the MacMillans in touch with "Alen Watson" ("Watson"). (A. 63, 81 ¶¶ 27-31; A. 269-70, 284 ¶¶ 24-28.) Watson identified himself as a fraud prevention specialist at Fidelity and said that he had just defeated an attempt to withdraw \$100,000 from the MacMillans' JIA at Fidelity and that the MacMillans needed new Social Security cards as a result. (A. 64, 81-82 ¶¶ 32-33, 35; A. 270, 284-85 ¶¶ 28-30, 32.) Watson

said that the MacMillans needed to keep all of this confidential, telling them that the security issue was perhaps from within Fidelity.<sup>2</sup> (A. 64, 82 ¶¶ 34, 37; A. 270-71, 285 ¶¶ 31, 34.) In reality, “Adam Smith” and “Alen Watson” were scam artists. (A. 67, 84 ¶ 58; A. 272, 285 ¶ 45.)

Over the course of multiple phone calls with Bruce and Linda on February 1 and 2, 2022, Watson said that, in order to get new Social Security numbers, the MacMillans would need to transfer all of their money from their Fidelity accounts to Coinbase, which Watson represented was a Social Security-approved safe house.<sup>3</sup> (A. 63-64, 82 ¶¶ 32, 37-39; A. 270-71, 284-85 ¶¶ 29, 32, 34, 36-37.) At Watson’s suggestion, Bruce looked at the Coinbase website, concluding that it was well done and that the process for opening a Coinbase account was legitimate and sophisticated. (A. 65, 82 ¶¶ 41-43.)

The MacMillans had total faith in what Watson was telling them to do; they believed that their Fidelity accounts had been breached and that they needed to convert their assets to cryptocurrency. (A. 67, 84 ¶ 57; A. 271-72, 285 ¶¶ 39, 44.) They created Coinbase accounts with Watson’s assistance, giving Watson their personal information, including their photo IDs, to create the accounts and allowing Watson to install an “ultraviewer” on their computer. (A. 65-66, 82-83 ¶¶ 44-49; A.

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<sup>2</sup> In his first affidavit, Bruce elaborated that Watson furthermore told him that RMD was perhaps responsible for the purported hack into the MacMillans’ account. Affidavit of Bruce MacMillan ¶ 65; (A. 271 ¶ 35).

<sup>3</sup> In actuality, Coinbase is a company that operates an online platform for trading and transferring cryptocurrency, such as Bitcoin. (A. 59, 79 ¶ 1; A. 265, 283 ¶ 2.)

271-72, 285 ¶¶ 40-43.) Bruce used his own phone number and email to create his Coinbase account and, on February 3, 2022, at Watson’s direction, Bruce arranged for the MacMillans’ Bath Savings Account (“Bath Account”) to link to his Coinbase account, transferring \$100 from their Bath Account into his Coinbase account to make his Coinbase account operational. (A. 66, 83-84, 136-37 ¶¶ 48-49, 52-54.)

That same day, Watson told Bruce that the first step to get the MacMillans’ money to the “safehouse” was to liquidate the MacMillans’ JIA at Fidelity, worth \$278,997 at the time, and transfer the proceeds to Coinbase. (A. 67, 84 ¶¶ 59-60.) Watson gave Bruce specific instructions regarding how he should transfer the MacMillans’ money.<sup>4</sup> During this conversation, Bruce told Watson that he would need a reason to give RMD regarding why he, Bruce, wanted to withdraw his funds. (A. 68, 84 ¶ 63.) Watson told Bruce to tell RMD that he had an “exciting real estate opportunity,” and Bruce agreed that this is what he would say to RMD. (A. 68, 84 ¶¶ 64-65; A. 272, 285 ¶ 46.)

On February 3, 2022, Bruce called RMD, speaking initially to a client relationship associate, and instructed RMD to liquidate the MacMillans’ JIA at Fidelity. (A. 68, 84 ¶ 66; A. 272, 285 ¶ 47.) Upon learning of Bruce’s request, George Carr, Bruce’s client advisor, called Bruce back and asked what the

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<sup>4</sup> Watson said that only \$110,000 was to be transferred out of the MacMillans’ Fidelity JIA initially, and that money was to be wired first through the MacMillans’ Bath Account, instead of directly to Coinbase, in order to use an existing bank relationship. (A. 67, 84 ¶¶ 60-62.)

MacMillans were using the funds for. (A. 60, 68, 84, 137 ¶¶ 7, 67-69; A. 266, 273, 283, 285 ¶¶ 7, 48.) Pursuant to his plan with Watson, Bruce lied to Carr, telling him that the MacMillans wanted to put their money into an exciting real estate investment. (A. 68-69, 84-85 ¶¶ 64-65, 70, 74; A. 272-73, 285 ¶¶ 46, 49, 51.) Bruce admits that he wanted to mislead RMD so that he could get his money to Coinbase. (A. 69, 85, 137 ¶ 74; A. 273, 285 ¶ 51.) Bruce never asked RMD to evaluate that so-called real estate investment; in fact, when Carr inquired about what the investment was, Bruce declined to share any details. (A. 69, 85 ¶¶ 72-73.) Pursuant to Bruce's instruction, RMD thereafter placed the trades in the MacMillans' JIA. (A. 69, 85 ¶ 76.)

Via his online account on Fidelity.com, Bruce thereafter authorized and instructed Fidelity to wire a total of \$110,000 from the MacMillans' JIA to the MacMillans' Bath Account.<sup>5</sup> (A. 69-70, 85-86, 138-39 ¶¶ 78-83.) On February 7 and 15, 2022, Bruce went to Bath Savings and signed two wire authorization forms, directing Bath Savings to send that \$110,000 on to Coinbase. (A. 70-71, 86-87 ¶¶ 84, 91.) Cindy Owens, an employee of Bath Savings, asked Bruce about the reason for his wire to Coinbase, and he falsely informed her that it was for an exciting investment opportunity and that his long-time financial advisor was assisting him

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<sup>5</sup> Bruce authorized the distribution of the \$110,000 in two separate installments because Watson told him to do it that way. (A. 70, 86, 138-39 ¶ 83.)

with the investment.<sup>6</sup> (A. 70-71, 86 ¶¶ 85-87.)

Sometime prior to February 9, 2022, Watson informed Bruce that the next step to get the MacMillans' new Social Security cards was to move their money from their IRAs to the "safe house" at Coinbase. (A. 72, 87 ¶ 99; A. 273, 285 ¶ 52.) Watson reminded Bruce that he should tell RMD that the money was for the "exciting real estate opportunity." (A. 73, 87 ¶ 100; A. 273, 285 ¶ 53.) Continuing to follow Watson's instructions, Bruce called RMD again on February 9, 2022, less than one week after their prior call, and instructed Carr to sell all of the investments in the MacMillans' IRAs—worth \$1,045,393 at the time—and transfer the cash to the MacMillans' joint checking account.<sup>7</sup> (A. 72-73, 87, 140 ¶¶ 98, 101-02; A. 273-74, 285-86 ¶¶ 54-55.) Bruce believed that his direction to liquidate Linda's IRA was within the scope of permission that Linda had given him to make financial decisions. (A. 279-80, 287-88, 338 ¶¶ 89-91, 95.)

On their February 9 call, Carr advised Bruce of the tax consequences that would result from the liquidation of their IRAs. (A. 73, 87 ¶ 104; A. 274, 286 ¶ 56.) Carr then asked whether the MacMillans were taking their money to another

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<sup>6</sup> In the meantime, Coinbase suspended Bruce's account until February 15, 2022 due to risk management and safety concerns. The restriction of his Coinbase account meant that Bruce could not send money, in the form of cryptocurrency, off of the Coinbase platform. After it received a message from Bruce's email address requesting that his account be unrestricted, Coinbase sent Bruce an email on February 8, 2022, warning him to be wary of scams and anyone asking for account information. (A. 71, 86-87, 139 ¶¶ 88-90.)

<sup>7</sup> Pursuant to M.R. Civ. P. 56(d), RMD accepted for purposes of its Second Motion for Summary Judgment that Bruce was the only one on this call and that he, rather than Linda personally, directed the liquidation of Linda's IRA.

investment advisor, in which case he advised that they could avoid the taxes. (A. 73, 87-88, 140 ¶ 105 ; A. 274, 286 ¶ 57.) Pursuant to the MacMillans' instructions, RMD placed the trades in their IRAs and, after advising the MacMillans again of the tax withholdings, transferred \$710,868.40 to the MacMillans' joint checking account at Fidelity. (A. 74, 88 ¶¶ 107-10; A. 274-75 286 ¶¶ 59-61, 63.) Fidelity sent Linda a transaction confirmation, dated February 9, 2022, confirming the sales in her IRA, and Bruce reviewed that correspondence as he always did. (A. 275, 286, 288, 339 ¶¶ 64, 98, 100.)

On February 15, 2022, Bruce directed Fidelity to wire \$700,000 from the MacMillans' Fidelity checking account to Coinbase. (A. 74, 88, 140-41 ¶ 112; A. 275, 286 ¶ 66.) His request was transferred to Fidelity's Wire Risk Department, and Bruce falsely stated that the purpose of the wire was to invest in cryptocurrency. (A. 74, 88, 141-42 ¶¶ 113-14; A. 275, 286 ¶¶ 67-68.) On February 15 and 16, 2022, the MacMillans also initiated, via Fidelity.com, wires of the remaining funds in their joint accounts to Coinbase, totaling \$181,000 sent in four different wires. (A. 72, 87-88, 142 ¶¶ 94-97, 116-17). On those same dates, Bruce sent all of the MacMillans' funds, which were now available to trade as Bitcoin in his Coinbase account, off of the Coinbase platform to three different external Bitcoin addresses. (A. 76, 89, 142 ¶¶ 122-23; A. 277, 287 ¶ 77.) From there, the scam artists stole the MacMillans' money. (A. 76, 89 ¶ 124; A. 277, 287 ¶ 78.)

Sometime in late February 2022, Watson told Bruce that the MacMillans needed to take out a loan to “prove their identity” to Social Security. (A. 76, 89 ¶ 125; A. 277, 287 ¶ 79.) The MacMillans consequently applied for and received a home equity line of credit from Camden National Bank, the proceeds of which they also lost to the scam artists.<sup>8</sup> (A. 76, 89-90 ¶¶ 126, 135; A. 277-78, 287 ¶¶ 80, 85.)

In April 2022, Bruce realized he had been defrauded. (A. 77, 90 ¶ 136; A. 278, 287 ¶ 86.) He called Carr, revealing that he and Linda had been tricked by criminals into liquidating all of their financial assets and transferring their funds to Coinbase. (A. 78, 90 ¶ 138; A. 278, 287 ¶ 86.) Linda signed and submitted an identity theft affidavit to the IRS, likewise admitting “*we transferred all our funds to Coinbase.*” (A. 281, 289 ¶ 107 (emphasis supplied)). The MacMillans met with the FBI in the Spring of 2022. (A. 281, 289 ¶ 105.) During that meeting, they discussed the liquidation of Linda’s IRA, but she never said that she objected to the liquidation of her IRA, nor did she ever express to Bruce that he did not have her permission to liquidate it. (A. 281, 289, 339 ¶¶ 105-06.) The FBI determined that Watson was a

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<sup>8</sup> The MacMillans falsely represented to Camden that they planned to use the loan proceeds for home improvement projects. (A. 76, 89 ¶ 126; A. 277, 287 ¶ 80.) After Bruce realized that he would have no liquid assets to show on his loan application if he included the February Fidelity statements, Watson suggested that the MacMillans use the January statements even though the funds were no longer in their Fidelity accounts; Bruce complied. (A. 76-77, 89 ¶¶ 128-29; A. 277-78, 287 ¶¶ 81-82.) The MacMillans received the HELOC and, acting on Linda’s behalf as “commander-in-chief” of the MacMillans’ finances, Bruce ultimately withdrew and transferred that entire \$150,000 line of credit to the Coinbase platform, falsely informing Camden that the MacMillans had a “short-term investment opportunity.” (A. 77, 89-90, 143, ¶¶ 130-32, 134; A. 278, 281, 287, 288, 339 ¶¶ 83-84, 102.) At his deposition, Bruce claimed that RMD was responsible for these damages, too.

money mule in an international crime organization. (A. 78, 90 ¶¶ 139-40; A. 279, 287 ¶¶ 87-88.)

## **B. Procedural History**

The MacMillans filed a two-count Complaint, dated June 15, 2023, asserting claims against RMD for breach of fiduciary duty and breach of contract. (A. 33-44.) On June 28, 2024, RMD moved for summary judgment on both counts, arguing that, as a matter of law, it had no fiduciary or contractual duty to prevent the third-party criminal fraud.<sup>9</sup> In their Opposition, the MacMillans raised for the first time a claim that Linda did not consent to the liquidation of her IRA, submitting an affidavit from Bruce stating that Linda was not on the February 9 call with Carr. RMD responded that it had no notice of this new theory of liability, and, by Order dated September 5, 2024, the Business and Consumer Court (*McKeon, J.*) agreed “that the Complaint [did] not sufficiently allege a claim based on the liquidation of [Linda’s IRA] without her authorization.”<sup>10</sup>

While RMD’s Motion for Summary Judgment was still pending, the MacMillans filed a Motion to Amend Complaint, dated September 10, 2024, seeking to amend their Complaint to allege that Linda did not consent to liquidating her IRA. On October 28, 2024, the Business Court granted the MacMillans’ Motion to

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<sup>9</sup> RMD simultaneously filed two Motions *in Limine*, including one seeking to exclude the MacMillans’ expert.

<sup>10</sup> The Complaint itself asserted that “[t]he MacMillans were asking to sell all their securities and withdraw all their money from Fidelity.” (A. 41 at ¶ 120 (emphasis supplied)); *see* Answer ¶ 120 (admitting that fact).

Amend.<sup>11</sup> (A. 23-27.) Recognizing that RMD would be prejudiced, it allowed RMD to conduct limited additional discovery on Linda’s new claim and to file summary judgment on the same. (A. 26-27.)

By Order dated October 28, 2024, the Business Court granted RMD’s first Motion for Summary Judgment on the breach of fiduciary duty claim, concluding that RMD had no duty to protect the MacMillans from the third-party fraud or to “delay clear client instructions from a client in order to conduct some type of undefined investigation.” (A. 14-22.) The Court also granted summary judgment, in part, on the MacMillans’ claim for breach of contract, concluding that nothing in the Investment Advisory Agreement between the parties provided that RMD would protect the MacMillans from third-party fraud, but explaining that it was simultaneously granting the MacMillans’ Motion to Amend, thus leaving “the only issue remaining” on the breach of contract claim to be “whether [RMD] obtained Linda’s permission before transferring money out of her IRA.” (A. 21-22.) On November 13, 2024, the MacMillans filed a Motion for Reconsideration, which the Business Court denied. (A. 10-11, 57-58.)

On January 27, 2025, RMD filed its Second Motion for Summary Judgment

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<sup>11</sup> The Business Court accepted “Plaintiffs’ counsel’s assertion that he understood the issue was part of Plaintiffs’ case all along” such that it found no bad faith or undue delay. (A. 26.) The MacMillans later represented in their Opposition to RMD’s Second Motion for Summary Judgment that “[n]either the MacMillans, nor their counsel, knew that Linda’s consent was necessary until George Carr testified to that fact at his deposition on November 28, 2023.” Pl.s’ Opp. to RMD’s Second MSJ at 22.

on Linda’s remaining breach of contract claim, accepting Bruce’s version of events from his first affidavit and arguing that, as a matter of law, Bruce had actual authority to direct the liquidation of Linda’s IRA. On April 8, 2025, the Business Court granted RMD’s Motion, agreeing that Bruce had actual authority and disregarding Bruce’s second affidavit wherein he contradicted his prior sworn testimony. (A. 12, 28-32.) On April 15, 2025, the MacMillans filed a notice of appeal as to the Orders granting RMD’s first Motion for Summary Judgment, denying their Motion to Reconsider, and granting RMD’s second Motion for Summary Judgment. RMD thereafter filed a notice of appeal.<sup>12</sup>

### **ISSUES PRESENTED**

1. Whether the Business Court properly concluded that, as a matter of law, RMD did not breach a fiduciary duty to the MacMillans when it complied with the MacMillans’ unambiguous instructions to liquidate their investment accounts.
2. Whether the Business Court properly concluded that, as a matter of law, RMD did not breach its contract with Linda when it liquidated her IRA at the direction of Bruce, whom Linda allowed to make financial decisions for her.

### **SUMMARY OF THE ARGUMENT**

The MacMillans’ notion of RMD’s fiduciary duty greatly oversimplifies the requisite legal analysis in this case, which presents circumstances of third-party economic harm. Failing to consider that they chose not to place their trust or confidence in RMD when they unilaterally decided to “invest” in cryptocurrency,

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<sup>12</sup> Neither party filed a notice of appeal as to the Court’s Order granting the MacMillans’ Motion to Amend.

the MacMillans seek to impose upon investment advisors a duty to detect clients' deception. That duty is unworkable; it would, in fact, place RMD in the position of violating its long-established duties as both a fiduciary and agent. The Business Court therefore properly concluded that RMD had no applicable duty of care, and this Court should affirm summary judgment on that same basis. The MacMillans' contract claim fares no better because Bruce had authority to direct the liquidation of Linda's IRA—he testified to that fact and admitted to it in the record, and the MacMillans' failed to produce any evidence to the contrary.

## ARGUMENT

### I. **There are multiple grounds on which this Court should affirm summary judgment.**

This Court will affirm summary judgment based on any ground manifest in the record, including on alternative grounds, when “the record reflects that there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law.” *Yankee Pride Transp. and Logistics, Inc., v. UIG*, 2021 ME 65, ¶¶ 10-11, 264 A.3d 1248. In so deciding, this Court will consider “the evidence and any reasonable inferences thereof in the light most favorable to the non-[moving] party,” *id.*, but it remains the MacMillans' “burden to make out the prima facie case and demonstrate that there are disputed facts,” *Toto v. Knowles*, 2021 ME 51, ¶ 8, 261 A.3d 233. They did not meet that burden here.

## II. **RMD did not breach any fiduciary duty owed to the MacMillans.**

The elements of a breach of fiduciary claim are (1) a fiduciary relationship, (2) a breach of the fiduciary duty, and (3) damages proximately caused by the breach. *Meridian Med. Sys. v. Epix Therapeutics, Inc.*, 2021 ME 24, ¶ 12, 250 A.3d 122 (applying both the Second and Third Restatements of Torts). The MacMillans’ failure to present a prima facie case as to duty, breach, and causation provide separate bases to affirm judgment in favor of RMD on the MacMillans’ breach of fiduciary claim. *See Boivin v. Somatex, Inc.*, 2022 ME 44, ¶ 10, 279 A.3d 393.

### **A. The Business Court correctly concluded that there was no applicable duty of care.**

- i. RMD’s fiduciary relationship with the MacMillans did not include the duty to detect, investigate, or prevent the third-party criminal fraud.

The MacMillans argue that the Business Court should have considered RMD’s duty to the MacMillans more “broadly.” (Blue Br. 31-34.) They further argue that the fiduciary relationship acknowledged by RMD was sufficient to establish a triable duty of care (Blue Br. 34-35).<sup>13</sup> It was not, and the scope of a fiduciary duty is a question of law that is apt for summary judgment. *See, e.g., Gniadek v. Camp Sunshine at Sebago Lake, Inc.*, 2011 ME 11, ¶¶ 29-31, 11 A.3d 308.

The MacMillans’ argument, if correct, would turn investment advisors into

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<sup>13</sup> RMD has always acknowledged that it owed some fiduciary duties to the MacMillans; however, those duties did not include the duty to protect them from falling victim to—and from participating in—the third-party fraud that occurred here.

insurers against losses incurred by any client who makes a bad decision about what to do with her own money. *See Bryan R. v. Watchtower Bible and Tract Soc.*, 1999 ME 144, ¶ 23, 738 A.2d 839 (warning of “[t]he creation of an amorphous common law duty” that would give rise to “unlimited liability”). After all, the client has the right to make her own investment decisions—even reckless and bad decisions.

The MacMillans’ broad view of the applicable duty is misplaced. It (i) ignores the third-party harm at issue, (ii) fails to consider duty in the context of the specific events at issue, including Bruce’s deception of RMD, and (iii) assumes incorrectly that an investment advisor’s fiduciary duties are limitless. The MacMillans also (iv) conflate the “know your client” rule with an unworkable duty of care, and (v) mischaracterize SEC guidance.

*1. RMD did not have a duty to prevent the economic harm perpetrated by the third-party criminals with whom only the MacMillans communicated.*

The MacMillans argue that RMD had a duty to protect them from third-party harm, but the breach of fiduciary claim belongs among the family of torts for which “[t]here does not exist a general obligation to protect others from harm not created by the actor.” *Id.* ¶ 14 (citing Restatement (Second) of Torts § 314). The undisputed facts show that RMD had no knowledge of or role in the criminal fraud that began on the MacMillans’ computer, and Bruce alone, without consultation or intermediation by RMD, withdrew the MacMillans’ assets from their Fidelity

accounts and wired them to his Coinbase account. (A. 62, 69-72, 74-75, 81, 85-88 ¶¶ 23, 79-96, 112-116.)

RMD is unaware of any case law or precedent (nor do the MacMillans point to any) imposing a duty of care on investment advisors to detect and prevent third-party fraud on a client-investor who moves his own money to the third-party wrongdoers.<sup>14</sup> As the Business Court recognized, the MacMillans need to, but cannot, point to a duty that went “beyond taking care of [its] client’s funds and providing sound advice, to include a duty to protect clients from [financial] elder abuse arising from third party fraud.” (A. 18.)

The MacMillans did not argue below, nor do they argue in their opening brief, that an investment advisor-client relationship is a “special relationship” giving rise to the exceptional duty to protect against third-party harm. *See Foster v. Oral Surgery Assocs*, 2008 ME 21, ¶ 22, 940 A.2d 1102 (“An issue raised for the first time on appeal is not properly preserved for appellate review.”); *Melhorn v. Derby*, 2006 ME 110, ¶ 11 905 A.2d 290 (issues without developed argument are waived on appeal). Nor could they, because the harm at issue here is *pecuniary* rather than physical harm. *See* Restatement (Second) of Torts § 314A (Am. L. Inst. 1965 & Sept. 2025 Update) (describing special relations in which there may be a duty to

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<sup>14</sup> The FINRA arbitration panel decision, discussed by the MacMillans, (Blue Br. 45-47), is not law, and RMD is not governed by FINRA, which governs broker-dealers rather than investment advisors.

protect against “unreasonable risk of physical harm”). Thus, the MacMillans’ argument is fundamentally flawed. RMD had no fiduciary duty to protect against third-party harm.

2. *The MacMillans’ expansive notion of duty ignores the context of the specific events at issue.*

The MacMillans advance a novel notion of duty that ignores the specific events that led to their harm. “A fiduciary duty will be found to exist, as a matter of law, only in circumstances where the law will recognize both the disparate positions of the parties and a reasonable basis for the placement of trust and confidence in the superior party in the context of the specific events at issue.” *Bryan R.*, 1999 ME 144, ¶ 20, 738 A.2d 839 (defining the legal inquiry as whether “a religious organization has a fiduciary relationship with its members that requires it generally to protect [them] from other members of the church who may present a danger”).<sup>15</sup>

The undisputed facts show that the MacMillans had no “reasonable basis” to expect RMD to protect them from their unilateral financial decisions. In fact, the MacMillans’ intentional deceit of RMD demonstrates that they had limited trust or confidence in RMD with respect to those transactions. (A. 68-69, 84-85 ¶¶ 63-65,

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<sup>15</sup> The scope of the fiduciary duty owed by investment advisors is defined by the specific facts and circumstances at issue. See *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 181 (1963) (determining whether an investment adviser had a duty to disclose to his clients that he had “a practice of purchasing shares of a security for his own account shortly before recommending that security for long-term investment and then immediately selling the shares at a profit . . . following the recommendation.”).

74.) RMD was not the “superior party” with knowledge of the material facts related to either the fraud or the MacMillans’ movement of their money to Coinbase; rather, the MacMillans trusted Watson, in whom they had “total faith.” (A. 67, 75, 84, 88 ¶¶ 57, 118-121.) In fact, it was Bruce who assessed and vetted Coinbase, concluding on his own that it seemed “legitimate” and “sophisticated.” (A. 65, 82 ¶¶ 41-43.)

For these same reasons, RMD is not liable for the tax consequences of the MacMillans’ unilateral financial decisions. *See* (Blue Br. 34.) RMD twice advised the MacMillans of the tax consequences, including on the phone in response to Bruce’s liquidation instructions. (A. 73-74, 85, 88 ¶¶ 104, 108-09.) But Bruce’s goal was to obey Watson’s order of silence and get his money to Coinbase; after Bruce spoke with Carr and remained undeterred by the tax liabilities, he called Watson to report back that the MacMillans’ IRA funds would soon be available for transfer. (A. 73, 75, 88 ¶¶ 106, 121.)

The general negligence cases cited by the MacMillans, (Blue Br. 31-33), do not contradict the Business Court’s adherence to this fact-specific inquiry as to the duty of care; rather, they support it.<sup>16</sup> *See* (A. 20 (“The MacMillans were relying on

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<sup>16</sup> The Maine Superior Court case considered duty in the context of the specific events. *See Rickett v. VIP Tour & Charter Bus Co.*, No. CV-19-499, 2022 WL 17403413, \*2-3 (Me. Super. Ct. May 13, 2022) (explaining that a common carrier has an established duty to provide a “reasonable safe discharge at a reasonably safe location” in a case about a bus letting a passenger off near a darkly lit gravel path). The Georgia and Illinois cases cited by the MacMillans likewise have a direct nexus between the duty owed and the specific facts. *See Norfolk S. Ry. Co. v. Zeagler*, 748 S.E.2d 846, 850, 853 (Ga. 2013) (railroad had a statutory duty to provide plaintiff with training to protect him from injury at grade crossings, which was exactly how the plaintiff-train conductor suffered injury); *Marshall v. Burger King Corp.*, 856 N.E.2d 1048,

RMD for investment advice and management of their funds, not to protect them from falling for a scam on their own computer.”)).

3. *An investment advisor’s duty of care encompasses the investment advice it provides to a client, and it is undisputed that RMD did not provide investment advice that resulted in the MacMillans’ harm.*

An investment advisor’s fiduciary duties are limited. *See* Restatement (Third) of Torts: Liab. for Econ. Harm § 16, cmt. a (Am. L. Inst. 2020 & June 2024 Update) (“[T]o any broad statements about [fiduciary relationships], exceptions or qualifications must inevitably be made.”). An investment advisor’s duty of care extends to the investment advice it provides to a client.<sup>17</sup> *See* Standard of Conduct for Investment Advisers, Investment Advisers Act Release No. IA-5248, 2019 WL 3779889 (July 12, 2019) (“SEC Release”), at \*7 (“An adviser’s fiduciary duty *applies to all investment advice the investment adviser provides to clients, including advice about investment strategy, engaging a sub-adviser, and account type.*” (emphasis supplied)); *see also* Restatement (Third) of Torts § 16 cmt. a (“A fiduciary duty is, in general, a duty to act for the benefit of another *on matters within the scope of the parties’ relationship.*” (emphasis supplied)).<sup>18</sup>

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1051, 1058 (Ill. 2006) (special relationship between a business invitor and invitee gave rise to applicable duty of care when plaintiff-invitee was struck by a car in the defendant-restaurant).

<sup>17</sup> RMD never admitted that its duties of care or loyalty include protecting clients from third-party fraud, and the MacMillans’ representations to the contrary cite to only their own statement of material facts in the second summary judgment record. (Blue Br. 9, 11-12, 37.) RMD’s Rule 56(h)(3) responses properly qualified these statements. *See, e.g.*, (A. 181 ¶ 253; A.184 ¶ 261.)

<sup>18</sup> Contrary to the MacMillans’ contention, (Blue Br. 40-41), the duty to monitor client assets extends to monitoring only the advice that an investment advisor *provides* to its clients. *See* SEC Release at \*7.

This alone is sufficient to affirm judgment because RMD never gave investment advice to the MacMillans with respect to the transactions that resulted in their damages, which were their own wires to and from the Coinbase platform.<sup>19</sup> The MacMillans did not seek RMD’s advice about liquidating their accounts or what to do with the proceeds. (A. 69, 75, 85, 88 ¶¶ 72-73, 118.) Instead, the MacMillans followed Watson’s advice as to how best to conceal the truth about their transfers to Coinbase. RMD had no knowledge of that plan, never recommended that investment, nor did it transfer the MacMillans’ money to Coinbase. (A. 62, 75, 81, 88 ¶¶ 23-24, 118-20.)

4. *The “Know Your Client” concept does not support the MacMillans’ claims.*

The MacMillans conflate the “know your client” concept with some nebulous fiduciary duty that RMD had to “know” the MacMillans so well that it should have known that fraud was afoot despite Bruce’s deception. (Blue Br. 38-39.)<sup>20</sup> Given that investment advisors must provide investment advice that is “suitable” for a

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<sup>19</sup> RMD’s execution of the MacMillans’ trade and transfer instructions was not investment advice. Instead, this constitutes the action of a directed agent. The MacMillans had the authority to place those trades and transfers on their own through Fidelity directly. (A. 62, 80 ¶¶ 19-20.) Further, the Investment Advisory Agreement discusses the discretionary authority that RMD had with respect to the MacMillans’ investments separately from “client trading instructions,” which RMD is required to act on. (A. 60-61, 84 ¶¶ 12, 15.)

<sup>20</sup> None of the record statements cited by the MacMillans, *see* (Blue Br. 38), support their argument that the “Know Your Client” concept required RMD to detect when a client falls victim to third-party fraud. The MacMillans’ misrepresent the record in this regard. *See, e.g.*, (A. 193-194 ¶¶ 289-290 (objecting to and denying the conclusory arguments, improperly asserted as fact, that a financial advisor must “know their client” in order to prevent fraud)). Moreover, the fact that “knowing” a client may help an investment advisor recognize when a client’s instructions are unusual does not equate to the imposition of a duty to correctly divine when a client is being victimized behind the scenes.

particular client, the “know your client” rule generally requires an adviser “to make reasonable inquiry into the client’s financial situation, investment experience and investment objectives” in order to “reasonably determine that the investment advice is suitable for the client.” Suitability of Investment Advice, Investment Advisers Act Release No. 1406, 1994 WL 84902, at \*2-3 (March 16, 1994) (emphasis supplied). This duty arises in the context of providing suitable, client-tailored, investment advice. Here, RMD provided no investment advice to the MacMillans about the transactions at issue, so the “know your client” rule is not applicable.<sup>21</sup> The MacMillans seek an unworkable and amorphous duty under which RMD would have been obligated to detect a client’s intentional deception.

*5. SEC guidance supports RMD’s position.*

In support of their broad view of duty, the MacMillans cite, for the first time, to guidance from the SEC. (Blue Br. 35-36, 45.) The actual guidance, however, contemplates fiduciary duties in the context of the particular investment advice, acknowledging that the fiduciary duty follows the scope of the investment advice because some clients choose to engage management over different aspects of an investment portfolio; one size does not fit all.<sup>22</sup>

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<sup>21</sup> Even if it were applicable, “an adviser should not be held to have given unsuitable advice if it is later shown that the client had misled the adviser.” Suitability of Investment Advice, Investment Advisers Act Release No. 1406, 1994 WL 84902, at \*3 (March 16, 1994).

<sup>22</sup> The portion of the SEC release that the MacMillans rely on states in full:

The SEC Guidance instead supports RMD’s position. According to the SEC, even where an investment advisor provides investment advice about a particular transaction—which RMD did not—it “should not be held to have given advice that is not in the client’s best interest if it is later shown that the client had misled the adviser concerning the information on which the advice was based.” See SEC Release at \*5 n.36. Investment advisors therefore do not have a duty to be clairvoyant, and RMD did not have a fiduciary duty to detect and prevent the economic harm that third-party criminals inflicted on the MacMillans.

- ii. The duty proposed by the MacMillans would have forced RMD to violate its well-established duties as fiduciary and agent.

The MacMillans argue, without citation to legal authority, that the “prudent person standard” required RMD to investigate Bruce’s instructions and delay

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The adviser’s fiduciary duty is principles-based and applies to the entire relationship between the adviser and its client. The fiduciary duty follows the contours of the relationship between the adviser and its client, and the adviser and its client may shape that relationship by agreement, provided that there is full and fair disclosure and informed consent . . . . Although all investment advisers owe each of their clients a fiduciary duty under the Advisers Act, that fiduciary duty must be viewed in the context of the agreed-upon scope of the relationship between the adviser and the client. In particular, the specific obligations that flow from the adviser’s fiduciary duty depend upon what functions the adviser, as agent, has agreed to assume for the client, its principal. For example, the obligations of an adviser providing comprehensive, discretionary advice in an ongoing relationship with a retail client (e.g., monitoring and periodically adjusting a portfolio of equity and fixed income investments with limited restrictions on allocation) will be significantly different from the obligations of an adviser to a registered investment company or private fund where the contract defines the scope of the adviser’s services and limitations on its authority with substantial specificity (e.g., a mandate to manage a fixed income portfolio subject to specified parameters, including concentration limits and credit quality and maturity ranges).

SEC Release at \*3.

compliance. (Blue Br. 40-41.) They also argue that RMD should have contacted the MacMillans' so-called "trusted contacts." (Blue Br. 44-45). These arguments ignore the undisputed fact that Bruce intentionally misled RMD in order to evade questions from RMD, and he misled other financial institutions for the same reason. (A. 69, 71, 74, 85-86, 88, 141 ¶¶ 74, 86-87, 113-14.)

The MacMillans claim RMD should have taken steps that would actually require RMD to violate its established statutory and fiduciary obligations. The investment advisory industry is a highly regulated field. RMD is a "federal covered investment advisor" regulated by the SEC and governed by the Investment Advisers Act of 1940 as well as the rules promulgated thereunder.<sup>23</sup> (A. 59, 79 ¶ 3); *see* 15 U.S.C. §§ 80b-1 to 80b-21. With limited inapplicable exceptions, state law with respect to federal covered investment advisors, such as RMD, is preempted. *See* SEC U.S. Securities and Exchange Com., *Regulation of Investment Advisers* (March 2013), [https://www.sec.gov/about/offices/oia/oia\\_investman/rplaze-042012.pdf](https://www.sec.gov/about/offices/oia/oia_investman/rplaze-042012.pdf) at 8 ("state adviser laws are preempted for" federally registered advisers); *see also* 32 M.R.S. § 16102(6), (15)(E) (excluding federal covered investment advisors from the jurisdiction of the Maine Office of Securities).<sup>24</sup>

No SEC rule grants SEC-registered investment advisers the authority to place

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<sup>23</sup> Individuals can submit complaints to the SEC about the conduct of their investment advisors.

<sup>24</sup> Broker-dealers, which are professionally distinct from investment advisors, are governed by the Financial Industry Regulatory Authority (FINRA) and its rules. FINRA is distinct from the SEC. *See* (Blue Br. 45-46 (discussing a FINRA arbitration decision)).

holds on transactions. In fact, RMD would face liability if it delayed a client's transaction and the market dropped during the delay.<sup>25</sup> Such a financial loss would be particularly detrimental to clients who cannot recover in the market, such as those at the age of retirement. As a matter of law, RMD is not required to take on this risk. *See* Restatement (Third) of Agency § 8.08 cmt. d (Am. L. Inst. 2006 & Oct. 2024 Update) (“Although an agent has a duty of diligence, that duty is to make reasonable efforts to achieve a result and not a duty to achieve the result regardless of the effort, risk, and cost involved.”); *see also* Restatement (Second) of Torts § 302(B), cmt. f (the “burden of precautions” is a factor that militates against requiring precautions to prevent criminal misconduct).

The MacMillans' contention that RMD also had a fiduciary duty to reach out to third parties by virtue of its trusted contact policy fares no better. (Blue Br. 44-45.) RMD had a legal obligation, pursuant to SEC Regulation S-P, to protect a client's privacy and integrity. 17 C.F.R. §§ 248.1-30. Regulation S-P permits disclosure of client information only if the client has authorized it or if it is necessary to process a transaction. *Id.* As the Business Court explained, the MacMillans authorized RMD to reach out to certain third-party contacts only in the event of their incapacitation. (A. 16.) They did not authorize such communication under any other

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<sup>25</sup> The MacMillans again misrepresent the record, citing to only their own statement of material facts to argue that the prudent person standard requires delaying unusual activity. (Blue Br. 40-41.) RMD's Rule 56(h)(3) responses establish that RMD never admitted to a duty or even authority to delay a client's requested transaction. (A. 107-09 ¶¶ 401-03.)

circumstances, and the MacMillans make no claim that they were disabled or experiencing diminished capacity when they were communicating with Watson.<sup>26</sup> Imposing the MacMillans’ suggested duty on investment advisors would effectively place the investment advisor in the impossible position of at once complying with its duty as agent to timely fulfill its clients’ instructions while also conducting “undefined investigations” regarding those same instructions. *See* (A. 20).<sup>27</sup>

In light of RMD’s established duties, the amorphous duty sought by the MacMillans is unworkable and would give rise to unlimited liability given that an investment advisor would take on the risk of liability every time it executes on client

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<sup>26</sup> The undisputed facts show that RMD’s Trusted Contact Policy was intended to help protect against circumstances of a client’s “diminished capacity.” (A. 207 ¶ 307); *cf.* (Blue Br. 13).

<sup>27</sup> Maine securities laws—which do not apply to RMD, *see* 32 M.R.S. § 16102(6), (15)(E)—provide immunity to covered professionals in the event that they choose to make a disbursement hold when they “reasonably believe” there may be “financial exploitation.” 32 M.R.S. §§ 16806, 16807. Such laws do not require a hold, nor do they at all permit holds on transactions within an investment account given that transaction holds could result in losses. *Id.*; North American Securities Administrators Association, *NASAA Model Act to Protect Vulnerable Adults from Financial Exploitation: Legislative Text and Commentary*, available at <https://www.nasaa.org/wp-content/uploads/2022/08/NASAA-Legislative-Commentary-for-the-Model-Act-to-Protect-Vulnerable-Adults-from-Financial-Exploitation-7.18.23.pdf> (“NASAA Model Act Commentary”) § 7 (noting that a delay in executing transactions “could be inconsistent with applicable federal laws and regulations governing the execution of securities transactions”). Maine securities laws also provide immunity for the reporting of suspected financial exploitation, 32 M.R.S. §§ 16802, 16803, and such reporting is contemplated only in situations where the professional actually subjectively believes that such exploitation is occurring, *see* 32 M.R.S. § 16802; NASAA Model Act Commentary § 3.

There is only one law addressing this issue that applies to RMD as an SEC-registered investment advisor, and that law is the Senior Safe Act. 12 U.S.C. § 3423. The Senior Safe Act permits, but does not mandate, securities firms to report financial exploitation of a senior to a covered agency if certain conditions are satisfied. *Id.* It does not at all permit reporting to family or friends. Moreover, it provides immunity against civil liability for making the report (i.e., immunity for violation of the client’s privacy), but it does not provide immunity for any financial loss resulting from any delay. These laws demonstrate that the MacMillans’ proposed duty is unworkable and unrecognized. *See Gafner v. Down East Comm. Hosp.*, 1999 ME 130, ¶¶ 41-42, 735 A.2d 969 (declining to create a new duty “from whole cloth” when it had not gained “significant acceptance in other jurisdictions”).

instructions or does not. *See Bryan R.*, 1999 ME 144, ¶ 23, 738 A.2d 839 (expressing concern for the “creation of an amorphous common law duty” that “would give rise to unlimited liability and liability out of all proportion to culpability.”).

iii. RMD’s awareness of the potential for third-party fraud did not impose the duty sought by the MacMillans.

The MacMillans argue, without citation to legal authority, that RMD’s awareness of and trainings on elder financial abuse imposed a fiduciary obligation on it to prevent the MacMillans’ loss, and that, by implementing its Trusted Contact Policy, RMD had a duty to look for diminished capacity. (Blue Br. 41-45.)

As the Business Court properly concluded, “the fact that RMD was aware of the potential for financial scams to affect their elderly clients, and even took action to mitigate potential harm with their Trusted Contact policy, did not impose upon them a legal duty to protect the MacMillans from third party fraud.”<sup>28</sup> (A.20.) Indeed, “[t]he fact that [an] actor realizes or should realize that action on his part is necessary for another’s aid or protection does not of itself impose upon him a duty to take such action.” *Bryan R.*, 1999 ME 144, ¶ 12, 738 A.2d 839 (citing Restatement (Second) of Torts § 314). “The mere fact that one individual knows that a third party

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<sup>28</sup> The Business Court “accepted as true that [RMD] held [itself] out as knowing [its] clients, that [it] was aware of the threat of elder abuse, and that it was important enough for [it] to adopt the trusted contact policy.” (A. 57.) Although the Business Court properly concluded that taking steps to mitigate fraud does not create a duty to prevent fraud, there is no record support for the MacMillans’ argument that the Trusted Contact Policy was intended to protect clients from falling victim to third-party fraud. Rather, the Trusted Contact Policy states in its own plain language that it is intended to assist in safeguarding clients’ from their own diminished capacity, and there is no evidence that the MacMillans were experiencing diminished capacity during the relevant time period, nor do they make that argument on appeal.

is or could be dangerous to others does not make that individual responsible for controlling the third party or protecting others from the danger.” *Id.* No investment advisor would take steps to mitigate against the potential for fraudulent harm on its clients if doing so imposed the duty to detect and prevent such third-party fraud.

RMD’s statement that strong professional relationships with clients help it protect them from fraudulent activity does not equate to an assumption or acknowledgment of some obligation to prevent its clients from falling victim to fraud on their own. *Cf.* (Blue Br. 39). One could argue that, conversely, RMD would be derelict if it did not at least try to educate its clients on the potential for fraud and encourage them to be forthcoming with RMD about their circumstances.<sup>29</sup>

The MacMillans’ argument that RMD somehow took on the duty to “protect” them is further undermined by the fact that the MacMillans suffered economic harm, not physical harm. *Cf.* Restatement (Second) of Torts § 323 (one who renders services “which he should recognize as necessary for the protection of the other’s person or things” may be liable for “*physical* harm” in some limited circumstances (emphasis supplied)); *see also Devine v. Roche Biomedical Laboratories, Inc.*, 637

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<sup>29</sup> For these same reasons, RMD’s acknowledgment and belief that it should at least try to take steps to prevent elder financial abuse do not equate to a fiduciary duty to prevent its clients from falling victim to fraud on their own. The MacMillans’ argument that RMD “recognized its obligation to protect,” is therefore unavailing, as are their citations to unnecessarily repetitive statements in only their own statement of material facts in support of that argument. *See* (Blue Br. 37); *see also, e.g., Oceanic Inn, Inc. v. Sloan’s Cove, LLC*, 2016 ME 34, ¶ 4 & n.2, 133 A.3d 1021 (explaining that a nonresponsive, excessive, and unhelpful response to statement of material facts could have been disregarded).

A.2d 441, 447-48 (Me. 1994) (economic injury not recoverable under counterpart provision in Restatement (Second) of Torts § 324A).

RMD’s mere awareness of the potential for financial fraud or even its steps to so mitigate is insufficient to generate liability. Rather, the MacMillans would have to show that RMD actually knew of the *particular* fraud that resulted in the harm. *See* Restatement (Second) of Torts § 302(B), cmt. f (factors to consider when assessing whether an actor was required to take precautions against criminal misconduct include “the known character, past conduct, and tendencies of the person whose intentional conduct causes the harm”); *Gniadek*, 2011 ME 11, ¶¶ 29-31, 11 A.3d 308 (applying § 302(B) to conclude that a camp would not have understood that it created an unreasonable risk of third-party harm where the “known character” and “past conduct” of an employee did not demonstrate a high risk of the harm).

There is no evidence—nor have the MacMillans ever suggested—that RMD had actual knowledge of Watson or his co-conspirators. The MacMillans never informed RMD about Watson, and Bruce concealed his plans. (A. 75, 88 ¶¶ 118-120.) In short, RMD did not take on a duty to “protect” the MacMillans from third-party fraud when the undisputed facts show that the MacMillans suffered economic harm and RMD had no knowledge of the fraudulent bad actors.

iv. Neither history, policy, nor social ideals support the MacMillans’ contention that RMD had a duty to detect and prevent the fraud.

“In analyzing those claims that do not rest on well-established notions of

duty,” this Court has announced that it must “always consider societal expectations regarding behavior and individual responsibility in allocating risks and costs” as well as the “hands of history, our ideals of morals and justice, the convenience of administration of the rule, and our social ideas as to where the loss should fall.” *Alexander v. Mitchell*, 2007 ME 108, ¶ 16, 930 A.2d 1016; *see also Bryan R.*, 1999 ME 144, ¶ 20, 738 A.2d 839 (factors apply when considering a fiduciary duty). These factors support that RMD had no applicable duty of care here.

First, the duty sought by the MacMillans is contrary to the historical purpose of an investment advisor’s fiduciary duty, which is to protect investors from misconduct by their investment advisor. *See Capital Gains*, 375 U.S. at 192-94; (A. 18 (“[A] fiduciary duty is typically understood as one ensuring that those who manage client’s money do so in the client’s best interests, not in their own.”)). RMD is unaware of any case law or precedent imposing a duty of care on investment advisors to prevent losses incurred by a client—whether through third-party fraud or otherwise—when it is the client’s decision where to place the assets. There is no duty to protect against losses incurred through a client-investor’s own doing.

Second, social expectations do not support the MacMillans’ position. An investment advisor must rely on the client to provide all material information; truth and candor are foundational to the investment advisory relationship. The law of agency reflects these social principles, making clear that it was the MacMillans’

obligation, as principals, to keep RMD, as their agent, informed of their circumstances. *See* Restatement (Third) of Agency § 8.15 (“A principal has a duty to deal with the agent fairly and in good faith, including a duty to provide the agent with information about risks of physical harm or pecuniary loss that the principal knows, has reason to know, or should know are present in the agent’s work but unknown to the agent.”). It is also implicit both socially and legally that a client gets to decide what to do with her own money.

Third, considerations of individual responsibility and the allocation of risks do not support imposition of a duty here. For third-party harm wholly outside the investment advisor’s systems, it is the client who holds the cards regarding the relevant information.

Fourth, administration of the “amorphous” duty sought by the MacMillans would be unworkable. Perhaps nowhere is this better demonstrated than in the MacMillans’ brief, which, on the one hand, argues for a standard of care in which an investment advisor would be required to distrust her client, (Blue Br. 11 (“[A]n investment advisor should not trust what the client says.”)), and, on the other hand, establishes a relationship based on “the highest degree of trust,” (Blue Br. 35).<sup>30</sup> One cannot owe a fiduciary duty to someone she is required to mistrust. The MacMillans

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<sup>30</sup> The MacMillans’ repeatedly mischaracterize the record insofar as what RMD “acknowledged” with respect to “knowing” and trusting a client. RMD’s Rule 56(h)(3) responses repeatedly qualify that truth and candor, and having a good flow of information from the client, are ultimately paramount to the investment advisory relationship. *See* (A. 190, 192, 194, 222-23 ¶¶ 282, 286, 290, 366.)

similarly argue, without any legal authority, that the “prudent person standard” required RMD to “ask many questions” and “delay the transaction.” (Blue Br. 40-41.) This ignores the undisputed fact that Carr did ask questions and Bruce misled him, (A. 68-69, 84-85 ¶¶ 69, 72, 74); but, even setting that aside, it advances an unworkable standard. RMD is obligated to comply with client instructions.

This Court’s concern for “boundless liability” in cases of nonfeasance is also relevant here. *See Estate of Cilley v. Lane*, 2009 ME 133, ¶ 21, 985 A.2d 481 (“[W]e are hesitant to create a duty that would impose liability for the failure to act, or nonfeasance.”). This Court refused to impose a duty requiring people to contact emergency assistance when they witnessed another’s injury because it lacked “any practical limit.” *Id.* Here, the duty sought by the MacMillans would require RMD to be omniscient or second-guess and investigate its clients in every instance, effectively bringing its business—and, importantly, its clients’ business—to a halt.

Last, with regard to ideals of “morals and justice” and where the loss should fall, RMD has never waived from its position that the MacMillans’ loss was tragic. But responsibility for that loss falls to the international crime ring who stole the MacMillans’ money and in whom the MacMillans admit they placed their trust; it does not fall to RMD. If the loss fell to RMD, it would fall to the only party that did not intentionally engage in deception. The MacMillans’ theory that RMD is liable because it fell for their deception is not supported by the law or reasonable allocation

of the risks, and it completely undermines the entire purpose of RMD's fiduciary duty. Thus, policy considerations militate in favor of summary judgment.

**B. The MacMillans' failure to put forth any evidence of a breach of duty is an alternative basis to affirm summary judgment.**

This Court can alternatively affirm judgment on the breach of fiduciary claim because there is no evidence that RMD abused its position of trust.

To prove the breach of a fiduciary duty under Maine common law, the MacMillans must point to record evidence showing "that the dominant party has abused its position of trust." *Leighton v. Fleet Bank of Maine*, 634 A.2d 453, 457-58 (Me. 1993). For example, where Hannaford provided nothing but "a fair exchange in groceries in return for [its] customers' payments" nor "took advantage of the system of allowing customers to use [credit] cards," customers could not show that Hannaford breached a fiduciary duty on their claim for harm resulting from third-party wrongdoers who stole customer credit card information from Hannaford. *See Anderson v. Hannaford Bros. Co.*, 659 F.3d 151, 158 (1st Cir. 2011). Here, there is no evidence that RMD "abused its position of trust." RMD did nothing to take advantage of the MacMillans; to the contrary, Bruce knowingly deceived RMD, Fidelity, and Bath Savings so that he could move his money to Coinbase. (A. 69, 71, 74, 85-86, 88, 141 ¶¶ 74, 86-87, 113-14.) The MacMillans therefore failed to put forth a prima facie case with respect to the essential element of breach.

### **III. RMD did not breach a contract with the MacMillans**

The MacMillans do not argue on appeal that RMD breached its contract with them by virtue of its alleged failure to detect and prevent the third-party fraud. *See, e.g., Lincoln v. Burbank II*, 2016 ME 138, ¶ 41, 147 A.3d 1165 (arguments not raised in opening brief are waved). Instead, Linda, through Bruce as the personal representative of her estate, renews only the argument that Bruce lacked authority to direct RMD to liquidate her IRA. Solely for the purpose of its summary judgment motion, *see* M.R. Civ. P. 56(d), RMD accepted the premise that Bruce directed liquidation of Linda’s IRA. The Business Court properly concluded that, as a matter of law, Bruce had actual authority to make that request and “there is nothing in the written agreement between the parties that required Linda’s individual permission.” (A. 32.) This Court can alternatively affirm judgment on the contract claim because Linda ratified the liquidation of her IRA.

#### **A. Bruce had actual authority to direct the liquidation of Linda’s IRA.**

An agency relationship exists where (1) there is authorization from the principal that the agent shall act for her; (2) the agent consents to so act; and (3) there is an understanding that the principal is to exert some control over the agent’s actions. *State Farm Mut. Auto. Ins. Co. v. Koshy*, 2010 ME 44, ¶¶ 16-17, 995 A.2d 651. A “person may be an agent although the principal lacks the right to control the full range of the agent’s activities, . . . or the agent’s exercise of professional

judgment.” Restatement (Third) Of Agency § 1.01, cmt. c. “A principal’s failure to exercise the right of control [also] does not eliminate it;” rather, this requirement merely “assumes that the principal is capable of providing instructions to the agent and of terminating the agent’s authority.” *Id.*

Here, the undisputed facts show that (1) Linda authorized Bruce to make financial decisions on her behalf; (2) Bruce consented to so act, as demonstrated by the fact that he did so act and considered himself the “commander in chief” of their family finances; and (3) Linda could have, but did not, terminate Bruce’s authority.<sup>31</sup> (A. 279-81, 287-89, 338-39 ¶¶ 89-95, 98, 102, 106.) That is sufficient to establish a principal-agent relationship. Next, Bruce had actual authority to order the liquidation. “An agent acts with actual authority when, at the time of taking action that has legal consequences for the principal, the agent reasonably believes, in accordance with the principal’s manifestations to the agent, that the principal wishes the agent to so act.” Restatement (Third) of Agency § 2.01. Actual authority can be in the form of either express authority or implied authority. *Libby v. Concord Gen.*

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<sup>31</sup> The MacMillans did not argue that Linda could not exercise control over Bruce’s actions. *See Foster v. Oral Surgery Assoc’s*, 2008 ME 21, ¶ 22, 940 A.2d 1102 (issues raised for the first time on appeal are not preserved); *Lincoln*, 2016 ME 138, ¶ 41, 147 A.3d 1165 (arguments not raised in opening brief are waved). Nor could they make such an argument because Linda had the legal right to order the liquidation herself. “An individual has capacity to act as principal in a relationship of agency . . . if, at the time the agent takes action, the individual would have capacity if acting in person.” Restatement (Third) Of Agency § 3.04; *see id.*, cmt. b (“The dispositive question is whether, as to an agent’s action, the principal’s legal rights and obligations would have been affected had the action instead been done by the principal in person.”); *see Budge v. Town of Millinocket*, 2012 ME 122, ¶ 26, 55 A.3d 484 (applying Section 3.04 to determine whether a Town had the capacity to act as principal based on its own legal authority).

*Mut. Ins. Co.*, 452 A.2d 979, 981 (Me. 1982).

Neither express nor implied authority depend on the perception or belief of the third-party; rather, they each "depend[] on a manifestation of consent *by the principal*, and go[] to the perceptions of the *agent*." *Libby*, 452 A.2d at 981 (emphases in original). Thus, RMD's perception of Bruce's authority is immaterial to the actual authority analysis, and indeed the MacMillans do not argue that Carr's testimony regarding Bruce's authority or lack thereof creates a dispute of fact.

A principal's manifestation of authority need not be specific to the particular act: actual authority includes "[a]cts necessary or incidental to achieving [the] principal's objectives," Restatement (Third) of Agency § 2.02, cmt. d, and the principal's manifestation of actual authority can be "however general or specific," *id.* § 2.01, cmt. c. Here, Bruce had both express and implied authority.

i. Bruce had express authority to direct the liquidation of Linda's IRA.

"Express authority is that authority which is directly granted or conferred upon the agent in express terms by the principal." *Libby*, 452 A.2d at 982. Here, (i) Linda gave Bruce permission to handle her finances; (ii) Linda allowed Bruce to be the "commander-in-chief" of all family finances; (iii) Bruce always made financial decisions for Linda; (iv) Linda deferred to Bruce's decisions regarding the management of her finances; and (v) "[i]n Bruce MacMillan's judgment, his February 9 request to liquidate Linda's IRA did not go beyond the latitude that Linda

MacMillan had given him to make financial decisions.” (A. 279-80, 287-88 ¶¶ 89-91, 93, 95.) Bruce unambiguously testified to all of these facts, and the MacMillans admitted to them in the summary judgment record.

Whether Bruce shared information about his request with Linda after the fact—which he argues he did not, *see* (Blue Br. 51)—is immaterial to the analysis. *See Libby*, 452 A.2d at 981 (actual authority “depends on a manifestation of consent *by the principal*, and goes to the perceptions of the *agent*.” (emphases in original)). Bruce had express authority to direct RMD to order the liquidation of Linda’s IRA, and this Court should affirm summary judgment on Count Two on that basis.

ii. Bruce also had implied authority to direct the liquidation.

Although the express authority relied on by the Business Court is enough to affirm judgment on the contract claim, Bruce also had implied authority. Implied authority is “actual authority circumstantially proven from the facts and circumstances attending the transaction in question.” *Id.* at 982. Such implied authority may be “implied or inferred from the words used, from customs and from the relations of the parties.” *Id.* at 981. Implied authority “is often used to mean actual authority either (1) to do what is necessary, usual, and proper to accomplish or perform an agent’s express responsibilities or (2) to act in a manner in which an agent believes the principal wishes the agent to act based on the agent’s reasonable interpretation of the principal’s manifestation in light of the principal’s objectives

and other facts known to the agent.” Restatement (Third) of Agency § 2.01, cmt. b.

Bruce’s authority to direct the liquidation of Linda’s IRA is implied from the customs of and relationship between them. *Libby*, 452 A.2d at 981.<sup>32</sup> Throughout their fifty years of marriage, Linda gave Bruce latitude to make financial decisions for her. (A. 279, 287 ¶ 89.) Bruce always did the communicating with RMD. (A. 280, 288 ¶ 97.) Bruce kept an eye on Linda’s IRA for unauthorized activity. (A. 279, 287 ¶ 92.) Linda never looked at the Fidelity statements for her IRA; Bruce looked at them for her, including the February 2022 statement that confirmed the liquidation of Linda’s IRA on February 9, 2022—six days before the MacMillans wired the cash from that liquidation to Coinbase. (A. 280, 288, 339 ¶¶ 98-101). These facts demonstrate implied authority.<sup>33</sup>

Moreover, implied authority “encompasses situations in which the agent reasonably believes the principal wishes action to be taken due to necessity.” Restatement (Third) of Agency § 2.02, cmt. b. That is the situation here: the MacMillans felt urgently that they needed to follow Watson’s instructions. Bruce and Linda were on the initial calls with Watson and she, like Bruce, had total faith

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<sup>32</sup> Bruce and Linda were married when he made the request and remained married at the time of RMD’s motion practice. (A. 265, 283 at ¶ 1); *see* Restatement (Second) of Agency § 22 (“The [spousal] relation is of such a nature . . . that circumstances which in the case of strangers would not indicate the creation of authority . . . may indicate it in the case of husband or wife.”). The MacMillans cite a Kentucky case, (*Blue Br. 49*), that is unpersuasive because it addresses a spouse’s apparent authority rather than actual authority.

<sup>33</sup> The MacMillans also represented with their Opposition to RMD’s Second Motion for Summary Judgment that they never considered whether Linda’s consent was necessary until Carr testified about it in November 2023. *See* Pl.’s Opp. to RMD’s Second MSJ at 22. The fact that, for twenty-one months, neither Bruce nor Linda thought that Bruce lacked authority underscores that Bruce did have authority.

in Watson. (A. 270-72, 284-85 ¶¶ 29-34, 44.) She applied for a new social security card and opened a Coinbase account. (A. 270-72, 284-85 ¶¶ 33, 40, 43.) She knew that Coinbase would be the “safe house” for the MacMillans’ money. (A. 271, 285 ¶¶ 36-40); *see* Restatement (Third) of Agency § 2.01, cmt. b. (implied authority includes circumstances in which an agent “act[s] in a manner in which an agent believes the principal wishes the agent to act based on the agent’s reasonable interpretation of the principal’s manifestation in light of the principal’s objectives and other facts known to the agent”). The record thus demonstrates that Bruce had implied authority to liquidate Linda’s IRA.

iii. There is no material dispute of fact about Bruce’s actual authority.

The MacMillans do not argue that the Business Court erred in declining to consider Bruce’s second affidavit, which disputes his prior sworn testimony.<sup>34</sup> *See Lincoln*, 2016 ME 138, ¶ 41, 147 A.3d 1165 (arguments not raised in opening brief are waved); *State v. Salisbury*, 2017 ME 215, ¶ 2, 173 A.3d 146 (failure to provide legal argument with proper authority constituted waiver on appeal).

Nevertheless, they continue to argue that Bruce proceeded “without [her]

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<sup>34</sup> Pursuant to this Court’s rule in *Zip Lube, Inc. v. Coastal Sav. Bank*, 1998 ME 81, ¶ 10, 709 A.2d 733, the Business Court properly disregarded Bruce’s statements, in his second affidavit, which were in direct contradiction to his prior sworn testimony. *Compare, e.g.*, Bruce MacMillan Dep. Day 3 at 15:7-15:17, 18:21-20:11, 32:15-33:21 (explaining that he did not think he needed Linda’s permission to direct the liquidation of her IRA because he was in charge of their finances and Linda allowed him to be the “commander in chief” of those finances, including on the “subject” of her IRA) *with, e.g.*, Second Affidavit of Bruce MacMillan ¶ 8 (stating that his use of the term “commander in chief” at his deposition was reflective of his honorable service in the United States Navy).

knowledge or authorization,” seemingly relying on Linda’s purported lack of specific knowledge. (Blue Br. 51.) They cite no legal authority in support of this argument; as the Business Court explained, “[i]t is the nature of an agency relationship . . . that once you have given an agent authority, the authority is not revoked because the agent made a poor decision.” (A. 32.)

The MacMillans also argue that the Business Court did not rely on facts showing that Linda manifested consent. (Blue Br. 50.) But “[a] principal’s manifestation of assent to an agency relationship may be informal, implicit, and nonspecific.” Restatement (Third) Of Agency § 1.01, cmt. d. Here, the only evidence is that Linda did consent to Bruce’s authority—Bruce testified to that very fact, and the MacMillans produced no admissible evidence to the contrary. (A. 279, 281, 287-88, 339 ¶¶ 89-91, 93, 104); *see Fitzgerald v. Hutchins*, 2009 ME 115, ¶ 12, 983 A.2d 382 (no dispute of fact as to agent’s authority when party disputing agent’s authority admitted knowledge of agent’s authority); *see also* (A. 31 (“There is no testimony from Linda disputing Bruce’s authority.”)).

Lastly, the MacMillans argue that Bruce exceeded his scope of authority. (Blue Br. 50.) The undisputed facts and Bruce’s sworn testimony belie this claim. The MacMillans admitted, and Bruce testified, that “[i]n Bruce’s judgment, his February 9 request to liquidate Linda’s IRA did not go beyond the latitude that Linda had given him to make financial decisions,” (A. 280, 288 ¶ 95.) It is also undisputed

that Bruce reviewed Linda’s Fidelity statements as part of the authority he had as “commander-in-chief” of the MacMillan finances. (A. 280, 288, 339 ¶ 98.)<sup>35</sup>

Although Carr and Bruce had differing recollections of the February 9, 2022 phone call, summary judgment is still appropriate. If Bruce’s version of events is correct, RMD is entitled to judgment as a matter of law because the undisputed facts show that he acted with actual authority. If Carr’s version of events is correct and she participated in the call, Linda gave her express consent to the liquidation. Under either scenario, RMD is entitled to judgment as a matter of law.

**B. As a matter of law, Linda ratified the liquidation of her IRA.**

This Court can alternatively affirm judgment on the contract claim because Linda ratified the liquidation of her IRA.<sup>36</sup> Ratification is a question of law that is apt for deciding on summary judgment. *See, e.g., Est. of Frost*, 2016 ME 132, ¶¶ 20-21, 146 A.3d 118. “An effective ratification of a prior act generates the legal consequences that would have resulted if the prior act had been carried out by a

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<sup>35</sup> Bruce described his role as the “commander in chief” of the MacMillans’ finances. When asked why he did not show Linda the February 9, 2022 transaction confirmation from Fidelity, reflecting the trades placed in Linda’s IRA, Bruce testified as follows:

- Q. So why didn’t you show it to her?  
A. This whole subject was something that was really not of interest to her. She allowed me to be the commander in chief of all this, and she never asked to see correspondence from Fidelity. . . if she had asked, she could have seen it.

Bruce MacMillan Dep. Day 3 at 32:15-33:21 (emphasis supplied); *see also* Dep. Ex. 110.

<sup>36</sup> Contrary to the MacMillans’ argument, (Blue Br. 51), the Business Court did not reach the issue of ratification.

person acting with actual authority.” *U.S. Bank Nat'l Ass'n. v. Gordon*, 2020 ME 33, ¶ 10, 227 A.3d 577. “The intention to ratify may be manifested by express words or by conduct.” *Est. of Frost*, 2016 ME 132, ¶¶ 19-21, 146 A.3d 118. Such affirmance “need not be communicated to the third party or the agent.” Restatement (Third) of Agency § 4.01, cmt. d.

The record bears out two independent bases for Linda’s ratification. Linda manifested her affirmance to Bruce’s liquidation order through (i) inaction, acquiescence, and silence, having never objected to the liquidation of her IRA to anyone until this lawsuit, and (ii) her conduct in accepting the proceeds from the liquidation, which was in furtherance of Watson’s instructions.

First, Linda manifested her affirmance through inaction. Specifically, “[a]n affirmance of an unauthorized transaction can be inferred from a failure to repudiate it.” *QAD Invs., Inc. v. Kelly*, 2001 ME 116, ¶¶ 21-23, 776 A.2d 1244. Here, Linda never expressed to Bruce that he did not have such permission, nor did she express disapproval of Bruce’s actions. (A. 281, 289, 339 ¶ 106.) Nor did Linda state as much during her Spring 2022 conversation with the FBI, even though her IRA was a subject of the interview and she knew it had been liquidated. (A. 281, 289, 339 ¶ 105); *see* Restatement (Third) of Agency § 4.01, illus. 2 (principal ratified agent’s unauthorized statements when principal knew that unauthorized statements were false and said nothing to agent or anyone about it). Linda never raised the issue in

the affidavit she submitted to the IRS, in which she conveyed her extensive knowledge of the fraud.<sup>37</sup> (A. 281, 289, 340 ¶¶ 107-108.)

Second, a principal can separately “ratify the unauthorized action of a purported agent through conduct by accepting the benefits of the action.” *Est. of Frost*, 2016 ME 132, ¶¶ 19-21, 146 A.3d 118. Here, Linda accepted the proceeds of the liquidation of her IRA when the money was transferred to her joint checking account. (A. 275, 286 ¶ 63.) She thereafter moved forward in compliance with Watson’s instructions, transferring all of the money to Coinbase in order to get what she thought would be a new social security card. (A. 270-71, 276, 284-86 ¶¶ 29, 33, 37-40, 69-71.) Her acceptance of this plan is further established by her willingness to take out a HELOC weeks later at Watson’s direction. (A. 277, 287 ¶ 80.)

Linda also knew the material facts. *Est. of Frost*, 2016 ME 132, ¶¶ 19-21, 146 A.3d 118. She was on the calls with Watson; she knew that the goal was to send their funds to Coinbase; and she knew that Bruce was communicating with RMD to effect that end. (A. 269-72, 281, 284-85, 288, 339 ¶¶ 25-26, 29, 34, 36-44, 104.) And she unequivocally knew by the time she met with the FBI, and then submitted her affidavit to the IRS, that Bruce had directed RMD to liquidate her IRA. (A. 281, 289, 339 ¶¶ 105, 107.)

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<sup>37</sup> It appears that this lawsuit is the only means by which Linda has ever raised the issue of Bruce’s authority to order the liquidation of her IRA. *See* 2A C.J.S. Agency § 72 (Dec. 2024 update) (“[R]atification of an unauthorized act also may be implied from an unreasonable delay in repudiating such act.”). Indeed, Bruce represented that the issue of authority never occurred to him until Carr’s deposition.

Bruce was, by his own admission, acting on Linda’s behalf when he directed the liquidation, (A. 279-80, 287-88 ¶¶ 89-91, 94-96); *see U.S. Bank*, 2020 ME 33, ¶ 10, 227 A.3d 577 (actor must have “acted or purported to act as an agent on the later ratifier’s behalf”), and RMD’s belief about Bruce’s authority is immaterial: “[r]atification is effective even when the third party knew that the agent lacked authority to bind the principal but nonetheless dealt with the agent,” Restatement (Third) of Agency § 4.01, cmt. b. As a matter of law, Linda, through her husband as personal representative of her estate, cannot now object to her husband’s authority because she gave legal effect to his request.

**IV. The MacMillans’ failure to show causation is another basis to affirm judgment in favor of RMD on both counts.**

“The same rules of causation generally apply whether the cause of action sounds in contract, negligence, or breach of fiduciary duty.” *Niehoff v. Shankman & Assocs. Legal Ctr.*, 2000 ME 214 ¶ 8, 763 A.2d 121. The MacMillans were required to, but did not, put forth prima facie evidence of causation for each of their claims, and this Court should affirm judgment in favor of RMD on this alternative basis. *See, e.g., Yankee Pride*, 2021 ME 65, ¶¶ 13, 16, 264 A.3d 1248.

**A. RMD’s conduct was not the proximate cause of the harm.**

“Proximate cause is an action occurring in a natural and continuous sequence, uninterrupted by an intervening cause, that produces an injury that would not have occurred but for the action.” *Toto*, 2021 ME 51, ¶ 10, 261 A.3d 233. “It is the

exclusive function of the court to declare the existence or non-existence of rules which restrict the actor's responsibility short of making him liable for harm which his negligent conduct is a substantial factor in bringing about, and to determine the circumstances to which such rules [apply.]” Restatement (Second) of Torts § 453.

Here, RMD is not liable because RMD’s act of liquidating the MacMillans’ investment accounts was not “uninterrupted by an intervening cause.” An intervening force can be “set in motion” before or after an actor’s negligent conduct. *Id.* § 441, cmt. a. Acts of third-persons may constitute a “superseding cause.” *Id.* § 440; *see also id.* § 447, cmt. g. The Restatement sets out six factors to assess whether an intervening force is a superseding cause, and two factors are noteworthy: “(1) the fact that the intervening force is due to an act of a third person which is wrongful toward the other and as such subjects the third person to liability to him; and (2) the degree of culpability of a wrongful act of a third person which sets the intervening force in motion.”<sup>38</sup> *Id.* § 442(e)-(f). A third person’s crime is a well-recognized

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<sup>38</sup> The remaining factors also militate in favor of RMD:

(a) the fact that its intervention brings about harm different in kind from that which would otherwise have resulted from the actor's negligence; (b) the fact that its operation or the consequences thereof appear after the event to be extraordinary rather than normal in view of the circumstances existing at the time of its operation; (c) the fact that the intervening force is operating independently of any situation created by the actor's negligence, or, on the other hand, is or is not a normal result of such a situation; [and] (d) the fact that the operation of the intervening force is due to a third person's act or to his failure to act.

Restatement (Second) of Torts § 442; *see also Michalka v. Great Northern Paper Co.*, 151 Me. 98, 105-07 (1955) (reversing jury’s determination of proximate cause, which was “based entirely on speculation and sympathy,” because release of water from dam 30 miles upstream was not a proximate cause of flooded

superseding cause unless there are “special grounds for anticipating criminal action.”<sup>39</sup> *Id.* § 448 & cmt. b.

Both summary judgment records are rife with a host of intervening acts by the third-party criminals. To start, the third-party criminals stole the MacMillans’ money, (A. 76-77, 89-90 ¶¶ 124, 135; A. 277-78, 287 ¶¶ 78, 85), and on that basis alone the MacMillans did not show proximate cause, Restatement (Second) of Torts § 447, cmt. g (no proximate cause when “the negligence of the [intervening act of a third person] may be so great . . . as to make it appear an extraordinary response to the situation created by the actor”). “Smith” and “Watson” set their scheme in motion well before RMD’s alleged negligence, sending a pop-up message to the MacMillans’ computer and having information about their Fidelity accounts when they first called. (A. 63-64, 81-82 ¶¶ 26-27, 33; A. 269-70, 284 ¶¶ 23-24, 30.) By the time Bruce called RMD, Watson had already installed an ultraviewer on the MacMillans’ computer, and he had coached Bruce on how to deceive RMD. (A. 66-67, 84, 87 ¶¶ 55-56, 64, 100; A. 272-73, 285 ¶¶ 46, 53.)

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land when the flooding was a rare occurrence, there existed other releases of water along the river, there were unusual season conditions, and defendant lacked any control over the cause).

<sup>39</sup> Section 448 should not even apply here given the MacMillans’ conduct; nevertheless, “[s]pecial grounds” are situations that are “commonly recognized” as affording temptations to which a recognizable percentage of humanity is likely to yield. Restatement (Second) of Torts § 448 & cmt. b. Here, RMD had no special reason to anticipate the sophisticated theft of the MacMillans’ money. *See McCloud v. Save-A-Lot Knoxville, LLC*, 388 F.Supp.3d 954, 963-64 & n.5 (E.D. Tenn. 2019) (noting that § 448 of the Restatement would cut off store’s liability for criminal acts, such as pretext phone calls or phishing scams, arising from store’s practice of printing on receipts the customers’ six-digit credit card information because such criminal acts would be an uncommon result of store’s practice even despite the common issue of identity theft).

The MacMillans' own conduct also constitutes superseding causes, all of which "brings about harm different in kind from that which would otherwise have resulted" from RMD's liquidation of the MacMillans' accounts. Restatement (Second) of Torts § 442.<sup>40</sup> For the same reason, no jury could reasonably find that RMD's alleged wrongdoing exceeded that of the MacMillans. *See Page v. Amtrak, Inc.*, 168 F. Supp. 3d 337, 346 (D. Me. 2016) (citing 14 M.R.S. § 156). This Court should therefore affirm summary judgment because the MacMillans failed to put forth prima facie evidence of causation.

**B. The MacMillans cannot otherwise rely on speculation.**

While causation is often a question for the fact-finder, "the court has a duty to direct a verdict for the defendant if the jury's determination of proximate cause would be based on speculation or conjecture," and summary judgment is therefore appropriate when jurors would be left only to speculate as to issues of causation. *Cyr v. Adamar Associates Ltd. Partnership*, 2000 ME 110, ¶¶ 6-8, 752 A.2d 603.

Even assuming RMD had a duty to further delay or investigate the MacMillans' unambiguous instructions, the MacMillans did not put forth evidence showing that such omissions were the proximate cause of their harm. They cannot

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<sup>40</sup> For example, the MacMillans did not disclose that their computer was compromised; they authorized the transfer of their funds from the Fidelity account; they provided their personal information to Watson; they ignored fraud alerts from Coinbase; they instructed RMD to liquidate their accounts; they purposefully misled RMD, Bath Savings, Fidelity, and Camden National Bank; and they authorized the distributions to the Coinbase platform. (A. 63-77, 79-90 ¶¶ 25, 28, 32, 46, 55, 57, 63-65, 70, 74, 77-87, 89-91, 94, 96, 112-114, 121, 123, 126-129, 132-134; A. 269-78, 284-87 ¶¶ 25, 29, 40, 43, 49, 51, 55, 66-68, 77, 80, 84.)

show, absent speculation, that RMD would have discovered the risk of economic harm to the Plaintiffs. *See Webb v. Haas*, 1999 ME 74, ¶¶ 1-3, 20-22, 728 A.2d 1261 (remanding for the trial court to grant summary judgment in favor of officer because the “causal link” between victim’s death and officer’s failure to investigate victim’s truck was “too tenuous” to survive a summary judgment, as was the requisite “causal link” between both the officers’ acts and the victims’ injuries).

Apart from the criminals, only the MacMillans knew the facts related to the fraud, and it is undisputed that the MacMillans deceived not only RMD but also Fidelity, Bath Savings, and Camden as well. (A. 69-71, 74-76, 85-86, 88, 89 ¶¶ 74, 85-87, 113-14, 118-20, 126-28; A. 273, 275, 277, 285-87 ¶¶ 51, 67-68, 80.) Those institutions’ questions did not deter Bruce, and the MacMillans’ argument—that a few more questions from RMD would have somehow made a difference—is pure speculation. For these reasons, none of the MacMillans’ unsupported causation arguments created a genuine issue of material fact.

**V. This Court need not reach the Second Motion for Summary Judgment**

RMD filed a notice of appeal as to only the Order, dated October 28, 2024, granting RMD’s first Motion for Summary Judgment in part. (A. 14-22.) If this Court agrees that the Business Court could have granted summary judgment in full in the first instance, it need not reach the Second Motion for Summary Judgment. With the first Motion for Summary Judgment before it, the Business Court could

have granted summary judgment on Linda’s contract claim regarding the liquidation of her IRA for two reasons. First, for all of the same reasons described with regard to causation, *see* Argument IV, *supra*, Linda failed to put forth prima facie evidence in the first summary judgment record showing that RMD’s compliance with the direction to liquidate her IRA was the proximate cause of her economic loss.

Second, the MacMillans failed to create a dispute of fact in the first summary judgment record as to Linda’s authorization for the liquidation of her IRA. The only evidence that the MacMillans advanced to create a dispute of fact on this issue was Bruce’s testimony in his first affidavit, which the MacMillans submitted in opposition to RMD’s first Motion for Summary Judgment. *See* (A. 169, 172, 252-54 at ¶¶ 218, 227, 423, 424.) Such testimony was not admissible, however, because the MacMillans had by then already judicially admitted that both Bruce and Linda requested the liquidation of their IRAs. Plaintiffs alleged in their original Complaint—and RMD admitted in its Answer—that, with respect to the MacMillans’ orders to Carr, “[t]he MacMillans were asking to sell all their securities and withdraw all *their* money from Fidelity which comprised one hundred percent of *their* retirement savings.” (A. 41 ¶ 120 (emphases supplied).)

A party’s “assertion of fact in a pleading is a judicial admission by which [the pleader] normally is bound throughout the course of the proceeding.” *Atlas Glass & Mirror, Inc. v. Tri-N. Builders, Inc.*, 997 F.3d 367, 373 (1st Cir. 2021). “Unlike

ordinary admissions, which are admissible but can be rebutted by other evidence, judicial admissions are conclusive on the party making them.” *Id.* Bruce’s subsequent testimony, submitted in opposition to RMD’s first Motion for Summary Judgment and stating that Linda did not personally ask for the liquidation of her IRA, was therefore inadmissible. Given that Bruce’s inadmissible testimony was the sole evidence advanced by the MacMillans to create a dispute of fact as to Linda’s authorization, the MacMillans did not create a material dispute of fact in the first summary judgment record as to whether Linda authorized the liquidation of her IRA. *See* (A. 169, 172, 252-54 ¶¶ 218, 227, 423, 424.)

The record in support of RMD’s Second Motion for Summary Judgment shows that, even under Bruce’s version of events in his first affidavit, he had authority to direct the liquidation of Linda’s IRA. However, this Court need not reach that issue if it agrees that the Business Court could have granted judgment to RMD on the breach of contract claim in its entirety in the first instance.

## **CONCLUSION**

An investment advisor’s fiduciary duties do not extend to insuring clients who were defrauded by third-party criminals, particularly where the investment advisor had no contact with the fraudsters and the clients neither sought nor acted on the investment advisor’s advice but instead misled the investment advisor. Such a duty would be unworkable and lacks support from any legal authority. Summary

judgment is furthermore appropriate because Bruce, by his own admission, had authority to conduct financial transactions on behalf of Linda. This Court should therefore affirm summary judgment in favor of R.M. Davis, Inc. on these bases or on the alternative grounds manifest in the record.

Dated: December 19, 2025

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**CERTIFICATE OF SERVICE**

I, Susan M. Weidner, hereby certify that on this 19<sup>th</sup> day of December, 2025,

I served an electronic copy of the foregoing Brief of Appellee/Cross-Appellant R.M. Davis, Inc. upon Appellants by email as follows:

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Paper copies will be served on Appellants at the above mailing addresses pursuant to M.R. App. P. 7(c)(4).

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