To be Argued by:
AIDAN SYNNOTT
(Time Requested: 15 Minutes)

APL-2020-00137
New York County Clerk's Index No. 654584/2017

Court of Appeals

of the

State of New York

THE MOORE CHARITABLE FOUNDATION and KENDALL JMAC, LLC,

Plaintiffs-Appellants,

– against –

PJT PARTNERS, INC., PARK HILL GROUP, LLC,

Defendants-Respondents,

– and –

ANDREW W.W. CASPERSEN,

Defendant.

BRIEF FOR DEFENDANTS RESPONDENTS

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March 3, 2021

Corporate Disclosure Statement Pursuant to Rule 500.1(f)

PJT Partners Inc. is a publicly traded corporation and has no parent corporation. Park Hill Group LLC has merged into PJT Partners LP, which is indirectly wholly owned by PJT Partners Holding LP, the general partner of which is PJT Partners Inc.

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Preliminary Statement

Plaintiffs, not Park Hill Group LLC ("Park Hill") and PJT Partners Inc. ("PJT"), are responsible for their misplaced personal trust in Andrew W.W. Caspersen. In a matter of days, with no due diligence and at the urging of his employee and Caspersen's friend, billionaire investor Louis Bacon "invested" $25 million of his private foundation's money in a purported promissory note guaranteeing a "risk-free" 15% annual return. Expecting a risk-free 15% return is the modern equivalent of buying the Brooklyn Bridge. It is (and was) too good to be true. Caspersen devised his fraudulent scheme to take advantage of his family and friends (including Plaintiffs' advisor, James McIntyre) solely for his own benefit. Although Plaintiffs could have uncovered Caspersen's scheme with a simple Internet search (and later did so with a single question), they chose instead blindly to trust McIntyre's longtime friend.

None of this is Park Hill's or PJT's fault. Although Caspersen happened to be employed by Park Hill, his fraud did not further Park Hill's business, and he did not possess the apparent authority to perform the fraudulent transaction on its behalf. The First Department dismissed Plaintiffs' claims of *respondent superior* and apparent authority for failure to plead their elements, and Plaintiffs do not appeal their dismissal. Thus, as this case comes to this Court, Caspersen is determined to have been a "rogue" employee.

The tort of negligent supervision does not apply here either. Park Hill and PJT had no knowledge of Caspersen's fraud and no notice that he was predisposed to fraud or had committed it before. Moreover, Plaintiffs had no relationship with Park Hill or PJT that granted Caspersen access to Plaintiffs or caused Plaintiffs to be more trusting of him. Rather, Caspersen had a preexisting personal relationship with McIntyre. In these circumstances, it makes no sense to hold Park Hill and PJT liable, under a simple negligence standard, for failing to root out fraud in a transaction in which they were uninvolved and unaware. Plaintiffs, as the parties blindly accepting a purported 15% risk-free return, appropriately bear that responsibility.

The First Department's unanimous decision (R238–89), affirming the Commercial Division's dismissal of this claim (R19), should be affirmed. The First Department dismissed this claim for two independent reasons. First, Plaintiffs fail to allege Park Hill or PJT had notice of Caspersen's propensity. Second, Plaintiffs fail to allege a duty-creating relationship between themselves and Park Hill or PJT. This Court should affirm on either ground or each.

As to the first, the First Department correctly held that Plaintiffs fail to allege that Park Hill and PJT had actual knowledge of any prior conduct that would have caused them to know that Caspersen possessed the propensity to commit fraud. Park Hill and PJT thus owed no duty, to anyone, to terminate his

employment or to construct supervision of him for the purpose of preventing him from committing a fraud. To the contrary, Plaintiffs allege Park Hill and PJT "failed to notice," "failed to detect," and "failed to discover" certain prior bad acts by Caspersen: misappropriation of a deal fee, personal trading, and drinking.

The requirement that an employer have actual knowledge of one or more instances of similar wrongful conduct by the employee before negligent supervision liability is imposed is sound. Only after such knowledge has been established should courts consider whether the employer "should have known" the employee's purported propensity for similar wrongful conduct. Plaintiffs seek to expand the duty owed by employers by imposing a "should have known" standard on an employer's knowledge relating to prior conduct that might have demonstrated propensity. In other words, even if an employer had no reason to suspect that its employee was a bad actor (as was true here), the employer would be considered negligent for failing to notice red flags that might have uncovered conduct revealing an employee's propensity to commit further bad acts. This should not be the standard as an employer would risk limitless liability based on a jury's speculation, with the benefit of hindsight, about what the employer should have discovered to alert it to an employee's propensity.

As to the second issue, the First Department correctly held that Plaintiffs fail to allege any relationship between themselves and Park Hill and PJT

that could support a duty of supervision owed to them. Requiring a special relationship reasonably limits an employer's liability for intentional torts by a rogue employee. The requirement of a special relationship is further supported where, as here, Plaintiffs allege only economic harm, not bodily injury. The line is correctly drawn, in the context of appellees' business and many other businesses, at "customers." This case presents no occasion to draw (or re-draw) the outer boundary of a special relationship, moreover, because Plaintiffs allege *no relationship* with Park Hill or PJT.

Plaintiffs' proposed extension of the duty—to so-called "potential" and "prospective" customers who interact with a rogue employee in his so-called "capacity as an employee"—is unworkable and overbroad. These phrases have no established meaning in the case law or the Restatements, and Plaintiffs do not define them. Instead, Plaintiffs effectively assert that, because Caspersen was a typical office worker with a phone and email address and not confined to face-to-face interactions, Park Hill and PJT would be liable to any person that he could have defrauded over the phone or email. The class of potential plaintiffs is limited only by the rogue employee's imagination.

Moreover, the Complaint nowhere alleges facts supporting Plaintiffs' newly-invented standard. Plaintiff failed to allege sufficient facts to demonstrate Plaintiffs were a "potential" or "prospective" customer of Park Hill and PJT, or

that they interacted with Caspersen in his "capacity as an employee." The First Department's now-final holdings on apparent authority and *respondent superior* bar Plaintiffs from arguing otherwise, and Plaintiffs have waived their right to amend their Complaint.

Counterstatement of the Questions Presented

1. Did the First Department correctly dismiss Plaintiffs' negligent supervision claim because of Plaintiffs' failure to allege Park Hill and PJT's actual knowledge of one or more instances of similar wrongful conduct from which they should have known Caspersen's purported propensity to commit fraud?

Yes.

2. Did the First Department correctly dismiss Plaintiffs' negligent supervision claim because of Plaintiffs' failure to allege a special relationship between themselves and Park Hill or PJT?

Yes.

Counterstatement of Facts

A. The Parties

At the relevant times, Park Hill was a subsidiary of the investment bank PJT, and provided advisory services. R30–31 ¶¶ 11–12, 16.[1] One of Park Hill's businesses, known as the secondary advisory business (or "Secondaries" business), focused on the restructuring of ownership interests in private equity funds and certain other types of investment vehicles. R31–32 ¶¶ 16–17. In essence, it advised private equity funds as they sought new limited partners when the original investors wished to exit their commitments.

Plaintiff The Moore Charitable Foundation ("Moore Charitable") is a private non-profit organization. R30 ¶ 9. Billionaire Louis Bacon is the Founder and Chairman of Moore Charitable. R58. Bacon is also the Founder, Chairman and Chief Executive Officer of Moore Capital Management, LP ("Moore Capital"). R58.[2] At the relevant time, Moore Capital managed almost $4 billion in securities and other assets. R63.

Plaintiff Kendall JMAC LLC ("Kendall") is an investment vehicle organized as a Delaware limited liability company. R30 ¶ 10. The members of

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[1] Since the relevant events, Park Hill has been merged into PJT Partners LP.

[2] *Leadership: Louis Bacon*, Moore Charitable Found. (last visited Mar. 1, 2021), https://moorecharitable.org/leadership/louis-bacon/.

Kendall are Moore Charitable and James McIntyre, an investment professional employed by Moore Capital. R40 ¶ 46. "JMAC" refers to James McIntyre. McIntyre attended Princeton University with his friend Caspersen.

B. Caspersen's Job Was to Advise on Private Equity Fund Recapitalizations.

Caspersen joined Park Hill's Secondaries business in February 2013 as a Managing Director. R32 ¶ 17. Prior to doing so, Caspersen had worked at Coller Capital, an investment advisor that manages funds that invest in Secondaries opportunities. R36 ¶ 31. Park Hill hired Caspersen to "start a new business line focused on representing private equity fund managers" in "fund recapitalization or 'fund recap'" deals. R32 ¶ 18. At Park Hill, Caspersen specialized in advising on the restructuring of a specific type of investment vehicle: private equity funds. *Id.* These funds were typically structured with the investors owning limited partnership interests. *Id.* Irving Place Capital ("Irving Place") was one of Caspersen's private equity fund manager clients. R36 ¶ 30; *see infra*, p. 10.

Caspersen's job involved communicating with private equity fund managers (both current and prospective clients) about fund recap deals and "prospective buyers" of limited partnership interests in his clients' funds. R33 ¶ 21. In a 2013 press release, Park Hill described Caspersen's job as "working directly with private equity fund managers and limited partners through structured

secondary transactions." R80.[3] It is only in this specific context—while advising on legitimate "fund recap deals"—that the Complaint alleges that Caspersen was a "sole point of contact." R33 ¶ 22.

Caspersen, like many professionals, also had a role in "transmit[ting]" Park Hill's advisory fee invoices to his "clients," *i.e.*, the fund managers. R34 ¶ 22. With this sole and debatable exception, Plaintiffs do not allege that Caspersen's job involved handling money. For example, none of Caspersen, Park Hill, or PJT is alleged to have been a custodian of the funds flowing from new limited partners to old limited partners in the fund recap deals.

To the extent Plaintiffs' brief purports to describe a broader job for Caspersen (*see, e.g.*, Moore Br. 5), it is unsupported by their Complaint. The Complaint does *not* allege that Park Hill held Caspersen out as having the authority to solicit clients other than private equity fund managers; to advise on deals other than fund recaps; or to deal with non-clients other than prospective buyers of limited partnership interests. That is why the First Department dismissed Plaintiffs' apparent authority claim. *See infra*, pp. 20–21.

Plaintiffs' claim that Caspersen "handled transactions by himself" (Moore Br. 5) is also unsupported by their Complaint, and false. In reality, other

[3] The Complaint's quotation of this press release omits the word "secondary." R32 ¶18.

Park Hill employees worked on these deals, as well as many outside professionals, and the Complaint does not allege otherwise.[4]

C. Caspersen Worked on a Legitimate Secondaries Transaction Between Irving Place and Coller Capital.

In 2014, Irving Place retained Caspersen to advise on a recapitalization of a private equity fund it managed. R36–37 ¶¶ 30, 33. The "lead buyer" was Coller Capital, Caspersen's former employer, which committed $500 million to purchase the fund's limited partnership interests. R36–37 ¶ 31. The transaction closed in August 2015. R37 ¶ 32.

Plaintiffs allege that "PJT did not issue a press release to announce the closing, and the closing was not reported in the press." *Id.* As this Court may notice, the latter allegation is false: the closing was contemporaneously reported in industry publications, such as *Private Equity International* and *Alt Assets*.[5]

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[4] For example, concurrent public sources disclosed that Irving Place had been represented by the law firm of Kirkland & Ellis LLP and that another investment bank, Houlihan Lokey, had also been involved in the transaction. Kelly Holman, *Irving Place Capital Restructures Fund III*, Priv. Equity Int'l (Aug. 10, 2015), https://www.privateequityinternational.com/irving-place-capital-restructures-fund-iii/. This Court may take judicial notice of publicly available sources such as news articles. *See People* v. *Jones*, 73 N.Y.2d 427, 431 (1989) ("[A] court may take judicial notice of facts which are capable of immediate and accurate determination by resort to easily accessible sources of indisputable accuracy." (quotation omitted)).

[5] *See*, *e.g.*, Holman, *supra* n.4; Jack Hammond, *Irving Place Complete Fund Restructuring*, Alt Assets (Aug. 11, 2015) https://www.altassets.net/private-

D. Caspersen Offers His Friend James McIntyre a Fake Investment Opportunity with a 15% "Risk-Free" Return.

Two months after the closing of the Irving Place-Coller Capital deal, Caspersen reached out to his long-time friend, James McIntyre, with a fraudulent opportunity.[6] On Saturday, October 24, 2015, Caspersen emailed McIntyre about an "opportunity" he was offering to his "family and friends" to purchase a promissory note with a "risk-free" 15% rate of return. R39 ¶ 41. Caspersen promised "private equity returns (15% net) but without the risk or unpredictable cash flow," which he said were "well above market for relationship reasons." R78.[7] Caspersen also promised that the note could be redeemed at any time with

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equity-news/by-news-type/fund-news/irving-place-completes-fund-restructuring.html.

[6] The Complaint dances around the friendship between Caspersen and McIntyre. It says that Caspersen told McIntyre that he was making the offer to "his family and friends" (R39 ¶ 41), in context a reference to their friendship. R78. Strictly speaking, the legal issues do not depend upon the friendship, but it may explain the degree of Plaintiffs' gullibility. It is public knowledge that Caspersen and McIntyre attended Princeton together, both graduating in 1999. *See* Alexandra Stevenson & Matthew Goldstein, *Victim in Wall St. Scheme Was a Classmate of Its Accused Architect*, N.Y. Times DealBook (Apr. 3, 2016), https://www.nytimes.com/2016/04/04/business/dealbook/victim-in-wall-st-scheme-was-a-classmate-of-its-accused-architect.html; *Caspersen Allegedly Defrauded Princeton Classmate at Moore Fund*, Bloomberg (Apr. 4, 2016), https://www.bloomberg.com/news/articles/2016-04-04/caspersen-allegedly-defrauded-princeton-classmate-at-moore-fund.

[7] In their brief, Plaintiffs say that Caspersen "solicit[ed] [funds] *from the Foundation*." Moore Br. 8 (emphasis added). In reality, Caspersen's email to McIntyre, at his @moorecap.com email address, suggested that the note would

notice. R45 ¶ 63. Caspersen claimed to have "already secured $30 million in investments from his family and friends." R39 ¶ 41.

Plaintiffs allege that Caspersen said the note was "related" to the Irving Place-Coller Capital deal. R39 ¶ 41. While that is *not* reflected in Caspersen's email to McIntyre (*see* R78), Plaintiffs allege that Caspersen falsely stated that the Irving Place-Coller Capital deal "had not yet closed," that Coller Capital was the borrower, and that the note would "help facilitate the closing" of the Irving Place-Coller Capital deal. R39 ¶ 41. As noted above, Plaintiffs could have quickly confirmed that the deal had closed two months earlier with a news or Internet search. *Supra*, p. 10 & n.4–5.

Just days after Caspersen's initial outreach, Plaintiffs took the bait. Plaintiffs agreed to the deal no later than November 2, 2015, wiring $25 million (including $400,000 from McIntyre), the maximum allocation offered, to Irving Place III SPV LLC ("IP3 SPV"), an entity that Caspersen created, on November 5. R39–40 ¶¶ 43–46. Plaintiffs allege that IP3 SPV was so named "to deceive the Foundation into believing that the entity was associated with Irving Place." R39 ¶ 43. This was another red flag for Plaintiffs, as it contradicts Caspersen's statement—alleged two paragraphs earlier, on the same page of the Complaint—

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be "a good fit for Moore Capital." R78. Plaintiffs alone decided the Foundation should invest.

that the borrower was Coller Capital. R39 ¶ 41. Moreover, the Complaint nowhere explains how borrowing by Irving Place could possibly facilitate the sale to Coller Capital of limited partnership interests in a fund managed by Irving Place.

The fraudulent transaction was documented in a purported "promissory note" and "security agreement" between Plaintiffs and IP3 SPV. R40 ¶ 44. Neither Park Hill nor PJT is alleged to have been a party to those agreements. Nor do Plaintiffs allege that they paid, or believed that they paid, any consideration to Park Hill or PJT for the transaction.

Plaintiffs' brief refers to their purported "due diligence" (Moore Br. 8), but this apparently was limited to asking Caspersen "a series of questions." R39 ¶ 41.[8] To the extent that Plaintiffs asked anything other than where they should wire their money, their questions, and Caspersen's answers, are not alleged in the Complaint. Prior to parting with their $25 million, Plaintiffs do not allege that they communicated about the loan with *anyone other than Caspersen. See* R39–40 ¶¶ 41–46. They did not speak, or ask to speak, to anyone at Coller

[8] Plaintiffs also allege that Caspersen sent them "an annual financial report for Irving Place" that bore a watermark from the "dataroom for the Irving Place transaction." R39 ¶ 42. This is a red herring. Plaintiffs do not allege that the annual report made any reference to the $25 million loan or otherwise corroborated any aspect of Caspersen's offer.

Capital, Irving Place, Kirkland & Ellis, or Houlihan Lokey; nor anyone at Park Hill or PJT other than Caspersen. Plaintiffs did not even ask to speak to "John Nelson," the fictitious person whose name appeared on the signature lines for IP3 SPV. *See* R40 ¶¶ 44–45.

E. Caspersen Used Plaintiffs' Money to Place Personal Securities Trades and to Cover Up a Prior Embezzlement from Park Hill.

Caspersen used Plaintiffs' money for two purposes.

He transferred approximately $8.1 million from IP3 SPV to Park Hill to "cover up" a prior embezzlement from Park Hill. R40–41 ¶ 47. Before this litigation, Park Hill remitted this amount to Plaintiffs. R8; R44 ¶ 61. Park Hill's temporary receipt of these funds was the basis for Plaintiffs' conversion claim. R51 ¶¶ 104–107. The Supreme Court dismissed that claim (R19–20), and Plaintiffs abandoned it on appeal.

He transferred the remainder, approximately $16.9 million (plus funds from another source), from IP3 SPV to his personal brokerage account to make personal securities trades. R40–41 ¶¶ 47–48. He purchased stock options that eventually "lost all of their value." R34 ¶ 26.

F. When Plaintiffs Later Asked "Who Is John Nelson?," Caspersen's Scheme Quickly Unraveled.

In March 2016, Caspersen offered Plaintiffs a second opportunity to invest $20 million more on similar terms. R42 ¶ 52. The new promissory note was to be signed by "John Nelson," the fictitious person who signed Plaintiffs' earlier note. R40 ¶ 44, R42 ¶ 52. When Plaintiffs asked to speak to John Nelson, Caspersen played the part himself, first over the phone and then in an email from a domain he had registered that same day. R42–43 ¶¶ 53–56.

In the words of the Commercial Division, "the moment the Foundation asked for more information, the fraud began to unravel." R12. Caspersen was arrested that same month and ultimately pled guilty to securities fraud and wire fraud in the District Court for the Southern District of New York. R44 ¶ 59.

G. Park Hill and PJT Had No Knowledge of Caspersen's Alleged Prior Bad Acts.

Plaintiffs argue that Park Hill and PJT should have known that Caspersen had a "propensity" to commit fraud based on three prior bad acts: his misappropriation of the Irving Place deal fee; his personal securities trading; and his excessive consumption of alcohol.

Misappropriation of the deal fee. After the Irving Place-Coller Capital deal closed in August 2015, Caspersen allegedly misappropriated a "deal

fee" of approximately $8.1 million that Irving Place owed Park Hill. R37 ¶ 33. Caspersen sent Irving Place a "fake invoice," directing it to wire the fee into an account that he controlled personally. *Id.* Plaintiffs allege that the fee "became due when the Irving Place transaction closed in August 2015." *Id.* But the Complaint does *not* allege when Caspersen sent the fake invoice or when Irving Place paid it.[9] After receiving money from Plaintiffs, on November 6, Caspersen wired funds, in the exact amount of the Irving Place deal fee, from his IP3 SPV account (the account Plaintiffs allege was created for the purpose of persuading them they were paying Irving Place) to Park Hill. R41 ¶ 47.

Plaintiffs do *not* allege that Park Hill and PJT knew—at any time prior to March 2016—that Caspersen had embezzled the deal fee. To the contrary, Plaintiffs allege that Caspersen made the payment in November 2015 to "*cover up*" his embezzlement "by *making it appear* that Irving Place was finally paying PJT's deal fee from the real Irving Place Transaction." *Id.* (emphasis added). And

[9] In his criminal sentencing submission—which is the source of several of Plaintiffs' allegations, including those related to his personal securities trading and drinking—Caspersen said that he misappropriated the fee in *September* 2015, not August. Sentencing Brief at 13, *United States* v. *Caspersen*, No. 16 Cr. 414 (JSR) (S.D.N.Y. Oct. 21, 2016), ECF. No. 29 ("Sentencing Br."). While Plaintiffs have exaggerated the duration that the fee was outstanding, the difference is not material. Even if the fee was due in August, Caspersen created the appearance of payment within three months, by early November.

Caspersen did this before year end, which was the time at which Park Hill "would likely insist on receiving" the funds. R38 ¶ 40.

Instead, Plaintiffs allege that "PJT's *failure to detect* Caspersen's fraud against Irving Place was *negligent*." R38 ¶ 39 (emphasis added); *see also* R41 ¶ 49 ("PJT negligently failed to discover" theft of "Irving Place fee"). Park Hill and PJT were allegedly negligent because "back office" employees were fooled by Caspersen's explanation of a "stub closing." R37 ¶ 34. Plaintiffs say that the back office employees "knew or should have known" that the stub closing explanation was false. R37 ¶ 35. In this Court, Plaintiffs lean more heavily on the allegation that PJT "knew." Moore Br. 37–38. But no allegation of fact supports the conclusion that the back-office employees "knew" (or had the market expertise to know) that the explanation was false. To the contrary, the factual allegations indicate that Caspersen's deception was successful.

Later in November, after Plaintiffs had parted with their money, Caspersen transferred another $762,267 to Park Hill to "cover up" the misappropriation of a second deal fee owed by another client. R41 ¶ 49. There is no allegation that Park Hill knew about this diversion either. To the contrary, Plaintiffs allege it "negligently failed to discover" the diversion. *Id.*

Personal securities trading. Plaintiffs also allege that Caspersen engaged in "speculative" securities trading in his personal brokerage account,

which depleted both his substantial inherited wealth and the proceeds of his schemes. R27 ¶ 1, R29 ¶ 7, R41 ¶¶ 48–49. Plaintiffs allege, "on information and belief," that Caspersen used electronic devices supplied by Park Hill to place or monitor his personal securities trades. R35 ¶ 26.[10]

Drinking. Plaintiffs also allege that Caspersen would "drink alcohol to excess." R29 ¶ 7, R35 ¶ 27. They do not allege he did so at the office, but rather that he would sometimes drink at "restaurants or bars near his office" and then "returned to the office." R35 ¶ 27.

As with the deal fee diversion, Plaintiffs do *not* allege that Park Hill or PJT knew about Caspersen's personal trading and drinking. Instead, Plaintiffs allege that Park Hill and PJT "failed to notice" and "failed to detect" the trading and drinking. R35 ¶ 28, R36 ¶ 29; *see also* R34 (heading: "PJT's Failure To Detect Caspersen's Aberrant Trading and Alcohol Use"); R35 ¶ 28 (Caspersen drank and traded "without detection"). Nor do Plaintiffs allege that Caspersen's personal trading or drinking were fraudulent, tortious, or otherwise illegal—only that they were "dangerous and destructive behaviors." R34 ¶ 25.

[10] In the criminal case, Caspersen said that he primarily used his personal iPad for securities trading because it "refreshed more quickly than his cellphone and kept him from missing a tick." Sentencing Br. at 10.

In this Court, Plaintiffs say, without citation, that Caspersen "effectively made no attempt to conceal his gambling and drinking habits." Moore Br. 6. That is not alleged in the Complaint.

H. Procedural History

Plaintiffs believe Caspersen to be judgment proof. R44 ¶ 60. As a result, they attempted to impose secondary liability on Park Hill and PJT under the torts of negligent supervision, *respondeat superior*, and apparent authority. The Commercial Division of the Supreme Court in New York County (Hon. O. Peter Sherwood) dismissed the negligent supervision and *respondeat superior* claims without leave to amend. R16–19. The First Department affirmed the dismissal of those claims and, on Park Hill and PJT's cross-appeal, also dismissed the apparent authority claim without leave to amend. R238–41. In this Court, Plaintiffs appeal only the dismissal of their negligent supervision claim.

As to negligent supervision, the First Department affirmed the Commercial Division's holding that the Complaint "does not allege that defendants were aware of the facts that plaintiff[s] contend[] would have put them on notice of the employee's criminal propensity." R240 (citing *Doe* v. *Alsaud*, 12 F. Supp. 3d 674, 680 (S.D.N.Y. 2014)). The First Department also affirmed on the alternative ground that "the complaint also fails to allege that plaintiffs were ever customers of defendants, which is fatal to a claim of negligent supervision." R240.

Respondeat superior. The Commercial Division dismissed this claim on the ground that Caspersen's fraud on Plaintiffs did not further the business of Park Hill or PJT. The First Department affirmed on that same ground, finding Caspersen "orchestrated a fraudulent scheme through a fictitious transaction solely for personal gain." R239–240 (citing *Bowman* v. *New York*, 10 A.D.3d 315, 316 (1st Dep't 2004)). The First Department rejected the argument that Park Hill or PJT's business was furthered because "some of the fraudulently obtained funds were used to repay formerly embezzled funds" to enable Caspersen to continue his "fraudulent schemes undetected." R240 (citing *Heffernan* v. *Marine Midland Bank*, 267 A.D.2d 83, 84 (1st Dep't 1999)). Plaintiffs do not appeal the dismissal of their *respondeat superior* claim here.

Apparent authority. The Commercial Division allowed Plaintiffs' apparent authority claim to proceed on the basis of Caspersen's own statements—not Park Hill or PJT's—that the fraudulent opportunity was "related" to the real Irving Place-Coller Capital deal. R249–50. The First Department dismissed that claim, holding that the Complaint "does not identify any words or conduct of defendants that would give rise to a belief on plaintiffs' part that defendants' employee had authority to enter into the transaction." R241 (citing *Hallock* v. *New York*, 64 N.Y.2d 224, 231 (1984)). The First Department held that Plaintiffs could not establish apparent authority based on Caspersen's actual authority "with

respect to a somewhat related but different type of transaction." *Id.* (citing *Standard Funding Corp.* v. *Lewitt*, 89 N.Y.2d 546, 551 (1997)). Plaintiffs do not appeal the dismissal of their apparent authority claim here.

Leave to amend. CPLR 3025(b) requires that: "Any motion to amend or supplement pleadings shall be accompanied by the proposed amended or supplemental pleading clearly showing the changes or additions to be made to the pleading." Plaintiffs did not comply with that rule. Accordingly, the Commercial Division denied their request for leave to amend (R236), and the First Department affirmed (R240). Plaintiffs do not appeal that denial here.

Argument

Both issues on appeal—Park Hill and PJT's notice of Caspersen's propensity and the relationship between the parties—relate to Park Hill and PJT's duty of care. *Hamilton* v. *Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 233 (2001); *Ford* v. *Grand Union Co.*, 268 N.Y. 243, 249 (1935).

"Unlike foreseeability and causation, both generally factual issues to be resolved on a case-by-case basis by the fact finder, the duty owed by one member of society to another is a legal issue for the courts." *Eiseman* v. *New York*, 70 N.Y.2d 175, 187 (1987). "It is still the responsibility of courts, in fixing the orbit of duty, to limit the legal consequences of wrongs to a controllable degree."

Strauss v. *Belle Realty Co.*, 65 N.Y.2d 399, 401 (1985) (quotation and citation omitted).

The First Department appropriately fixed the limit of duty in this case.

I. Both Lower Courts Correctly Held That Plaintiffs Fail to Allege That Park Hill or PJT Was on Notice of Caspersen's Purported Propensity to Commit Fraud.

Plaintiffs' theory is that Park Hill and PJT "knew or should have known" of Caspersen's propensity to commit fraud as a result of his diversion of the Irving Place deal fee, his personal securities trading, and his excessive drinking. Moore Br. 37. The Commercial Division dismissed this claim because Plaintiffs fail to allege that Park Hill or PJT "were aware of this conduct before Caspersen sold plaintiffs the fake investment." R19. The First Department affirmed on that same ground. R240.

Both lower courts correctly found that what Defendants were alleged to have known was insufficient for negligent supervision liability. Plaintiffs barely address those holdings, and only in the final two paragraphs of their brief. Moore Br. 40–41. Instead, Plaintiffs' primary argument as to propensity is that Park Hill and PJT are liable for Caspersen's fraud if they "should have known" about his deal fee diversion, personal securities trading, and drinking. *Id.* at 37–40. Plaintiffs are wrong on the law, and fail to allege Park Hill and PJT's notice of

Caspersen's propensity under either an actual-knowledge or constructive-knowledge standard.

As to the legal standard, both lower courts correctly held that Plaintiffs were required to allege Park Hill and PJT's actual knowledge of one or more instances of similar wrongful conduct that indicated Caspersen's purported propensity. This Court has never approved negligent supervision liability without actual knowledge of sufficiently similar wrongful conduct, and lower court decisions likewise hold that actual knowledge is required. That bright-line rule provides clear guidance to employers regarding whom they must supervise and for what. Plaintiffs cite no case that has held that an employer owes a duty of supervision merely because the employer "should have known" (but did not) about employee misconduct. This Court should not impose a new duty on employers to investigate employees with a seemingly clean record to uncover unknown misconduct. Such a rule will expose employers to insurer-like liability and subject workers to unemployment based on arbitrary and biased speculation about their purported propensities.

Regardless of the legal standard, Plaintiffs fail to allege that Park Hill knew, or should have known, about Caspersen's misappropriation of the deal fee, his personal securities trading, or his excessive drinking. Finally, as the

Commercial Division also held (R19), Plaintiffs fail to allege that drinking and personal securities trading are indicative of a propensity to commit fraud.

A. This Court Should Not Impose a New Duty on Employers to Investigate Employees With No Known Offense History for the Purpose of Discovering Unknown Misconduct.

1. Precedent Establishes An Employer's Actual Knowledge of at Least One Instance of Similar Wrongful Conduct Is a Required Element of Negligent Retention and Supervision.

This Court has permitted negligent retention and supervision cases to go forward only where employers had actual knowledge, prior to the conduct causing plaintiffs' injuries, that the employees had repeatedly engaged in similar wrongful conduct. Where an employer was not aware of prior similar wrongful conduct by an employee, this Court has never required the employer to guess at whether there were "signs" that the employee might in the future commit his first wrongful act, or to investigate to discover unknown past wrongful conduct.

In *Hogle* v. *H.H. Franklin Manufacturing Co.*, 199 N.Y. 388 (1910), this Court affirmed a jury verdict where an employer knew that its employees had "habitually" thrown scrap metal at plaintiff's home, for more than a year prior to plaintiff's injury, and the practice had "continued" and increased after plaintiff's complaint to defendant. *Id.* at 395. In *Hall* v. *Smathers*, 240 N.Y. 486 (1925) (Moore Br. 11), this Court reinstated a claim for a new trial where, prior to a building super's assault on a tenant, the landlord had received "[f]requent

complaints" that the super "assaulted callers." *Id.* at 489. The super was "kept in his position in spite of the complaints of the tenants, and with full knowledge of the defendants' agents of his habits and disposition." *Id.* at 491.[11]

This Court drew the line clearly in *Ford*, when it refused to impose liability on a grocery store whose employees used the premises for rifle practice, tragically shooting and killing a pedestrian. 268 N.Y. 243. This Court noted that the employees "did not customarily" use the store for target practice and had "never previously indulged in other dangerous play." *Id.* at 253. This Court explained a "*fundamental principle[] of tort liability*": "where there is no notice that an employee is in the habit of acting in a manner dangerous to others, there is no duty to control the actions of the employee outside the scope of his employment." *Id.* at 249 (emphasis added).

This Court held to the requirement of a known prior offense in *Judith M.* v. *Sisters of Charity Hospital*, 93 N.Y.2d 932 (1999) (mem.). *Judith M.* affirmed the Fourth Department's dismissal of a negligent hiring, retention, and

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[11] Likewise, in *Haddock* v. *City of New York*, 75 N.Y.2d 478 (1990) (Moore Br. 11), the city knew that its employee, who raped plaintiff on city property where she was an invitee, had a long "rap sheet," including a prior conviction for attempted rape and a separate parole violation for rape. *Id.* at 482–83. The main issue in the appeal was whether the city was entitled to "governmental immunity," which this Court held it was not. As the *Haddock* case illustrates, any expansion of negligent retention and supervision liability will burden not only private employers, but also the State and local governments.

supervision claim against a hospital by a patient who had been sexually assaulted by an orderly. The Fourth Department dismissed the claim because the orderly had "no history of, or propensity for, sexual misconduct" and rejected the plaintiff's arguments that the hospital "had reason to suspect such history or propensity." 249 A.D.2d 890 (4th Dep't 1998). This Court affirmed, holding that "mere speculation and unsubstantiated allegations" against the orderly were insufficient to impose a duty on the hospital. 93 N.Y.2d at 934.

More recently, this Court applied the same rule in a related context in *Brandy B.* v. *Eden Central School District*, 15 N.Y.3d 297 (2010). That case concerned a school district's duty to supervise one student to prevent him from sexually assaulting another on a school bus. This Court held that the school district had no duty of supervision absent "sufficiently specific knowledge" of "prior conduct similar to the unanticipated injury-causing act." *Id.* at 302. Because the perpetrator had no "prior history" of "sexually aggressive behavior," the school district was not liable. *Id.*[12]

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[12] This Court also rejected the argument that the school district was on notice because the perpetrator had "displayed severe aggression" and had a history of "threats with weapons," "fire setting," "stealing," and "exposing himself and masturbating in public." *Brandy B.*, 15 N.Y.3d at 300–01. That conduct, this Court held, was not sufficiently similar to the tort upon plaintiff, which involved "exposing himself" to her and "forc[ing] her to touch him." *Id.* at 301.

Ford, *Judith M.*, and *Brandy B.* support the rule that an employer (or another party owing a duty of supervision) cannot be liable for negligent supervision unless it has actual knowledge that the party to be supervised has previously committed the same, or sufficiently similar, wrongful act to the injury-causing act at least once.

Federal courts in New York have repeatedly identified this bright-line rule. For example, in *Doe* v. *Alsaud*, 12 F. Supp. 3d 674 (S.D.N.Y. 2014), the complaint alleged that the employer "knew or should have known of [the employee's] predisposition for abusing women, his violent propensities, and his status as a sexual predator, yet did nothing to stop it." *Id.* at 680 (quoting *Alsaud* complaint). *Alsaud* held that allegation insufficient, noting that "New York courts have held in employee sexual misconduct cases that an employer is only liable for negligent supervision or retention if it is aware of specific prior acts or allegations against the employee." *Id.* (collecting cases).

Likewise, in *Haybeck* v. *Prodigy Services Co.*, 944 F. Supp. 326, 332 (S.D.N.Y. 1996) (Sotomayor, J.), an online "sex chat" service knew that its employee had AIDS and was having sex with customers. *Id.* at 332. The Court refused to impose liability based on that knowledge because neither fact is "tortious under the law." *Id.* Plaintiff was required to allege that the employer knew that the employee had a history of committing torts—*i.e.*, "that Prodigy knew

that [the employee] was having unprotected sex with customers without informing them that he carried the AIDs virus." *Id.*[13]

2. Plaintiffs' Proposed Duty to Discover Unknown Employee Misconduct Is Unprecedented and Unsound.

None of the cases cited by Plaintiffs in this Court (*see* Moore Br. 37–41) holds that an employer had notice of an employee's propensity, and thus owed a duty of supervision, without actual knowledge of prior offenses by the employee. In *Kenneth R.* v. *Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 164 (2d Dep't 1997) (Moore Br. 37), the diocese had received prior complaints of sexual abuse against the same priest. In *Quiroz* v. *Zottola*, 96 A.D.3d 1035 (2d Dep't 2012) (Moore Br. 30), the employer had received prior complaints that the truck driver drove recklessly. Meanwhile, in *Nagele* v. *Archdiocese of New York*, 39 A.D.3d 270 (1st Dep't 2007) (Moore Br. 37), the claim was dismissed because there was no allegation that the archdiocese was aware of prior thefts by the priest. The same is true of the other cases cited by Plaintiffs in the First Department.[14]

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[13] *See also, e.g.*, *Mucciarone* v. *Initiative, Inc.*, 2020 WL 1821116, at *5 (S.D.N.Y. April 10, 2020) (dismissing negligent retention and supervision claim where employee had "no negative performance history or indicators" and "never faced any allegations of inappropriate workplace behavior either at [the defendant] or any prior employer").

[14] In *Doe* v. *Chenango Valley Central School District*, 92 A.D.3d 1016, 1017 (3d Dep't 2012) (Moore 1AD, Dkt. 6 at 20), the school district had received a prior complaint about the school bus driver's exposing himself to students on his bus. In *N.X.* v. *Cabrini Medical Center*, 280 A.D.2d 34, 37 & n.1, 41 n.4 (1st Dep't 2001) (Moore 1AD, Dkt. 6 at 18), the negligent hiring claim was

Sanchez v. *New York*, 99 N.Y.2d 247 (2002) (Moore Br. 39), is consistent. It concerns the duty of the State to supervise inmates in a maximum security prison to prevent them from assaulting other inmates. Such inmates have a "proven capacity for violence" and "dangerous criminal propensities." *Id.* at 256. That is why they are in a maximum security prison. The State in *Sanchez* thus had what Park Hill and PJT lacked here: actual knowledge of one or more instances of similar wrongful conduct.

In fact, the State knew much more in *Sanchez*. The assault in *Sanchez* occurred at a time and in a location known to pose "elevated risk." *Id.* at 255. Specifically, it occurred in a 60-foot hallway during "go-back" time, when the hallway was occupied by more than 100 inmates, supervised only by a single officer with limited visibility in contravention of the State's own policies. *Id.* at 251, 255–56. In that context, this Court rejected the State's proposed requirement for liability—reminiscent of the board game *Clue*—that the State know in advance the "particular victim," "particular assailant," and the "specific notice of time, place or manner" of the assault. *Id.* at 253, 255.

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abandoned on appeal and the Court noted that "[o]bviously the situation would be different if the hospital had permitted Dr. Favara to practice after he committed a prior sexual assault."

To the extent *Sanchez* held that the State owes a duty to prevent all "foreseeable" inmate-on-inmate assaults in a maximum security prison, it declined to extend a mere foreseeability test to other contexts such as "public schools, hospitals or housing." *Id.* at 256. It is also not a rule that should be extended to all private employers. This Court has repeatedly established that mere "[f]oreseeability of injury does not determine the existence of a duty." *Eiseman*, 70 N.Y.2d at 187. A private employer need not treat its employees like Supermax prisoners. It need not guard against every intentional tort or crime that a rogue employee might "foreseeably" commit. Rather, until the employer has knowledge that the employee has an offense history, the employer owes no duty of supervision.[15]

Plaintiffs' argument for a broader duty rests solely on language in several lower court decisions referring to whether an employer "knew or *should have known*" of an employee's propensity. Moore Br. 37 (citing *Kenneth R.*, 229 A.D.2d 159) (emphasis added). Plaintiffs say that this language permits plaintiff to speculate about whether an employer "should have known" about an

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[15] Although foreseeability is not the issue in this appeal, Caspersen's lack of known offense history is also relevant to the issue of foreseeability. *See N.X.* v. *Cabrini Med. Ctr.*, 97 N.Y.2d 247, 253 (2002) (agreeing with the "general conclusion" that the risk of sexual assault by a doctor with "no known history of sexual misconduct" "taking place in the absence of defendant's prior knowledge" of such propensity is not foreseeable).

employee's unknown prior wrongful acts. Moore Br. 37–40. It does not. This language refers to whether the employer "should have known" the employee's propensity, not the employee's prior wrongful acts. Because these cases involved known prior similar wrongful acts, *supra*, p. 28, their "should have known" language clearly refers to the connection between the employee's known prior wrongful acts and the purported propensity.

In any event, this Court has never adopted a "should have known" standard in employer negligent supervision cases—not as to the employee's propensity, and not as to the employee's prior wrongful conduct. To the extent that any lower court has adopted a constructive-knowledge standard with respect to prior similar wrongful acts, this Court has not and should not. Because, in this case, Plaintiffs fail to allege known prior similar wrongful acts, *see infra* pp. 34–38, this Court has no occasion to consider whether to adopt an actual-knowledge or constructive-knowledge standard with respect to the connection between an employee's known prior wrongful acts and the purported propensity. Some lower courts have required actual knowledge of the propensity.[16]

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[16] *See, e.g.*, *Jones* v. *Hiro Cocktail Lounge*, 139 A.D.3d 608, 609 (1st Dep't 2016) ("[P]laintiff could not demonstrate that [the employer] *knew of the assailant's propensity* to commit such attacks." (emphasis added)); *Kirkman* v. *Astoria Gen. Hosp.*, 204 A.D.2d 401, 403 (2d Dep't 1994) ("While an employer may be [liable] . . . when the employer has either hired or retained the employee with

The duty that Plaintiffs propose would be disastrous for employers and employees alike. An employer would face uncapped liability for frauds or assaults perpetrated by a rogue employee, even though it had no prior knowledge that the employee had ever committed a fraud or assault. Juries would be allowed to speculate about whether the employer "should have" followed the breadcrumbs to discover prior misconduct concealed by the employee or "should have" read the tea leaves to predict a first offense. *See* Moore Br. 40 (arguing that employers should face liability for failing to discover "signs" that an employee is "dishonest," "violent," or "dangerous"). Juries' *post hoc* judgments about who employers "should have known" to be "dishonest" or "aggressive" will inevitably be influenced by cognitive biases, such as hindsight, as well as more invidious biases. Employers are subject to the same biases as juries, and should not be forced or encouraged to speculate about workers' purported propensities for dishonesty or aggression, absent knowledge of specific prior offenses.

Once the employer's duty of supervision is extended to employees with no known offense history, there is no way to cabin it to particular employees or particular torts. It would be a general duty to supervise all employees for all

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knowledge of the employee's propensity . . . , there is no evidence here that [the employer] had any such *knowledge*." (emphasis added)).

manner of misconduct at all times. Providing that level of supervision would be expensive and, ultimately, impractical.

Plaintiffs argue that a broader duty is necessary to prevent employers from "sticking their heads in the sand and ignoring obvious warning signs." Moore Br. 40. But employers already have sufficient incentives to try to employ good people. These incentives include tort liability under the doctrines of *respondeat superior* and apparent authority, claims Plaintiffs now concede they cannot plead here.

If this Court were to impose any duty on employers to search out and discover unknown misconduct that could indicate a tortious propensity, the low-hanging fruit would be pre-employment searches for criminal convictions or sex offender status. These one-time searches are less expensive than continuous surveillance, and the misconduct they find has already been adjudicated in court. Yet, New York courts have consistently declined to impose a general tort-law duty on employers to search for criminal convictions or sex offender status.[17] In fact, in

[17] *See, e.g.*, *Nouel* v. *325 Wadsworth Realty LLC*, 112 A.D.3d 493, 494 (1st Dep't 2013) (employer had no duty to discover that employee was a "registered sex offender"); *Yeboah* v. *Snapple, Inc.*, 286 A.D.2d 204, 205 (1st Dep't 2001) ("Notwithstanding the corporate defendants' failure to investigate Sanderlin's criminal background, liability cannot be charged to the corporate defendants on the ground of negligent hiring and supervision. An employer is under no duty to inquire as to whether an employee has been convicted of crimes in the past."); *Amendolara* v. *Macy's N.Y.*, 19 A.D.2d 702, 702 (1st Dep't 1963)

recognition of the competing public policies, the Legislature has carefully limited the circumstances in which an ex-offender can be denied employment based on criminal history.[18] It would be incongruous to impose a greater duty on employers to investigate and discover unknown and unadjudicated misconduct than to discover prior criminal convictions.

B. Plaintiffs Fail to Allege That Park Hill and PJT Had Notice of Caspersen's Purported Propensity to Commit Fraud.

1. Plaintiffs Fail to Allege That Park Hill or PJT Knew or Should Have Known About Caspersen's Prior Bad Acts.

Park Hill and PJT had no notice, prior to October 2015, that Caspersen was an employee who required special supervision. Plaintiffs admit that, despite his hidden flaws, he appeared to be a successful and high-performing employee. R34 ¶ 24. The Complaint does not allege that Park Hill or PJT actually knew about Caspersen's misappropriation of the deal fee, his personal trading, or his drinking. *Supra*, pp. 15–18. To the contrary, the Complaint says that they

(employer "was under no duty to inquire into the possibility that [employee] might have been convicted of crime in the past").

[18] N.Y. Correction Law § 751 *et seq.* and N.Y. Executive Law § 296(15) limit the circumstances in which public and private employers can decline to hire persons based on prior criminal convictions. These statutes reflect the policy judgment that "[p]roviding a former offender a fair opportunity for a job is a matter of basic human fairness, as well as one of the surest ways to reduce crime." *Acosta* v. *N.Y.C. Dep't of Educ.*, 16 N.Y.3d 309, 315 (2011).

"failed to notice," "failed to detect," and "failed to discover" these acts. R34 (heading); R35 ¶ 28; R36 ¶ 29; R38 ¶ 39; R41 ¶ 49.

Nor is there any support for the legal conclusion that they "should have known" about them. Plaintiffs do not allege any prior known act of wrongdoing that should have caused Park Hill or PJT to scrutinize the late deal fee, Caspersen's personal trading, or his drinking. Instead, with impermissibly circular reasoning, Plaintiffs rely on those facts that Park Hill and PJT did not know to impose the duty to discover them.

As to the deal fee, Park Hill received the exact amount that it was owed, from an account name apparently associated with Irving Place, less than three months after the Irving Place deal closed. *Supra*, p. 16; R41 ¶ 47. According to the Complaint, Caspersen "ma[de] it appear" that Park Hill was receiving its fee; and he did so before the time (the end of the fiscal year) when Park Hill was likely to "insist" upon receiving it. R38 ¶ 40; R41 ¶ 47. There is no factual allegation that the "back office" employees receiving Caspersen's false explanation had the necessary understanding of "stub closings" to know that Caspersen's explanation was false. *See* R37 ¶¶ 34–35.

These facts do not permit the "inference" (Moore Br. 39) that Park Hill knew or should have known about the embezzlement. No business, particularly no professional services firm, jumps to the conclusion of employee

embezzlement simply because a receivable is overdue for three months. While Plaintiffs say that Caspersen's explanation to the "back office" was "implausible" (R37 ¶ 34, R38 ¶ 37), because he had no known history of dishonesty, there was no reason for the clerical staff to be suspicious.[19]

Indeed, the primary purported reason that, Plaintiffs say, Park Hill and PJT "should have known" of the embezzlement is that Park Hill received money from the "wrong account"—*i.e.*, from the same IP3 SPV account into which Plaintiffs had wired their money. Moore Br. 9, 38. But Park Hill's receipt of the funds occurred *after* Caspersen's fraud on Plaintiffs was already complete. *See* R40–41 ¶ 47; *supra*, p. 16. In any event, Park Hill had no more reason to be suspicious on receiving an expected Irving Place fee from an apparent Irving Place account than Plaintiffs did when they paid in millions more into the same account (when expecting to loan money to Coller Capital, not Irving Place). One rarely wonders if the person paying you is the right person; one does one's best to pay only the right person.

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[19] A federal court, in dismissing a securities class action against PJT arising from the same underlying facts, held that the delay in receiving the Irving Place deal fee did not amount to a "red flag[ ]." *Barrett* v. *PJT Partners Inc.*, No. 16-CV-2841, 2017 WL 3995606, at *9 (S.D.N.Y. Sept. 8, 2017). As the Court noted, "a number of competing inferences are possible." *Id.*

As to Caspersen's personal trading, the Complaint offers only the allegation "on information and belief," that Caspersen sometimes used work electronic devices to place or monitor his trades. R35 ¶ 26. In a fraud case such as this one, allegations "on information and belief" are entitled to no weight.[20] Moreover, the purported fact that Caspersen sometimes used a work computer for personal trading does not mean that Park Hill was aware of those trades. Nor is Caspersen's trading itself alleged to be illegal. Park Hill was not obliged to spy on Caspersen's electronic devices, and to investigate his legal personal trading, to infer that he was prone to commit fraud.

As to Caspersen's drinking, the allegation is that he sometimes returned to the office for meetings after drinking elsewhere. R35 ¶ 27. There is no allegation that anyone he met with at Park Hill knew that he had been drinking—much less that they knew that he drank to excess habitually.

Because Plaintiffs fail to allege that Park Hill or PJT knew it was a victim of embezzlement, or of Caspersen's personal trading, or his drinking habits,

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[20] *Nat'l Westminster Bank USA* v. *Weksel*, 124 A.D.2d 144, 149 (1st Dep't 1987) (applying CPLR 3016(b) "[w]here liability for fraud is to be extended beyond the principal actors, to those . . . not participants in the fraudulent scheme"); *Facebook, Inc.* v. *DLA Piper LLP (US)*, 134 A.D.3d 610, 615 (1st Dep't 2015) ("Statements made in pleadings upon information and belief are not sufficient to establish the necessary quantum of proof to sustain allegations of fraud.").

Plaintiffs fail to allege that Park Hill or PJT had reason to know that Caspersen had a propensity to commit fraud.

2. Excessive Drinking and Personal Securities Trading Do Not Indicate a Propensity to Commit Fraud.

The overbreadth of Plaintiffs' theory is further illustrated by the disconnect between drinking and personal securities trading, on the one hand, and a propensity for fraud, on the other. Moore Br. 5–6, 38–39. The Complaint nowhere explains how drinking and personal securities trading indicate a propensity to commit fraud. Many people drink or trade securities without ever committing fraud. If this Court endorses Plaintiffs' theory that knowledge of drinking or personal securities trading are sufficient to hold an employer liable for a massive fraud committed by a rogue employee, then employers may be quicker to fire such persons. But there is no evidence that purging such persons is an effective means to protect the public from fraudulent schemes like Caspersen's.

Rather, this Court should affirm the Commercial Division's holding (R19) that drinking and personal securities trading are not indicative of a propensity to commit fraud. A "propensity" is "a natural tendency to behave in a *particular way*" and "the fact that a person is prone to a *specific type of bad behavior*." Black's Law Dictionary (11th ed. 2019) (emphasis added). As this Court held in *Brandy B.*, to allege knowledge of a propensity, plaintiff must allege "sufficiently specific knowledge" of "prior conduct *similar to the unanticipated*

injury-causing act." 15 N.Y.3d at 302 (emphasis added). On the facts of *Brandy B.*, for example, this Court held that the student's prior acts of "exposing himself and masturbating in public" were not sufficiently similar to sexual assault. *Id.* at 300–01. Likewise, the purported vices of drinking and personal securities trading are in no way "similar" to fraud.[21]

II. The First Department Correctly Held That Park Hill and PJT Owed No Duty to Plaintiffs.

The First Department dismissed Plaintiffs' negligent supervision claim for a second and independent reason: Park Hill and PJT had no relationship with Plaintiffs and thus owed them no duty. R240. In short, Plaintiffs were not "customers of defendants." *Id.*

Given the nature of Park Hill's and PJT's business, which offers advisory professional services to fee-paying clients, and the underlying tort of a fraud committed by Caspersen as a rogue employee, the First Department was right to limit Park Hill and PJT's potential duty of supervision to "customers." That is the only class of potential plaintiffs that has any relationship with Park Hill and

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[21] *See also, e.g.*, *Nouel*, 112 A.D.3d at 494 (insubordination and reckless driving insufficient to allege employer was aware of his propensity for sexual assault); *Milosevic* v. *O'Donnell*, 89 A.D.3d 628, 629 (1st Dep't 2011) ("culture" of alcohol use at company events insufficient to show that employer "was aware of the [employee's] violent propensities when intoxicated or of the possibility of an assault"); *Steinborn* v. *Himmel*, 9 A.D.3d 531, 534 (3d Dep't 2004) (allegations that employee improperly used alcohol and cigarettes was insufficient to suggest propensity to commit sexual assault).

PJT, that confers any benefit on them, or that is known to them. The requirement of a special relationship is supported, independently and jointly, by the facts that Plaintiffs seek to impose liability for a third-party intentional tort leading to indeterminate liability and for mere economic harm, as opposed to bodily injury or property damage.

Plaintiffs ask this Court to expand substantially the class of potential plaintiffs owed a duty to all so-called "potential" or "prospective" customers who encounter a rogue employee in his "capacity as an employee." Moore Br. 11. That test is unprecedented, overbroad, and unworkable. These phrases have no established meaning in negligent supervision case law, and Plaintiffs do not define them. What is clear is that this proposed test has nothing to do with any relationship between plaintiff and defendant. According to Plaintiffs, if an employer allows an employee to conduct business over the phone or email, the employer is liable to anyone that the employee might defraud through such communications—even though the employee is acting outside the scope of employment, is not furthering the employer's business, and lacks an appearance of authority to act on behalf of the employer. Moore Br. 15–20. That amounts to "unlimited liability to an indeterminate class of persons," which this Court has consistently refused to impose in tort. *532 Madison Ave. Gourmet Foods, Inc.* v. *Finlandia Ctr., Inc.*, 96 N.Y.2d 280, 289–92 (2001).

Worse, Plaintiffs are asking for an advisory opinion because their Complaint fails their own test. Quite simply, the Complaint does not allege that Plaintiffs were a "potential" or "prospective" customer of Park Hill or PJT, or that they encountered Caspersen in his "capacity as an employee." Indeed, either conclusion would be contrary to the First Department's now-final holdings regarding Plaintiffs' *respondeat superior* and apparent authority claims.

A. The First Department Correctly Limited Park Hill and PJT's Duty of Supervision to "Customers."

"As [this Court has] many times noted, foreseeability of harm does not define duty." *Finlandia*, 96 N.Y.2d at 289 (citing *Pulka* v. *Edelman*, 40 N.Y.2d 781 (1976)). "Absent a duty running directly to the injured person there can be no liability in damages, however careless the conduct or foreseeable the harm." *Id.* "The injured party must show that defendant owed not merely a general duty to society but a specific duty to him or her." *Hamilton*, 96 N.Y.2d at 233. "This restriction is necessary to avoid exposing defendants to unlimited liability to an indeterminate class of persons conceivably injured by any negligence in a defendant's act." *Finlandia*, 96 N.Y.2d at 289. To "fix the duty" is a "legal question for the courts." *Id.* at 288 (quotation omitted).

The First Department's limitation of the scope of Park Hill and PJT's potential duty of supervision in this case to their "customers" (R240) is well justified by, among other factors, Caspersen's underlying intentional tort of fraud,

the purely economic nature of the alleged injury, and the nature of Park Hill and PJT's business and their lack of any relationship to Plaintiffs.

1. A Duty to Prevent a Third Party From Committing an Intentional Tort Requires a Special Relationship.

Caspersen intentionally defrauded Plaintiffs. As the case comes to this Court, it is undisputed that he did so outside the scope of his employment; not in furtherance of Park Hill and PJT's business, but rather for his own selfish reasons; and without any appearance of authority to act on their behalf. *Supra*, pp. 20–21. Plaintiffs seek to impose a negligence-based duty on them to have prevented this "rogue" employee fraud.

The potential class of plaintiffs that could be defrauded by an employee who is acting outside the scope of his employment, for his own reasons, and without any apparent authority, is vast. That type of tort presents the specter of "liability in an indeterminate amount for an indeterminate time to an indeterminate class." *Credit All. Corp.* v. *Arthur Andersen & Co.*, 65 N.Y.2d 536, 551 (1985) (quoting *Ultramares Corp.* v. *Touche*, 255 N.Y. 170, 179 (1931) (Cardozo, J.)).

For good reason, in several circumstances, this Court has declined to recognize any duty to prevent others from committing intentional torts. For example, in *Eiseman*, 70 N.Y.2d 175, this Court held that a state university had no duty to protect other students, who were raped and/or murdered, from an ex-

offender the university admitted as a student. *Id.* at 189–92. And in *Hamilton*, this Court held that handgun manufacturers have no duty to those killed or injured by gun violence. 96 N.Y.2d 222.

Where this Court has recognized a duty to protect others from intentional torts committed by third parties, the duty has been limited to plaintiffs with a "special relationship" with defendant. *Finlandia*, 96 N.Y.2d at 289 (collecting cases and summarizing their holdings as requiring a "special relationship"). For example, in *Waters* v. *New York City Housing Authority*, 69 N.Y.2d 225 (1987), this Court held that a landlord's duty to protect others from crimes committed on its property by third parties is limited to plaintiffs with a "connection to the premises" (such as tenants and invitees) and does not extend to "members of the public at large." *Id.* at 229–31.

Consistent with these cases, a plaintiff alleging that a defendant was negligent in supervising a rogue employee who commits an intentional tort must allege a special relationship with that defendant. *See Finlandia*, 96 N.Y.2d at 289. As this Court recognized in *D'Amico* v. *Christie*, 71 N.Y.2d 76 (1987), a negligent supervision case, "[a] defendant generally has no duty to control the conduct of third persons so as to prevent them from harming others, even where as a practical matter defendant can exercise such control." *Id.* at 88. Although this Court has not yet directly held that the torts of negligent retention and supervision invariably

require a special relationship, every such case that this Court has allowed to proceed did involve such a relationship. *See, e.g.*, *Haddock*, 75 N.Y.2d 478 (plaintiff was invitee of defendant); *Hall*, 240 N.Y. 486 (plaintiff was tenant of defendant); *Hogle*, 199 N.Y. 388 (plaintiff was neighbor and lessee of defendant).

The First and Second Departments have each limited liability for the tort of negligent supervision based on the relationship between plaintiff and defendant. Specifically, the First Department held that a "special duty" is required, while the Second Department has held that a "client" or "privity" relationship is required. *Heffernan* v. *Marine Midland Bank*, 267 A.D.2d 83, 84 (1st Dep't 1999); *Gottlieb* v. *Sullivan & Cromwell*, 203 A.D.2d 241, 241–42 (2d Dep't 1994).

In *Gottlieb*, law firm employees misappropriated client confidential information and tipped third parties who engaged in insider trading. 203 A.D.2d at 241. Plaintiff traded contemporaneously with the insider traders. *Id.* *Gottlieb* held that the law firm's duty of supervision ran only to the specific client whose information was misappropriated. *Id.* Contrary to Plaintiffs' arguments here, *Gottlieb* did *not* hold that the firm would have been liable to contemporaneous traders who "happened to be a current client" of the firm, or suggest that the duty could be extended to contemporaneous traders who were "prospective" clients of the firm. Moore Br. 28–30. For a full-service law firm like Sullivan & Cromwell, a duty to "prospective" clients would effectively be a duty to the whole world.

Heffernan, like this case, involved a rogue employee who defrauded his family and friends with fictitious instruments promising a "risk-free" double-digit-interest rate. R89; 267 A.D.2d at 84. The First Department held that plaintiffs, who had no relationship with defendant bank other than through the rogue employee, failed to allege a "special duty running from the bank to them." 267 A.D.2d at 84. Unable to distinguish *Heffernan*, Plaintiffs are forced to say that it was "wrongly decided." Moore Br. 30 n.5.

Garcia v. *Duffy*, 492 So.2d 435 (Fla. Dist. Ct. App. 1986), cited by Plaintiffs (Moore Br. 31), also recognizes the need for a special relationship for negligent supervision liability. It held that "[o]nly when an employer has somehow been responsible for bringing a third person into contact with an employee . . . should the law impose liability on the employer." *Id.* at 439. Park Hill did not bring Plaintiffs together with Caspersen. Caspersen's personal friendship with Plaintiffs' investment manager brought them together.[22]

[22] *See also Keller* v. *Koca*, 111 P.3d 445, 447 (Colo. 2005) (Moore Br. 31) (plaintiff was family friend of employee); *Bennett* v. *Godfather's Pizza, Inc.*, 570 So.2d 1351, 1353 (Fla. Dist. Ct. App. 1990) (declining to impose liability for negligent supervision where plaintiff and employee "were together for purely social reasons").

2. A Duty to Avoid the Negligent Infliction of Economic Harm Requires a Special Relationship.

The requirement of a special relationship is further supported by Plaintiffs' allegations of only economic harm, rather than bodily injury or property damage. The vast majority of negligent supervision claims involve bodily injury, such as murders, assaults, and batteries,[23] rapes and sexual assaults,[24] motor

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[23] *Hall*, 240 N.Y. at 489 (Moore Br. 11) (building superintendent assaulted tenants and guests); *Sanchez*, 99 N.Y.2d at 249–50 (Moore Br. 39) (fight at prison facility); *Gonzalez* v. *City of New York*, 133 A.D.3d 65, 66 (1st Dep't 2015) (Moore Br. 35) (murder-suicide); *Selmani* v. *City of New York*, 116 A.D.3d 943, 943 (2d Dep't 2014) (Moore Br. 30) (bar fight); *Detone* v. *Bullit Courier Serv.*, 140 A.D.2d 278, 279 (1st Dep't 1988) (Moore Br. 31 n.6) (fight after bicycle accident); *Saunders* v. *Taylor*, No. 121087/02, 2003 WL 24002776, at *1 (Sup. Ct. N.Y. Cty. 2003) (Moore Br. 30–31) (battery); *Fernandez* v. *Rustic Inn, Inc.*, 60 A.D.3d 893, 894–95 (2d Dep't 2009) (Moore Br. 14) (bar fight); *Garcia*, 492 So.2d at 437 (Moore Br. 31) (battery).

[24] *Haddock*, 75 N.Y.2d at 480 (Moore Br. 11); *Kenneth R.*, 229 A.D.2d at 161 (Moore Br. 3); *Sheila C.* v. *Povich*, 11 A.D.3d 120 (1st Dep't 2004) (Moore Br. 16); *Keller*, 111 P.3d at 447, 450 (Moore Br. 31); *Chesterman* v. *Barmon*, 727 P.2d 130, 131, 132 (Or. Ct. App. 1986) (Moore Br. 32); *Ponticas* v. *K.M.S. Invs.*, 331 N.W.2d 907, 909 (Minn. 1983) (Moore Br. 22); *see also McLean* v. *Kirby Co.*, 490 N.W.2d 229 (N.D. 1992) (Moore Br. 32). *McLean* was not a negligent supervision case, but rather involved the "peculiar risk doctrine."

vehicle accidents,[25] or the accidental discharge of firearms.[26] In defining the scope of the duty of care in tort, economic losses are less important.

This Court has limited the duty to prevent economic losses in several cases. In *Finlandia*, for example, this Court held that defendants responsible for construction accidents in Midtown Manhattan owed no duty to avoid inflicting foreseeable economic losses on nearby businesses, unless those businesses suffered "personal injury or property damage." 96 N.Y.2d at 291–92. Another example is an accountant's liability for preparing financial statements, which this Court has limited to those in privity plus certain intended recipients known to the accountant. *Credit All.*, 65 N.Y.2d at 551; *Ultramares*, 255 N.Y. at 179–81.

Many scholarly authorities recognize there is no general duty to prevent economic harm and that any such liability should be limited to plaintiffs in a "special relationship."[27]

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[25] *D'Amico*, 71 N.Y.2d at 81–82 (Moore Br. 25); *Purdy* v. *Pub. Adm'r of Westchester Cnty.*, 72 N.Y.2d 1, 6 (1988) (Moore Br. 25); *Quiroz*, 96 A.D.3d at 1036 (Moore Br. 30); *Hall* v. *Werner Enters., Inc.*, No. 2:16-CV-196, 2018 WL 7117890, at *1 (S.D. Tex. Jan. 18, 2018) (Moore Br. 30); *Shafer* v. *TNT Well Serv., Inc.*, 285 P.3d 958, 961 (Wyo. 2012) (Moore Br. 33); *Lessard* v. *Coronado Paint & Decorating Ctr., Inc.*, 168 P.3d 155, 157 (N.M. Ct. App. 2007) (Moore Br. 34).

[26] *Di Cosala* v. *Kay*, 91 N.J. 159, 165 (1982) (Moore Br. 21).

[27] *See* Restatement (Third) of Torts: Liability for Economic Harm § 1(1) & cmt. c (Am. L. Inst. 2020) ("An actor has no general duty to avoid the unintentional infliction of economic loss on another" because economic losses "proliferate more easily than losses of other kinds" and are "not self-limiting" in the same

Many cases from other states hold that a duty to prevent economic harm should be limited to plaintiffs in a "special relationship." *See, e.g.*, *S. Cal. Gas Co.* v. *Superior Ct. of L.A. Cnty.*, 7 Cal. 5th 391, 403 (2019) (citing *Finlandia and* the Restatement (Third) of Torts) (requiring special relationship for negligence claim alleging only economic loss, which the court describes as the "dominant view"); *id.* at 403–04 (collecting cases from the District of Columbia, Illinois, Iowa, Massachusetts, and West Virginia); *Lawrence* v. *O & G Indus., Inc.*, 319 Conn. 641, 643–45 (2015) (no duty for economic loss "in the absence of privity of contract, personal injury, or property damage"); *id.* at 661–64 (collecting cases from Georgia, Nevada, Ohio, Pennsylvania, Tennessee, and Texas); *Balfour Beatty Infrastructure, Inc.* v. *Rummel Klepper & Kahl, LLP*, 451 Md. 600, 612 (2017) (no "tort liability to negligence that causes purely economic harm in the absence of privity, physical injury, or risk of physical injury").

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way as physical injury); *see also* W. Page Keeton et al., Prosser & Keeton on the Law of Torts § 92, at 657 (5th ed. 1984) ("Generally speaking, there is no general duty to exercise reasonable care to avoid intangible economic loss or losses to others that do not arise from tangible physical harm to persons and tangible things."); Dan B. Dobbs et al., The Law of Torts § 607 (2d ed.) ("[C]ourts very often reject liability for pure economic loss caused by negligence. In doing so, they often refer to the economic loss rule, mainly meaning that defendants are not liable for mere negligence that causes pure economic harm.").

Some states go even further, refusing to recognize *any* liability for negligent supervision that results only in economic loss, *even if a special relationship exists*. *See Semrad* v. *Edina Realty, Inc.*, 493 N.W.2d 528, 533–34 (Minn. 1992); *see also Midwest Knitting Mills, Inc.* v. *United States*, 950 F.2d 1295, 1300 (7th Cir. 1991) ("[T]here is now substantial evidence that Wisconsin would decline *in all circumstances* to allow a negligence suit for the recovery of only economic damages . . . ." (emphasis added)). This Court need not reach that issue in this case, since Plaintiffs fail to allege a special relationship.

3. The Nature of Park Hill and PJT's Business and Caspersen's Job Further Supports Limiting Park Hill and PJT's Duty to Fee-Paying Clients.

Additional considerations support limiting Park Hill and PJT's duty to supervise Caspersen to their fee-paying clients. PJT is an investment bank focused on advisory services, and Caspersen's job description was limited to advisory services offered to a specific type of client (private equity fund managers) interested in a specific type of transaction (fund recap). *Supra*, pp. 8–9. Caspersen's job did not involve managing other people's money as a fiduciary or interacting with retail investors at all. *Id.* Caspersen's legitimate job thus involved interaction with a defined group of highly sophisticated counterparties.[28] These

[28] Plaintiffs' arguments regarding Caspersen's access to a work phone and work email account (*see* Moore Br. 8, 15, 17, 19–20, 36) are in no way unique to Park Hill's business and would apply to most modern office workers. For good

contextual factors further support limiting Park Hill and PJT's duty to their customers.

At least in this context, a limitation to existing customers is not "arbitrary" (Moore Br. 18). Existing customers are known to the employer. They confer benefits on it. It can negotiate its liability to them by contract. And they pay, indirectly, the cost of the supervision that it undertakes. None of these factors is present with a "potential" or "prospective" customer. Instead, a "prospective" customer will often be a stranger. Employers are not fairly charged with protecting such persons from intentional torts. That is particularly the case when—as here—the plaintiff is a personal associate of the rogue employee. *Supra*, n.22.

Plaintiffs devote considerable attention to hypothetical cases involving assaults perpetrated by retail employees, delivery persons, and traveling salespersons, and frauds perpetrated by call center workers. Moore Br. 15, 17–20. These businesses are fundamentally different from Park Hill's. With the exception of a call center fraud, the injuries in question are bodily rather than economic,

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reason, courts have generally declined to impose liability based on the use of work phones or work emails. *See VFP Invs. I LLC* v. *Foot Locker Inc.*, No. 152153/15, 2015 WL 6499513 (Sup. Ct. N.Y. Cty. Oct. 22, 2015) (dismissing negligent supervision claim where rogue employees used company email accounts to falsely confirm fabricated invoices), *aff'd*, 147 A.D.3d 491 (1st Dep't 2017); *Delfino* v. *Agilent Techs., Inc.*, 145 Cal. App. 4th 790, 816 (Ct. App. 2006) (dismissing negligent supervision claim where employee used a company computer to send threatening messages online).

which is significant to the scope of duty. *See supra*, pp. 46–47. This Court has addressed the problem of premises liability, such as for retail businesses, many times. The landlord's duty is to secure its premises against violent crime, not financial frauds. This Court has not yet addressed the cases of delivery persons, traveling salespersons, or call center workers, and this case presents no opportunity to do so.[29]

B. The Complaint Fails to Allege That Plaintiffs Were Customers.

Plaintiffs do not allege that they were a "customer" of Park Hill or PJT. The only contact that Plaintiffs arguably allege with Park Hill or PJT is their contact with Caspersen himself regarding his fraudulent scheme. *Supra*, pp. 13–14. The mere fact Plaintiffs were defrauded by a rogue employee is insufficient to transform them from a stranger owed no duty into a "customer"

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[29] *Ponticas* refers in dicta to a duty to "members of the public," although on its facts, the plaintiff was a tenant of a residential apartment owned by defendant. 331 N.W.2d at 911 & n.5 (Moore Br. 22 & n.3). The language in *Ponticas* addressing an assault by a delivery person is also dicta. In that hypothetical, one factor that *Ponticas* highlighted was whether the delivery person "gain[s] access to a dwelling by virtue of their employment." *Id.* at 911. That rationale would appear to support a duty to customers, who allow the delivery person into their home because they are expecting a specific delivery from the defendant-employer. If, however, a criminal who happens to work as a delivery person commits a home invasion against a non-customer who was not expecting a delivery from the employer, it is hard to understand why the employer should be liable—even if the criminal uses a false delivery ruse. The criminal's choice of ruse is outside the employer's control, and the criminal could have used the same ruse even if not employed by the defendant.

owed a duty. *See Waters*, 69 N.Y.2d at 230–31 (no duty where "injured plaintiff had no association with the premises *independent of the crime itself*" (emphasis added)); *Heffernan*, 267 A.D.2d 83 (no duty where plaintiffs had no relationship with bank other than investing in rogue employee's Ponzi scheme).

Even if this Court were to draw the scope of duty somewhat broader than the First Department, it would make no difference because the Complaint alleges *no relationship* between Plaintiffs and Park Hill or PJT.

C. Plaintiffs' Proposed Alternative Test Should Be Rejected.

1. Plaintiffs' Test Is Unsupported by Precedent.

Unable to establish a special relationship, Plaintiffs ask this Court to hold that Park Hill and PJT owed a duty of supervision to all so-called "potential" and "prospective" customers who interacted with Caspersen in his "capacity as an employee." R170; Moore Br. 15–19, 27. This test is fundamentally flawed because it is not based on any actual relationship between plaintiff and defendant and because it would impose limitless liability to an indeterminate class for the economic harms inflicted by rogue employee torts.

No precedent supports this test. While Plaintiffs have found the stray phrase "potential customer" in several out-of-state cases (Moore Br. 31–34), none adopts this language as the test or holds that an employer owes a duty to all

"potential" or "prospective" customers.[30] None defines what it means to be a "potential" or "prospective" customer. And none supports a duty owed to any member of the general public that interacts with a rogue employee in his "capacity as an employee."[31] As for the opinions that Plaintiffs say "go[ ] even further" (Moore Br. 30–31 & n.6), none contains analysis regarding the class of plaintiffs owed a duty of supervision; the issue simply is not addressed.[32]

The existing causes of action for *respondeat superior* and apparent authority—while unavailing for Plaintiffs in this case—sufficiently protect persons (including potential and prospective customers) interacting with employees in their

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[30] *Garcia*, 492 So.2d at 437 (Moore Br. 31) (plaintiff was a passerby and was not a potential customer of defendant yacht delivery business); *Keller*, 111 P.3d at 447 (Moore Br. 31) (plaintiff was family friend of employee and not a potential customer of defendant dry cleaner); *Chesterman*, 727 P.2d at 131 (Moore Br. 32) (employee broke into plaintiff's home and was not a potential customer of defendant construction company). *McLean*, 490 N.W.2d at 232 (Moore Br. 32) (regarding "peculiar risk" doctrine and not negligent supervision liability).

[31] *Dolin* v. *Contemporary Fin. Sols. Inc.*, 622 F. Supp. 2d 1077 (D. Colo. 2009) (Moore Br. 33), said that plaintiffs there came into contact with the employee "because of his capacity as a broker." It is not clear what that phrase means, and *Dolin* did not purport to adopt it as a general test for duty. It appears to refer to the fact that the employee's job there was to recommend investments. *See infra*, pp. 54–55 (discussing facts of *Dolin*).

[32] *Selmani*, 116 A.D.3d at 943 (Moore Br. 30); *Quiroz*, 96 A.D.3d at 1036 (same); *Saunders*, 2003 WL 24002776, at *1 (Moore Br. 30–31) (plaintiff was a former employee of defendant); *Gray* v. *Schenectady City Sch. Dist.*, 86 A.D.3d 771 (3d Dep't 2011) (Moore Br. 31 n.6) (plaintiff was employee of defendant); *Detone*, 140 A.D.2d 278 (Moore Br. 31 n.6); *Hall*, 2018 WL 7117890 (Moore Br. 34).

"capacity as employees."[33] Plaintiffs say their proposed extension of negligent supervision liability is "gap-filling" (Moore Br. 27), but the purported "gap" of intentional torts by rogue employees does not need "filling." When a rogue employee assaults or defrauds persons with no relationship to the employer, outside the scope of his employment, not in furtherance of the employer's business, and without apparent authority, the connection between the tort and the employment relationship is simply too attenuated.

Plaintiffs cite only one case that imposed negligent supervision liability for a fraud perpetrated by a rogue employee. *Dolin*, 622 F. Supp. 2d 1077 (Moore Br. 33). *Dolin* is unpersuasive. It applied Colorado law, not New York law. Under Colorado law, the "prime factor in the duty analysis" is "foreseeability of harm." *Id.* at 1083. New York law is otherwise. *Finlandia,* 96 N.Y.2d at 289.

The facts of *Dolin* were also much different. The employee's job was to recommend investments to retail investors. *Dolin*, 622 F. Supp. 2d at 1079–83. His employer (CFS) was aware that he was selling the dubious "Note Contracts" in question. *Id.* at 1080. CFS had been contacted by a state securities regulator, had

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[33] *McBride* v. *County of Schenectady*, 110 A.D.2d 1000 (3d Dep't 1985), which Plaintiffs cite for the proposition that an employer is liable for a "salesperson who 'could operate independently and call upon prospective customers directly to obtain business'" (Moore Br. 28 (quoting *McBride*, 110 A.D.2d at 1001)), is a *respondeat superior* case, not a negligent supervision case.

been warned that the employee was selling the Note Contracts, and had falsely reassured the regulator that the employee would desist—all prior to plaintiffs' investments. *Id.* In contrast, Caspersen's job was limited to offering a specific type of advisory service to a specific kind of client. *Supra*, pp. 8–9. Park Hill had not been warned of Caspersen's fraudulent conduct and had no knowledge of it.

2. Plaintiffs' Test Is Overbroad and Unworkable.

A duty owed to all "potential" and "prospective" customers is far too broad. "Potential" or "prospective" customers are not actual customers; they are hypothetical customers. They do not confer benefits on the employer; the employer cannot limit its liability to them by contract; and they will often be unknown to the employer. For many businesses, nearly anyone could be a potential customer. This type of liability "to an indeterminate class" is anathema in New York. *Credit All.*, 65 N.Y.2d at 548.

Recognizing the overbreadth of a "potential" or "prospective" customer standard, Plaintiffs add the additional limitation that the employee interact with the plaintiff "in" or "because of" his "capacity as an employee." Moore Br. 2, 13, 15–20, 27, 30. This limitation fails to solve the overbreadth problem. As with a potential or prospective customer, this phrase has no established meaning in negligent supervision case law. Despite repeating this phrase many times, Plaintiffs never explain what it means.

A capacity-as-an-employee element does not fit with the tort of negligent supervision. To the contrary, that tort requires that an employee be acting outside the scope of employment. *Doe* v. *Guthrie Clinic, Ltd.*, 22 N.Y.3d 480, 485 (2014); *Gray*, 86 A.D.3d at 773–74; Moore Br. 16. An employee cannot act in his "capacity as employee," while acting outside his "scope of employment."

Plaintiffs suggest that an employee would not be acting in his "capacity as an employee"—and that the employer could thus avoid negligent supervision liability—if the employer required the employee to operate on-premises and the tort was committed off-premises. Moore Br. 19–20, 22–23. Plaintiffs cite no case for this; it is just something that they made up. This example appears to confirm that "capacity as an employee" is just a synonym for "scope of employment," and thus nonsensical. In any event, this proposed safe harbor would be of no benefit to many modern businesses that cannot practically be operated on-premises. For the typical modern office worker, Plaintiffs' test would impose insurer-like liability.

3. The Restatement Provides No Support to Plaintiffs.

Plaintiffs rely heavily on Section 317 of the Restatement (Second) of Torts. Moore Br. 35–37. This Court has never adopted Section 317 as controlling New York law. Nor has this Court ever applied Section 317 in a case involving

purely economic harm. And for several reasons, Section 317 provides no support to Plaintiffs.

First, by its plain language, Section 317 applies to claims involving "bodily harm." Restatement (Second) of Torts § 317 (Am. L. Inst. 1965). So too do the cases that cite Section 317.[34] This is further reinforced by Section 315, which, in setting forth the general rule that Section 317 applies, refers to "physical harm to another." *Id.* § 315. Plaintiffs' claim involves economic harm, not bodily harm, so Section 317 does not apply. *See Semrad*, 493 N.W.2d at 534 (Sections 315 and 317 do not apply to claims involving economic loss).[35]

Second, Section 317 requires that the employer "knows or should know the necessity" of exercising control. *See* Restatement (Second) of Torts § 317(b)(ii). This refers to the employer's knowledge of the employee's propensity, *Fernandez*, 60 A.D.3d at 897, which Plaintiffs fail to allege.

Third, Caspersen's fraud did not involve Park Hill or PJT's "premises" or "chattel" within the meaning of Section 317. *See* Restatement (Second) of Torts § 317(a)(i), (ii). Section 317 contemplates the use of a

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[34] *See D'Amico*, 71 N.Y.2d at 81–82 (Moore Br. 35) (MVA); *Gonzalez*, 133 A.D.3d at 66 (Moore Br. 35) (fatal shooting); *Kenneth R.*, 229 A.D.2d at 161 (Moore Br. 35) (sexual assault); *Ehrens* v. *Lutheran Church*, 385 F.3d 232, 234 (2d Cir. 2004) (Moore Br. 36) (sexual assault).

[35] The same rule applies under the newer Restatement. *See* Restatement (Third) of Torts: Liability for Economic Harm §§ 1(1) cmt. a.

dangerous chattel, such as a motored vehicle or a firearm. *See, e.g.*, *Shafer*, 285 P.3d at 966 (motored vehicle). Plaintiffs cite no authority extending Section 317 to a situation where the only "chattel" used by the employee was a work telephone or work email account.

D. Plaintiffs Fail to Pass Their Own Test.

The Complaint fails to allege that Plaintiffs were a "potential" or "prospective" customer of Park Hill or PJT, or that they interacted with Caspersen in his "capacity as an employee." As a result, Plaintiffs in effect seek an impermissible "advisory opinion" from this Court, adopting a standard that they cannot satisfy. *N.Y. Pub. Int. Rsch. Grp.* v. *Carey*, 42 N.Y.2d 527, 530–31 (1977).

The Complaint nowhere alleges that Plaintiffs were "potential" or "prospective" customers of Park Hill or PJT. In their brief, Plaintiffs refer to a "customer walking in the door for the very first time" (Moore Br. 11) who "just happen[s] not yet to have completed a transaction" (Moore Br. 1–2) because it had not "close[d]" (Moore Br. 13) or "consummated" (*id.* at 14). That is not Plaintiffs. Plaintiffs do not allege that they were on a cusp of becoming a fee-paying client (like Irving Place) or that there was a pending transaction waiting to close. Rather, Plaintiffs had no relationship with Park Hill or PJT at all.

Nor does the Complaint allege that Plaintiffs interacted with Caspersen "as an employee," whatever that means. As the First Department held

in dismissing Plaintiffs' *respondeat superior* and apparent authority claims, the Complaint failed to allege that Caspersen's fraud furthered Park Hill and PJT's business and was committed with their apparent authority. R239–40. In other words, this transaction was not within Caspersen's job description. *Supra*, pp. 8–9. Plaintiffs' attempt to assert that they have adequately alleged that they interacted with Caspersen "as an employee" is barred by those now-final holdings. In reality, Plaintiffs did not encounter Caspersen "because" he was an employee; they encountered him because their investment manager was his friend. *Supra*, p. 11.

Conclusion

This Court should affirm the First Department's dismissal of Plaintiffs' negligent supervision claim against Park Hill and PJT.

Dated: New York, New York
March 3, 2021

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NEW YORK STATE COURT OF APPEALS
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Dated: March 3, 2021

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