To Be Argued By:
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Court of Appeals

STATE OF NEW YORK

THE MOORE CHARITABLE FOUNDATION and KENDALL JMAC, LLC,

Plaintiffs-Appellants,

—against—

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

Defendants-Respondents,

—against—

ANDREW W.W. CASPERSEN,

Defendant.

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CORPORATE DISCLOSURE STATEMENT PURSUANT TO 22 NYCRR RULE 500.1(F)

Plaintiff-Appellant Moore Charitable Foundation is a 501(c)(3) organization with no corporate parent, subsidiary, or publicly traded affiliate. Plaintiff-Appellant Kendall JMAC, LLC is a Delaware Limited Liability Company with no corporate parent, subsidiary, or publicly traded affiliate.

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PRELIMINARY STATEMENT

Andrew Caspersen defrauded Plaintiffs-Appellants out of $25 million, and used the trappings of his employment with Defendants-Respondents to do it. That much is undisputed; Caspersen served several years in jail for it.

The issue before this Court is whether Plaintiffs have any right to bring a negligent supervision claim against Defendants for turning a blind eye to Caspersen's dangerous propensity to commit fraud. The Appellate Division held that Plaintiffs have no right to bring such a claim because "the complaint . . . fails to allege that plaintiffs were ever customers of defendants, which is fatal to a claim of negligent supervision." Put another way, the Appellate Division held that Defendants owed Plaintiffs no duty to exercise reasonable care in supervising Caspersen, solely because Plaintiffs had not previously completed a transaction with Defendants. This Court should overturn that erroneous and dangerous decision.

In New York, "[t]he existence and scope of a tortfeasor's duty is, of course, a legal question for the courts." *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 288 (2001). Applying the *532 Madison Avenue* test, there is no principled basis for drawing the line to include current and former customers within an employer's duty of non-negligent supervision, while excluding prospective customers who just happen not yet to have completed a transaction

with the employer. All the relevant factors—the reasonable expectations of parties and society, and considerations of fairness and sound public policy—support treating prospective customers the same as current or former customers. What's more, confirming that an employer's duty of non-negligent supervision of its employees runs to prospective customers would be in line with caselaw both within and outside of New York.

In fact, not only would recognizing such a duty be broadly consistent with negligence law nationwide, but it would be a particularly modest duty compared to other options. After all, lower court cases in New York and cases in other jurisdictions have permitted negligent supervision lawsuits brought by plaintiffs who were not even prospective customers of the defendant employer, but complete strangers. *See infra*, pp. 30-31 & n.6, 33-35. Consistent with that, the Restatement (Second) of Torts, which this Court has discussed with approval, offers a multi-factor test for duty that can impose significantly broader liability on employers than the test Plaintiffs advocate. *See infra*, pp. 35-37. The Court need not go that far to decide this appeal. Rather, reversal is required so long as the Court holds that an employer's duty to non-negligently supervise its employees runs to current, former, *and prospective* customers, when those customers interacted with the tortfeasor employee because of his or her capacity as an employee.

The Appellate Division also held that Plaintiffs' negligent supervision claim failed because Plaintiffs' complaint "does not allege that defendants were aware of the facts that plaintiff contends would have put them on notice of the employee's criminal propensity," but that holding misreads the Complaint. As explained in detail below, the Complaint alleges more than enough facts from which the reasonable inference can be drawn that PJT "knew or should have known of [Caspersen's] propensity for the conduct which caused the injury." *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159, 161 (2d Dep't 1997). That is certainly so at the motion to dismiss stage, when "the court must afford the pleadings a liberal construction, take the allegations of the complaint as true *and provide plaintiff the benefit of every possible inference.*" *EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 19 (2005) (emphasis added).

QUESTIONS PRESENTED

Question 1 Did the First Department err in announcing a new common law rule, unique in the country, that as a matter of law a company owes no duty under the common law tort of negligent supervision to a prospective first-time customer who was the kind of customer the tortfeasor employee was authorized to recruit for the company, even though the company *would* have liability to the victim on otherwise identical facts if the victim happened to have transacted business with the company in the past?

Question 2 Did the Appellate Division err in finding that the Complaint "does not allege that defendants were aware of the facts that plaintiff contends would have put them on notice of the employee's criminal propensity," when the Complaint expressly and repeatedly alleged that defendants "knew or should have known" those facts?

STATEMENT OF JURISDICTION

The Court has jurisdiction over the appeal pursuant to CPLR 5602(a)(1)(i) because the underlying action originated in the Supreme Court of the State of New York, County of New York, and the decision of the Appellate Division is a final determination that disposes of the matter as to Respondents. *See We're Assoc. Co. v. Cohen, Stracher & Bloom*, 65 N.Y.2d 148, 149 n.1 (1985) ("The order from which our permission to appeal was sought is final as to the individual defendants, and therefore the appeal is properly before us, because the action was finally determined as to them . . . ."); *see also Barile v. Kavanaugh*, 67 N.Y.2d 392, 395 n.2 (1986) (same).

STATEMENT OF THE CASE

A. Factual Background

1. PJT negligently permitted its employee Caspersen to drink to excess and gamble on stocks while at work.

Defendant Park Hill Group, LLC hired Andrew Caspersen as a Managing Director in its "secondaries" business in February 2013. [Record on Appeal ("R") 32 ¶ 17.] Caspersen's charge was to facilitate the purchase, sale, and restructuring of ownership interests in certain kinds of investment vehicles, such as private equity funds, as the head of Park Hill's fund recapitalization (or "fund recap") practice, a role he continued after Park Hill began operating as a division of Defendant PJT Partners (together, "PJT"). [R32 ¶¶ 17-19.] To promote Caspersen's success, PJT gave Caspersen broad authority to solicit potential clients, to speak on public panels focused on secondary market investments, and to make cold calls regarding potential deals. [R33 ¶¶ 20-21.] Caspersen was usually the sole point of contact for PJT's prospective clients and for potential participants in his transactions, and handled transactions by himself. [R33 ¶¶ 20, 22.] PJT's long leash for Caspersen was best illustrated by the fact that his direct supervisor worked hundreds of miles away. [R35 ¶ 28.]

Caspersen took full advantage of PJT's extremely lax supervision. While at work, he excessively gambled on high-risk options in his own trading accounts. [R34-35 ¶¶ 26.] Caspersen used PJT-issued devices to trade (and lose) millions of

dollars on risky bets during business hours, obsessively checking his positions. [*Id*.] Caspersen also drank heavily at work, routinely consuming ten or more alcoholic beverages in a day, mostly during business hours, and attending meetings while inebriated. [R35 ¶ 27.] He effectively made no attempt to conceal his gambling and drinking habits.

Given Caspersen's behavior at work, PJT had to have known about his obsessive stock gambling and alcoholism. [*See* R34-36 ¶¶ 25-29.] In the unlikely event that PJT was not actually aware of Caspersen's blatant misconduct, it could only be due to a complete failure to exercise the bare minimum of supervision. [R36 ¶ 29.] Any responsible employer, and certainly any in the financial services industry, *should* have been aware of Caspersen's gambling and drinking during the workday. [*Id.*] Yet PJT never did a thing to stop Caspersen's misconduct. [R35-36 ¶¶ 28-29.]

2. <u>**Caspersen stole an $8.1 million fee from PJT, and PJT turned a blind eye.**</u>

Aided by PJT's lack of oversight, Caspersen used his position at PJT to fuel his disastrous gambling habit. In 2014, Caspersen structured a legitimate deal involving Irving Place Capital and persuaded a former employer of his, Coller Capital, to commit hundreds of millions of dollars to the transaction. [R36 ¶¶ 30-31.] PJT earned an $8.1 million fee on the Irving Place transaction, which became due when the transaction closed in August 2015. [R37 ¶ 33.] Normally, that fee

would have been paid directly to a PJT account, but Caspersen sent Irving Place a fake invoice (on Park Hill letterhead) that diverted the funds to Caspersen's personal account. [*Id.*] Caspersen's illicit windfall was short-lived, however, because he quickly lost it all through his risky trading. [R38 ¶ 38.]

One would assume that PJT would have asked Caspersen about the missing $8.1 million Irving Place fee shortly after the deal closed. Not so. It was not until the next month that anyone at PJT asked Caspersen where the money was. In September 2015, when finally asked, Caspersen said that PJT would not receive any of its fee until after the transaction's second, "stub" closing. [R37 ¶ 34.]

Caspersen's explanation was facially absurd. First, stub closings were rare in PJT's secondaries practice, so PJT would have known if the Irving Place deal included one (which it did not). [R37-38 ¶¶ 35-36.] Second, even had there been a stub closing, PJT still would have received the bulk of the fee following the first closing, with only the balance due after the stub closing. [R37-38 ¶ 36-37.] PJT received nothing after the original closing. Yet even when presented with Caspersen's transparently false explanation for the missing eight million dollars, PJT conducted no further investigation. [R38 ¶ 37.] Had PJT simply asked a few questions, all would have been revealed. PJT's failure even to minimally supervise Caspersen left him able to execute the fraud at the core of this appeal. [R38 ¶ 39.]

3. Caspersen defrauded the Foundation into investing in a fake transaction for his real employer.

In October 2015, Caspersen was desperate to recover the $8.1 million he had stolen from PJT and then gambled away. [R38-39 ¶¶ 40-41.] In search of a source of replacement funds, Caspersen landed on the Moore Charitable Foundation, soliciting from the Foundation (using his PJT email address) an investment in a debt security that he claimed was necessary to facilitate the closing of the Irving Place transaction. [R39 ¶ 41.] Caspersen wrapped the phony deal in all the trappings of a legitimate transaction, providing the Foundation with a Park Hill-watermarked diligence document relating to the real Irving Place transaction that he took from PJT's data room, using his PJT email account to set up the deal, and relying on his knowledge of the actual Irving Place transaction to mislead the Foundation when it conducted due diligence on the potential investment. [R39-40 ¶¶ 41-43, 46.]

Just as he had done when he diverted PJT's fee from Irving Place, Caspersen sent the Foundation wire instructions on Park Hill letterhead directing the Foundation to wire funds to an entity that was actually controlled by him. [R39 ¶ 43.] The Foundation invested $24.6 million, along with a $400,000 investment from an investment professional associated with the Foundation. [R40 ¶ 46.] Caspersen used $8.1 million of that money to replace the fee he had stolen from

PJT; $762,267 to replace additional funds he had previously stolen; and blew most of the remainder gambling on the stock market. [R40-41 ¶¶ 47-49.] Yet again, PJT failed to do anything about Caspersen's fraudulent behavior towards PJT, even though it knew or should have known that the funds he belatedly sent to PJT to replace the stolen Irving Place deal fee came from an account opened by Caspersen instead of from the real Irving Place's bank account. [R40-41 ¶ 47.]

Caspersen maintained his charade with the Foundation for a time, making quarterly interest payments pursuant to the "investment." [R42 ¶ 50.] But in March 2016, Caspersen offered the Foundation an opportunity to invest an additional $20 million. [R42 ¶ 52.] Caspersen tried to use another PJT Managing Director to convince the Foundation that this follow-on investment was legitimate, but by this time, the Foundation had uncovered the fraud. [R43-44 ¶¶ 57-58.] Caspersen was subsequently arrested, convicted, and imprisoned. [R44 ¶¶ 59-60.]

The Foundation asked PJT to return the Foundation's investment. [R44 ¶ 61.] PJT agreed to pay the Foundation, but only to the extent that PJT's insurance provider would cover such payment. [*Id.*] As a result, PJT paid the Foundation only a little over $8.6 million of the $25 million Caspersen stole, and refused to pay the remainder. [R44 ¶ 61.] The Foundation brought this action to recover the rest.

B. Procedural History

Plaintiffs filed suit in the Supreme Court, New York County, asserting claims against PJT under theories of apparent authority, negligent supervision/retention, and *respondeat superior* for its role in allowing Caspersen's fraud. [R46-49 ¶¶ 68-94.] PJT moved to dismiss those claims under CPLR 3211(a)(7) and 3016(b). [R53.] The trial court dismissed Plaintiffs' negligent supervision and *respondeat superior* claims, but allowed the apparent authority claims to proceed. [R242.] Plaintiffs appealed the dismissal, and PJT cross-appealed.

The First Department dismissed the entirety of Plaintiffs' Complaint against PJT and denied Plaintiffs' petition for reargument or leave to appeal. [R238-241.] Its ruling on Plaintiffs' negligent supervision claim rested on two flawed holdings: <u>first</u>, that PJT owed no duty to Plaintiffs because they had never been customers of PJT's, and <u>second</u>, that the Complaint failed to allege that PJT was aware of the facts that would have put it on notice of Caspersen's propensity to commit fraud. [R240.] This Court granted Plaintiffs' permission for leave to appeal the First Department's dismissal of their negligent supervision claim. [R165.]

ARGUMENT

Point I New York's Negligent Supervision Law Should Protect Prospective Customers Such As Plaintiffs

A. A Duty of Care Owed to Prospective Customers Such As Plaintiffs Easily Meets This Court's Test for Defining the Existence and Scope of a Tortfeasor's Duty.

This appeal turns on whether PJT's responsibility to supervise its employees with due care is a duty PJT owes solely to *current* or *former* customers, or whether PJT also owes the same duty to *prospective* customers such as Plaintiffs. The Appellate Division limited New York's tort of negligent supervision to cases brought by plaintiffs who already had engaged in business with the defendant in the past. [R240 ("[T]he complaint also fails to allege that plaintiffs were ever customers of defendants, which is fatal to a claim of negligent supervision.").] A proper analysis under this Court's precedents, however, demonstrates that there is no principled basis for this limitation. The law should grant equal protection from negligently-supervised employees to a customer walking in the door for the very first time.

Although the Court has addressed negligent supervision (and analogous negligent retention) claims in past cases, *see Haddock v. City of New York*, 75 N.Y.2d 478 (1990); *Hall v. Smathers*, 240 N.Y. 486 (1925), the Court has not squarely addressed the scope of employers' duties under the common law tort of

negligent supervision.[1] The Court has, however, set forth how it generally analyzes the scope of an alleged tortfeasor's duty:

> The existence and scope of a tortfeasor's duty is, of course, a legal question for the courts, which "fix the duty point by balancing factors, including the reasonable expectations of parties and society generally, the proliferation of claims, the likelihood of unlimited or insurer-like liability, disproportionate risk and reparation allocation, and public policies affecting the expansion or limitation of new channels of liability."

532 Madison Ave., 96 N.Y.2d at 288 (quoting *Hamilton v. Beretta U.S.A. Corp.*, 96 N.Y.2d 222, 232 (2001) (quoting *Palka v. Servicemaster Mgt. Servs. Corp.*, 83 N.Y.2d 579, 586 (1994))).

Applying those factors here compels the conclusion that at the very least, an employer's duty to non-negligently supervise its employees should extend to third parties interacting with those employees as prospective customers of the employer. Stated differently, an employer's duty to non-negligently supervise its employees should protect all third parties who encounter those employees because of their

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[1] New York, like many other jurisdictions, applies the same test to the torts of negligent supervision and negligent retention (and, for that matter, negligent hiring): "In instances where an employer cannot be held vicariously liable for its employee's torts, the employer can still be held liable under theories of negligent hiring, negligent retention, and negligent supervision. However, a necessary element of such causes of action is that the employer knew or should have known of the employee's propensity for the conduct which caused the injury." *Kenneth R.*, 229 A.D.2d at 161 (citing, *inter alia*, *Hall*, 240 N.Y. at 486; Restatement (Second) of Torts § 317). Negligent hiring claims address negligence in the hiring of a tortfeasor employee, while negligent retention and negligent supervision claims, which are often treated interchangeably, address negligence in supervising an employee after hiring, including negligence in failing to terminate a dangerous employee. Plaintiffs did not bring a negligent hiring claim, but did plead both negligent supervision and negligent retention. [R48-49 ¶¶ 84-94.]

capacity as employees, whether those third parties were current or former customers, or simply hoping to become customers.

1. **Prospective customers have the same reasonable expectations of care as current or former customers.**

Under the Appellate Division's opinion in this case, *current and former* customers of an employer have a reasonable expectation that the employer has exercised due care in supervising its employees. It is no less reasonable for *prospective* customers, dealing with the same employees because of their status as employees, to have the same expectation that the employer has exercised due care in supervising those same employees. A prospective customer's expectation that he is dealing with an employee whom the employer has supervised with due care does not suddenly become reasonable only after the customer closes his first transaction with the employer.

To put it another way, parties—and society generally—reasonably expect employers to supervise their employees with due care for the protection of *any* prospective customers who interact with those employees. That expectation exists precisely because those employees are the employer's charges, whether or not the prospective customers happen to have previously transacted business with the employer. Stated differently, no one expects that an employer can wash its hands of its employee's known dangerous propensities simply because the prospective

customer victim happens not *yet* to have consummated a transaction with the employer.

In fact, the law already recognizes that prospective customers have a reasonable expectation that employers supervise their employees with due care when the prospective customer interacts with those employees on the physical premises of the employer's business. New York has long required businesses to protect visitors to their physical premises, including prospective customers (sometimes called "business invitees"), from potential harm. *See Pink v. Rome Youth Hockey Ass'n, Inc.*, 28 N.Y.3d 994, 997-98 (2016); *Basso v. Miller*, 40 N.Y.2d 233, 240-41 (1976). That duty of care includes the "duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control." *Pink*, 28 N.Y.3d at 997-98 (internal quotation marks omitted). And under New York law, employees are among those third persons whom employers "have the opportunity to control." *See Purdy v. Public Adm'r of County of Westchester*, 72 N.Y.2d 1, 8 (1988) (noting that "the traditional master-servant relationship" is one in which New York courts have imposed "a duty to control the conduct of others"); *Fernandez v. Rustic Inn, Inc.*, 60 A.D.3d 893, 896 (2d Dep't 2009) ("Certain relationships, . . . including the relationship between an employer and employee, may give rise to a duty to exercise control.").

A prospective customer's expectation that the employer exercise care in supervising its employee does not become unreasonable if the prospective customer's interaction with the employee takes place via telephone, e-mail, or at an in-person meeting outside of the business, rather than on the physical premises of the business. For example, parties reasonably expect the same due care when they receive a sales call from an employer's call center, or when they permit an employer's salesperson to enter their home for a product demonstration or to provide an estimate for a potential service. If an employee at the call center tricks a caller into disclosing his social security number and then sells it to a co-conspirator, or if a salesperson uses the guise of a product demonstration to gain access to a home to assault or rob the homeowner, the employer's liability should turn on whether it "knew or should have known of the employee's propensity for the conduct which caused the injury," *Kenneth R.*, 229 A.D.2d at 161, not on whether the foreseeable victim was a current or prior customer. Parties (and society) reasonably expect the employer to exercise the same care whenever a third party is dealing with the employee because of his or her capacity as employee, regardless of whether the third party happens to have previously done business with the employer or not.

The tortfeasor employee's personal motives in the interaction also make no difference in the reasonableness of the injured party's expectations of due care.

Other tort law concepts, including *respondeat superior*, turn on whether the employee was acting in furtherance of the employer's business, rather than solely for personal motives. *See, e.g.*, *N.X. v. Cabrini Med. Ctr.*, 97 N.Y.2d 247, 251 (2002). The tort of negligent supervision, however, expressly applies when *respondeat superior* does not—that is, when the tortfeasor employee is acting outside the scope of employment, solely for his or her own personal benefit. *See Passucci v. Home Depot, Inc.*, 67 A.D.3d 1470, 1472 (4th Dep't 2009); *Sheila C. v. Povich*, 11 A.D.3d 120, 129 (1st Dep't 2004); *Kenneth R.*, 229 A.D.2d at 161.

It should not matter, then, whether the call center employee or traveling salesperson ever intended to sell, or ever even tried to sell, the employer's wares to the victim before committing the tort. Likewise, in cases involving fraud, it should not matter whether the tortfeasor employee ever actually offered, let alone completed, a legitimate transaction with the victim on behalf of his employer. In all these cases, the victim was dealing with the tortfeasor because of his or her capacity as employee, and so could reasonably expect of the employer the same duty to non-negligently supervise that employee regardless of whether the employee intended or tried to complete a legitimate transaction on the employer's behalf before tortiously injuring the victim.

The reasonable expectations of society are the same in all these instances: employers should supervise their employees with due care, not just to protect

prospective customers on the employer's premises, but also to protect prospective customers off the premises when those prospective customers are dealing with employees because of their capacity as employees. Imposing that duty of care is eminently reasonable in a day and age when employers expect and require their employees to interact with third parties, including prospective customers, well beyond the boundaries of the employer's own store or office—all the more so when, as we have seen, many industries continue to function with their entire workforces working from home. A contrary rule would leave prospective customers unprotected in a wide variety of industries that largely rely on employees interacting with would-be customers outside of an office or store setting, including retailers who sell by phone or internet, and service professions such as the legal and financial industries that expect their employees to court prospective customers at those customers' own places of business, or in other locations such as restaurants, conferences, and the like.

2. Providing negligent supervision protection to prospective customers does not result in insurer-like liability.

Confirming that employers owe prospective customers the same duty of non-negligent supervision as they owe current or former customers will not lead to a proliferation of claims or insurer-like liability. PJT suggested in its Opposition to Leave to Appeal that Plaintiffs' rule would mean a dry cleaner would be

potentially liable to “anyone who wears clothes” [R174 n.3], but that strawman misrepresents the much narrower scope of Plaintiffs’ proposed rule.

It would be absurd to say that a dry cleaner could not be liable for negligent supervision if its employee assaults or robs a person who enters the dry cleaner’s store to drop off some clothes for cleaning, just because it was that person’s first time at the store. By the same logic, Plaintiffs’ proposed rule imposes negligent supervision liability on the dry cleaner (or any employer) who authorizes an employee with known dangerous propensities to go door-to-door through an apartment complex to try to recruit new customers, if the employee assaults or robs a resident in the complex while carrying out (or even just pretending to carry out) its employer’s sales mission. Under the rule the Appellate Division applied below, however, an employer could be liable for the employee’s assault during his door-to-door solicitation if the victim-resident happened to be a prior or current customer, but not if they were merely a prospective customer.

By contrast, Plaintiffs’ rule turns not on the arbitrary question of whether there has been a past transaction or not, but on whether the victim was interacting with the employee because of his or her capacity as employee. Thus, that same dry cleaner could never be liable for negligent supervision if that same dangerous employee happens to assault someone while on a date, or while playing in a pickup basketball game, even if the dry cleaner had reason to know of the employee’s

violent tendencies—and even if the victim happened to be a current or former customer of the dry cleaner. Why? Because in those situations, unlike the door-to-door sales circumstance, the victim did *not* encounter the employee because of his or her capacity as employee.

Similarly, that dry cleaner would never be liable for negligent supervision if its employee defrauded a counterparty on a personal eBay transaction, or defrauded a car dealership by rolling back the odometer on his car, even if the dry cleaner knew the employee was dishonest and likely to do such things. In all these cases, the dividing line between potential liability and no potential liability is whether the victim was interacting with the employee because of his or her capacity as employee, or in some other unrelated context. That dividing line strikes a fair balance, consistent with similar lines drawn in other tort contexts. *See infra*, pp. 24-25.

With Plaintiffs' proposed rule, the universe of potential negligent supervision claims brought by prospective customers will extend beyond the physical boundaries of the employer's premises, but only to the extent that the employer has chosen to structure its business to enable employees to do work for the employer off-premises. The employer will owe a duty to prospective customers who encounter employees off-premises if those employees are authorized to transact the employer's business off-premises—the door-to-door salesperson, or

the lawyer or financial services professional calling or emailing prospective customers directly or meeting with them in their own offices. But if an employer owns, say, a clothing boutique, and employs salespeople solely to sell clothing at the store, then that employer will not face potential negligent supervision liability for torts committed by employees off-site, even if the employer had reason to suspect the employee was likely to commit such torts. The scope of potential claims thus follows the employer's own business practices, and is not in any way a form of blanket social insurance against any and all misconduct by the employer's employees.

3. **Public policy, including fair allocation of risks and reparations, supports permitting prospective customers to sue for negligent supervision.**

Finally, the Court must consider whether imposing negligent supervision liability on employers for torts committed by their employees against prospective customers would force employers to bear a disproportionate amount of risk for such torts, and whether fairness and sound policy calls for imposing that risk (and cost) entirely on the victims. *See 532 Madison Ave.*, 96 N.Y.2d at 288. The answer is the same as before: drawing the line to include torts committed against prospective customers who interacted with the employee because of his or her capacity as employee is a fair allocation of risk and reparations, and good public policy.

If an employer knows or should know that its employee has a propensity to engage in tortious conduct harmful to third parties (including prospective customers), and yet authorizes that employee to go out into the world to interact with prospective customers as part of the employer's business, it is eminently fair to impose on that employer the cost of having affirmatively forced that risk of harm onto unknowing and unsuspecting prospective customers. As the First Department put it in decisions it failed to heed here, "[t]he negligence of the employer in [cases of negligent hiring and negligent retention] is direct, not vicarious, and arises from its *having placed the employee in a position to cause foreseeable harm*, harm which the injured party most probably would have been spared had the employer taken reasonable care in making its decision concerning the hiring and retention of the employee." *Sheila C.*, 11 A.D.3d at 129 (emphasis added); *see also Detone v. Bullit Courier Serv.*, 140 A.D.2d 278, 279 (1st Dep't 1988) (same). Courts outside New York embrace a similar formulation. *See, e.g.*, *Di Cosala v. Kay*, 91 N.J. 159, 172 (1982) (explaining that "the tort of negligent hiring addresses the risk created by exposing members of the public to a potentially dangerous individual").

When an employer (like PJT) has authorized an employee to do business with current and prospective customers off the employer's premises, the employer has "placed the employee in a position to cause foreseeable harm" to those current

and prospective customers, *Sheila C.*, 11 A.D.3d at 129. It is thus fair, and good public policy, to impose on the employer that risk of harm to both current and prospective customers—*if* the employer knew or should have known of the employee's dangerous propensities. In those circumstances, prospective customers, just as much as current customers, are an obvious category of "members of the public whom the employer might reasonably anticipate would be placed in a position of risk of injury" by the negligently hired, or retained, or supervised employee. *Ponticas v. K.M.S. Investments*, 331 N.W.2d 907, 911 n.5 (Minn. 1983). The employer is in a good position—better than the victim—to mitigate or prevent the harm,[2] and also benefits directly from having authorized its employees to interact with prospective customers out in the world, outside of the employer's premises.[3] As ever, with increased benefits come increased responsibilities.

On the other hand, if an employer has *not* authorized the tortfeasor employee to conduct any of its business offsite, the employer has done nothing to increase

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[2] *See Hamilton*, 96 N.Y.2d at 233 ("The key . . . is that the defendant's relationship with either the tortfeasor or the plaintiff places the defendant in the best position to protect against the risk of harm.").

[3] *See, e.g.*, *Ponticas*, 331 N.W.2d at 911 (noting, in negligent hiring case, that the rationale for imposing liability in cases "involving deliverymen or others who gain access to a dwelling by virtue of their employment, is that since plaintiff comes in contact with the employee as the direct result of the employment, and since the employer receives some benefit, even if only a potential or indirect benefit, by the contact between the plaintiff and the employee, there exists a duty on the employer to exercise reasonable care for the protection of the dwelling occupant to retain in such employment only those who, so far as can be reasonably ascertained, pose no threat to such occupant").

the risk to those who might encounter the employee offsite, and thus should not have to bear the risk that the employee ends up harming people—even prospective customers—offsite. In this latter situation, having done nothing to facilitate the employee's tortious conduct offsite, the employer is in the same situation effectively as any other party who happens to know about the employee's dangerous tendencies, such as the employee's friends or relatives. Although they may have missed an opportunity to *decrease* the risks faced by third parties who encounter the employee, they have done nothing to *increase* those risks measurably, either. There is thus not a strong argument to impose those risks, and the cost of reparations, on the employer rather than on the third parties who happen to encounter the employee offsite.

As a matter of public policy, Plaintiffs' rule does not represent a significant expansion of potential liability for employers. In fact, some courts in New York have already permitted negligent supervision or retention lawsuits brought by plaintiffs who were not prospective customers—who had no connection at all to the defendant employer. *See infra*, pp. 30-31 & n.6. Compared to those cases, Plaintiffs' rule is no expansion of potential liability at all.

B. <u>A Duty to Prospective Customers Fits Well Within the Set of Related Doctrines Imposing Liability on Employers.</u>

Several interlocking tort doctrines impose varying degrees of liability on employers for torts committed by their employees, including *respondeat superior*,

premises liability, and negligent supervision. Plaintiffs' rule imposing negligent supervision liability for torts committed by employees against prospective customers fits comfortably within New York's existing framework.

1. ***<u>Respondeat superior.</u>***

In New York, "[u]nder the doctrine of respondeat superior, an employer may be vicariously liable for the tortious acts of its employees only if those acts were committed in furtherance of the employer's business and within the scope of employment." *N.X.*, 97 N.Y.2d at 251. If these two predicates—"committed in furtherance of the employer's business" and "within the scope of employment"—are met, then the employer faces strict "vicarious[] liab[ility] for a tort committed by his servant." *Riviello v. Waldron*, 47 N.Y.2d 297, 302 (1979). A plaintiff need not prove that the tortfeasor employee had a propensity to commit the tort in question, let alone that the defendant employer knew or should have known of that propensity.

Moreover, under *respondeat superior*, the scope of potential liability is not limited to torts committed against current customers, or on the employer's premises. Even if the tortfeasor employee injured a complete stranger to the employer (*i.e.*, not a prospective customer), and did so off the employer's premises, the employer is strictly liable for the tort if the employee was acting "in furtherance of the employer's business and within the scope of employment." *N.X.*,

97 N.Y.2d at 251. For instance, if an employee driving a delivery truck for his employer negligently strikes a random passerby, the employer is liable under *respondeat superior* for the negligence. *See, e.g.*, *Ambroise v. United Parcel Serv. of Am., Inc.*, 143 A.D.3d 929, 930-31 (2d Dep't 2016). That is so even though the random passerby had no connection whatsoever to the employer.

2. Premises liability.

In New York, a landholder or leaseholder has "a 'duty to control the conduct of third persons on their premises when they have the opportunity to control such persons and are reasonably aware of the need for such control.'" *Pink*, 28 N.Y.3d at 997-98 (quoting *D'Amico v. Christie*, 71 N.Y.2d 76, 85 (1987)). "That duty includes 'minimiz[ing] foreseeable dangers on their property,' including 'foreseeable criminal conduct.'" *Id.* at 998 (alteration in original) (quoting *Maheshwari v. City of New York*, 2 N.Y.3d 288, 294 (2004), and *Burgos v. Aqueduct Realty Corp.*, 92 N.Y.2d 544, 548 (1998)).

As with *respondeat superior*, premises liability does not limit the employer's potential liability to just its current customers. If the employer had both the "opportunity to control" the tortfeasor—as is the case with employees, *see Purdy*, 72 N.Y.2d at 8; *Fernandez*, 60 A.D.3d at 896-97—and was "reasonably aware of the need for such control," then the employer can be liable for injuries suffered by *anyone* injured by a tortfeasor employee on the employer's premises,

even if the victim was a trespasser on the premises without the employer's permission. *See Basso*, 40 N.Y.2d at 240.[4]

3. <u>Negligent supervision.</u>

By design, negligent supervision and *respondeat superior* are complementary, covering different circumstances. *See Kenneth R.*, 229 A.D.2d at 161 ("In instances where an employer cannot be held vicariously liable for its employee's torts, the employer can still be held liable under theories of negligent hiring, negligent retention, and negligent supervision."); *see also Passucci*, 67 A.D.3d at 1472; *Sheila C.*, 11 A.D.3d at 129. *Respondeat superior* imposes the more stringent strict liability standard when employees are acting in furtherance of the employer's business, while negligent supervision extends employer liability to situations where the employee is acting outside the scope of his or her employment—but only when the employer "knew or should have known of the employee's propensity for the conduct which caused the injury." *Kenneth R.*, 229 A.D.2d at 161. The policy trade-off is that when employers fail to meet this

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[4] Before *Basso*, under New York law it was "the status of the plaintiff which ha[d] been determinative" of "the duty of care owed by the owner or occupier of land to one upon his property," *Basso*, 40 N.Y.2d at 239, and landowners or occupiers owed trespassers "a duty to refrain only from inflicting willful, wanton or intentional injuries" upon them, *id.* at 244 (Breitel, C.J., concurring) (internal quotation marks and citations omitted). In *Basso*, the Court did away with that more complicated regime, and adopted a "single standard of care" applicable to all potential victims, although "considerations of who plaintiff is and what his purpose is upon the land are factors which, if known, may be included in arriving at what would be reasonable care under the circumstances." *Id.* at 240-41.

baseline duty of care, they bear legal responsibility for an employee's tort even though the employee was not acting for the employer's benefit.

Plaintiffs' rule imposing negligent supervision liability for torts committed against prospective customers fits comfortably within this rubric. The rule does *not* extend an employer's potential negligence liability to any member of the public, as can be the case with both *respondeat superior* and premises liability. Rather, it tailors the employer's duty to be consistent with the general purpose and design of the negligent supervision tort. It imposes a duty (and potential liability) on an employer when the injured party was interacting with its employee because of his or her capacity as an employee—even though the employee's specific misconduct was outside the scope of the employee's work duties and intended solely to benefit the employee.

In this way, Plaintiffs' rule continues the gap-filling work of the negligent supervision tort. It ensures the tort applies not just in the context of personally motivated misconduct committed by employees *on an employer's premises* or *against current or former customers*, but also in the closely related context of personally motivated misconduct committed by employees authorized to engage in the employer's business *outside of the employer's premises* and *with prospective customers*. Applying the tort in the latter context is particularly important in today's modern economy. *Cf. Basso*, 40 N.Y.2d at 239-42 (noting that the

traditional premises liability rule, where the "status of the plaintiff" was "determinative," was a vestige of "'a culture deeply rooted to the land'" (quoting *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 630 (1959)), and replacing that traditional rule with a "single standard of care" where the plaintiff's "status is no longer determinative"); *McBride v. County of Schenectady*, 110 A.D.2d 1000, 1001 (3d Dep't 1985) (holding that where employee was a salesperson who "could operate independently and call upon prospective customers directly to obtain business," employer could be liable for employee striking pedestrian with his vehicle even though employee was driving home at the time).

C. A Duty to Prospective Customers Is Consistent With Existing New York Caselaw, and With Caselaw In Other Jurisdictions.

1. New York cases fit Plaintiffs' rule, and often go further.

Besides meeting this Court's balancing test, and fitting nicely within the existing multifaceted structure of employer liability in New York, Plaintiffs' proposed rule also squares with existing New York caselaw.

Perhaps the best example of this is the lead case PJT cited below: *Gottlieb v. Sullivan & Cromwell*, 203 A.D.2d 241 (2d Dep't 1994). There, the plaintiff sued a major law firm for losses he allegedly suffered because of insider trading by outside parties who had purchased confidential information stolen by three employees of the law firm. *See id.* at 241. The plaintiff was neither a client nor a prospective client of the law firm. Rather, the plaintiff was a market maker who

alleged that he lost money on stock options "that were adversely affected by the illegal trades made using the inside information leaked by the [law firm's] three renegade employees." *Id.*

PJT claims *Gottlieb* supports the proposition that one must be a current client of an employer to sue that employer for negligent supervision. [R173-174.] PJT does so by wrenching a soundbite out of context. *See Gottlieb*, 203 A.D.2d at 241-42 ("The plaintiff was not a client of the defendant's, with the result that, in the absence of any privity between the parties, the defendant owed the plaintiff no duty in the hiring and/or supervision of its employees, nor in maintaining the confidentiality of the stolen information."). But, as noted above, nothing in the case turned on whether the plaintiff was a current client versus a prospective client.

PJT's reading of *Gottlieb* would lead to illogical results if the facts were changed slightly. Under PJT's reading, if the plaintiff investor in *Gottlieb* had happened to be a current client of the defendant law firm—say, for instance, the law firm was representing him in a completely unrelated lawsuit against a former business partner—then the plaintiff would have been allowed to bring a negligent supervision claim against the law firm, solely because he happened to have been doing unrelated business with the law firm. That does not make sense, just as it would not make sense in the door-to-door salesperson scenario for one apartment complex resident to be protected and another unprotected merely because the

former happened to have transacted business with the salesperson's employer in the past. Plaintiffs' proposed rule, imposing a duty only when the victim has interacted with the tortfeasor employee because of his or her capacity as employee, makes far more sense than PJT's reading, which turns entirely on whether the victim is a current client (or has been a former client) of the employer.[5]

Other New York decisions have gone even further than Plaintiffs' proposed rule, permitting negligent hiring, retention, and supervision cases to proceed when the victim was neither a current nor a prospective customer of the employer. In *Selmani v. City of New York*, 116 A.D.3d 943 (2d Dep't 2014), for instance, the Appellate Division reversed the dismissal of negligent hiring, supervision, training, and retention claims brought by bar patrons who were assaulted by New York City Fire Department employees who had come to the bar to continue celebrating after the Department's annual dinner. *See id.* at 943-45. In *Quiroz v. Zottola*, 96 A.D.3d 1035 (2d Dep't 2012), the Appellate Division reversed the dismissal of negligent hiring, management, and supervision claims brought by a school bus driver whose bus was struck by the defendant's garbage truck, allegedly as a result of its employee's negligent driving. *See id.* at 1036-38. And in *Saunders v. Taylor*, 800

[5] *Heffernan v. Marine Midland Bank*, 267 A.D.2d 83 (1st Dep't 1999), also cited by PJT below, is harder to parse, given that the Appellate Division's opinion said nothing more about the negligence-based causes of action other than that "they were properly dismissed as plaintiffs fail to allege any facts showing a special duty running from the bank to them." *Id.* at 84. If *Heffernan* is rightly understood as limiting potential negligent supervision liability to current customers only, though, then that part of it was wrongly decided.

N.Y.S.2d 356, 6 Misc.3d 1015(A), at *4 (Sup. Ct. N.Y. Cty. 2003), Supreme Court declined to dismiss negligent hiring, retention, and supervision claims where the plaintiff and tortfeasor employee were DJs who worked at rival radio stations (one of which was the defendant), and the tortfeasor employee had allegedly assaulted the plaintiff. *Id.*[6]

2. Courts outside New York consistently approve negligent supervision liability towards prospective customers.

Numerous decisions outside of New York expressly contemplate negligent hiring, retention, or supervision liability towards prospective customers. In *Garcia v. Duffy*, 492 So. 2d 435 (Fla. Dist. App. 1986), for example, a Florida appellate court addressing claims of negligent hiring and retention held that the defendant employer owed the plaintiff no duty, because "[t]he plaintiff was neither an actual *nor potential* customer, licensee, or invitee of the employer." *Id.* at 442 (emphasis added). Similarly, in *Keller v. Koca*, 111 P.3d 445 (Colo. 2005), while the Colorado Supreme Court held against the victim in the case (who had been sexually assaulted by the tortfeasor employee), the court also found that the

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[6] *See also, e.g.*, *Gray v. Schenectady City Sch. Dist.*, 86 A.D.3d 771, 771, 773-74 (3d Dep't 2011) (permitting negligent supervision and negligent retention claims brought by victim whose connection to tortfeasor employee was "their affiliation with the same labor union"; "[t]he complaint sufficiently alleged that defendant's negligent supervision or retention of [the tortfeasor employee] permitted him continued access to the means to carry out his actions, which caused plaintiffs' injuries"); *Detone*, 140 A.D.2d at 279-80 (plaintiff, a stranger to the defendant courier service, was assaulted on the street by employee of defendant while employee was delivering a message; court held no liability for negligent hiring, but only because there was insufficient evidence of employee's propensity for violence).

defendant *would* have been potentially liable for negligent supervision if the tortfeasor employee had assaulted "potential customers." *See id.* at 450. And in *Chesterman v. Barmon*, 727 P.2d 130 (Or. Ct. App. 1986), *aff'd*, 305 Or. 439 (1988), while the Court of Appeals of Oregon rejected a negligent retention claim brought by a complete stranger to the defendant company who was raped by the defendant's employee in her home, the court noted that "[i]f [the tortfeasor employee] posed an unreasonable risk of injury to anyone, because of his employment, it was only to clients *or potential clients* of defendant." *Id.* at 132 (emphasis added).

Similarly, the North Dakota Supreme Court's decision in *McLean v. Kirby Company*, 490 N.W.2d 229 (N.D. 1992), held that a potential customer, who was raped by a door-to-door Kirby vacuum salesman, stated a claim for negligence against Kirby based on the conduct of its independent dealer. *See id.* at 232, 234. The court held that the vacuum company, Kirby, owed a duty to the victim—a prospective customer who allowed the salesman into her home ostensibly to do a vacuum cleaner demonstration—and thus could be held liable for negligence for failing to require its distributors to investigate potential dealers before hiring them. *See id.* at 234.[7]

[7] While the negligence theory in *McLean* involved a company's responsibilities regarding its independent dealers rather than direct employees, that theory of duty is not materially different

Finally, in *Dolin v. Contemporary Financial Solutions, Inc.*, 622 F. Supp. 2d 1077 (D. Colo. 2009), the plaintiffs, like Plaintiffs here, were defrauded by an employee of a financial services company. *See id.* at 1079-80. Just as in this case, the defendant company in *Dolin* argued that it could not be sued for negligent supervision because the victims never actually became clients of the defendant. *See id.* at 1082-83 (defendants argued "they owed no duty of care to Plaintiffs, who were 'strangers' because they did not have any accounts with [the defendant]"). The district court rejected this argument, applied a similar test to this Court's test from *532 Madison Avenue* to determine the proper scope of the defendants' duty, and held that the defendants owed plaintiffs a duty of care. *See id.* at 1084. "[Defendant] employed [the tortfeasor employee] as a securities broker and its registered representative, and [the employee] came into contact with Plaintiffs *because of his capacity as a broker*." *Id.* (emphasis added). That was enough to impose a duty of care on the defendants. *See id.*

Further demonstrating that the First Department's decision under review is based on a false dichotomy between prospective and current/former customers are cases nationwide that permit negligent supervision, retention or hiring claims by plaintiffs with *no* business relationship, current or prospective, with the defendant employer. For example, in *Shafer v. TNT Well Service, Inc.*, 285 P.3d 958 (Wyo.

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from the one in a negligent hiring or supervision case. If anything, the duty recognized in *McLean* is, again, more expansive than the one that this Court should find here.

2012), the defendant's employee struck the plaintiff while driving a company car. *See id.* at 960-61. The Supreme Court of Wyoming permitted a negligent supervision claim to proceed even though the plaintiff was not a current or prospective customer of the defendant employer—and, in fact, appeared to have no relationship whatsoever with the employer. *See id.* at 966-67. Other courts have done likewise. *See, e.g.*, *Hall v. Werner Enters., Inc.*, No. 2:16-CV-196, 2018 WL 7117890, at *1, *3 (S.D. Tex. Jan. 18, 2018); *Lessard v. Coronado Paint & Decorating Center, Inc.*, 168 P.3d 155, 157, 168-170 (N.M. Ct. App. 2007) (rejecting the argument that defendant owed a duty to "only those members of the public who have a connection to a defendant employer's business").

This more expansive view of negligent hiring, supervision, and retention has not been limited to car accident cases. In *Di Cosala*, the Supreme Court of New Jersey permitted a plaintiff with no current or prospective customer relationship to the defendant to bring negligent hiring and retention claims against a Boy Scout camp, for injuries suffered because of an employee's negligence in leaving a loaded handgun in his quarters. 91 N.J. at 169, 174, 176-78. The court framed the key question as "whether the employer, knowing of its employee's unfitness, incompetence or dangerous attributes when it hired or retained its employee, should have reasonably foreseen the likelihood that the employee through his employment would come into contact *with members of the public, such as the*

plaintiff, under circumstances that would create a risk of danger to such persons because of the employee's qualities." *Id.* at 177 (emphasis added).

D. Protecting Prospective Customers From Negligent Supervision Is Consistent With the Restatement (Second) of Torts.

Section 317 of the Restatement (Second) of Torts provides as follows:

> A master is under a duty to exercise reasonable care so to control his servant while acting outside the scope of his employment as to prevent him from intentionally harming others or from so conducting himself as to create an unreasonable risk of bodily harm to them, if
>
> (a) the servant
>
> (i) is upon the premises in possession of the master or upon which the servant is privileged to enter only as his servant, or
>
> (ii) is using a chattel of the master, and
>
> (b) the master
>
> (i) knows or has reason to know that he has the ability to control his servant, and
>
> (ii) knows or should know of the necessity and opportunity for exercising such control.

Restatement (Second) of Torts § 317.

This Court and other New York courts have cited Section 317 as support for New York's negligent supervision doctrine. *See D'Amico*, 71 N.Y.2d at 88-89 (favorably discussing that section of the Restatement); *Gonzalez v. City of New York*, 133 A.D.3d 65, 67 (1st Dep't 2015); *Kenneth R.*, 229 A.D.2d at 161. In

addition, while not citing Section 317, the Second Circuit has endorsed a similar approach in its interpretation of New York's negligent supervision doctrine, holding that the tort must have been "committed on the employer's premises or with the employer's chattels." *Ehrens v. Lutheran Church*, 385 F.2d 232, 235 (2d Cir. 2004) (citing *D'Amico*, 524 N.Y.S.2d 1).

Plaintiffs' proposed rule is consistent with this formulation in the Restatement. Specifically, subsection (a)(ii) would cover the examples given in section I.A.1, above—the call center operator, and the door-to-door salesperson—as well as this very case. [R39-40 ¶¶ 41-46 (describing Caspersen's use of PJT's chattels, including a PJT email account, confidential PJT records, and PJT letterhead).]

And again, as in many of the cases discussed above, the Restatement formulation extends potential liability considerably further than Plaintiffs' rule. The Restatement covers torts committed by an employee using a chattel of the master even if the victim was *not* interacting with the tortfeasor employee as a prospective customer. In *Shafer*, for instance, discussed above, the Supreme Court of Wyoming adopted Restatement (Second) of Torts § 317, and as a result held that the employer could be liable for negligent supervision based on the fact that its employee, although concededly acting outside the course and scope of his employment, had been driving a company car at the time he struck and injured the

plaintiff. *See Shafer*, 285 P.3d at 962, 964-67. The fact that the plaintiff was apparently a stranger to the defendant employer, *see id.* at 960-61, played no role in the court's decision.

In sum, rather expanding existing negligence doctrine, Plaintiffs' rule is well within the heartland of settled law in New York and nationwide.

Point II Plaintiffs More Than Adequately Pled That PJT Knew Or Should Have Known of Caspersen's Propensity To Commit Fraud

Once a duty exists for PJT to protect prospective customers like Plaintiffs from the harm caused by negligent supervision of its employees, all that is left to state a claim for negligent supervision is for the Complaint to allege that PJT "knew or should have known of the employee's propensity for the conduct which caused the injury." *Kenneth R.*, 229 A.D.2d at 161; *see also Naegele v. Archdiocese of New York*, 39 A.D.3d 270, 270 (1st Dep't 2007). New York's appellate courts have long held that negligent supervision claims need not be pled with specificity. *See Kenneth R.*, 229 A.D.2d at 162 ("There is no statutory requirement that causes of action sounding in negligent hiring, negligent retention, or negligent supervision be pleaded with specificity."). Nevertheless, Plaintiffs' allegations of PJT's actual or constructive knowledge were plenty specific.

Plaintiffs alleged that Caspersen stole an $8.1 million fee owed to PJT, that Caspersen lied to PJT that the fee was missing because of a "stub" closing on the deal, and that PJT *knew or should have known* that the explanation was false,

including because even in a "stub" closing the vast majority of the fee is still paid at the initial closing. [R37-38 ¶¶ 33-37.] The Complaint also alleged that when Caspersen finally transferred the funds to replace the missing fee, PJT knew or should have known that the money had arrived from an account owned by Caspersen rather than from the actual client account. [R41 ¶ 47.] So the Complaint expressly alleged that PJT had actual or, at the very least, constructive knowledge that Caspersen was lying about an $8 million missing fee from a deal he ran, and that when the funds finally arrived, they came from the wrong account. These allegations must be accepted as true. *Goldin v. TAG Virgin Islands, Inc.*, 149 A.D.3d 467, 467 (1st Dep't 2017). Because PJT knew, or at the very least should have known, that Caspersen lied about the very large missing fee, that is more than enough, by itself, to allege PJT had actual or constructive knowledge about Caspersen's propensity to commit fraud. That should have been enough for the trial court to decide the "knew or should have known" inquiry in Plaintiffs' favor.

But that is not all. The Complaint also alleges that PJT knew (or at minimum should have known) that Caspersen both engaged in obsessive high-risk securities trading and drank alcohol excessively during the workday. [R34-36 ¶¶ 25-29.][8]

[8] In its opposition to Plaintiffs' motion for permission to appeal, PJT tried to get the Court to ignore allegations regarding alcohol abuse and obsessive trading, contending that "Plaintiffs no longer challenge the Supreme Court's holding that alcoholism and speculative trading are insufficient to allege a propensity to commit fraud." [R181.] PJT is wrong. Plaintiffs continue to contend that knowledge (actual or constructive) of Caspersen's severe alcohol abuse and obsessive options trading are directly relevant to PJT's knowledge of the danger Caspersen

Plaintiffs are entitled to the inference, certainly at the motion to dismiss stage, that this combination of dangerous behaviors in a senior executive serving as the sole point of contact for big financial deals constitutes a major red flag for fraud risk. *See EBC I, Inc.*, 5 N.Y.3d at 19 ("In the context of a motion to dismiss pursuant to CPLR 3211, the court must afford the pleadings a liberal construction, take the allegations of the complaint as true *and provide plaintiff the benefit of every possible inference.*" (emphasis added)).

That the Complaint formulates allegations of PJT's knowledge as what PJT "knew or should have known" matters not at all, because *that is precisely what the test calls for*: "a necessary element of such causes of action is that the employer *knew or should have known* of the employee's propensity for the conduct which caused the injury." *Kenneth R.*, 229 A.D.2d at 161 (emphasis added); *see also Sanchez v. State of New York*, 99 N.Y.2d 247, 255 (2002) (holding in case involving negligent supervision of an inmate by a prison that "foreseeability is defined not simply by actual notice but by actual *or constructive* notice—by what the [defendant] knew or had reason to know" (emphasis in original) (internal

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posed to prospective customers like Plaintiffs. The Appellate Division did not address that particular argument, instead holding more broadly (and wrongly) that Plaintiffs' Complaint "does not allege that defendants were aware of the facts that plaintiff contends would have put them on notice of the employee's criminal propensity." [R240.] This Court thus has no occasion or reason to address that argument. In any event, Plaintiffs have in no way waived their ability to contend that PJT's knowledge of Caspersen's alcohol abuse and obsessive options trading are relevant, certainly at the pleading stage, to the negligent supervision analysis.

quotation marks omitted)). PJT has argued that the Complaint is somehow deficient because it "alleges no basis for concluding that Park Hill or PJT *knew* those things," [R180], but that argument ignores that the test for negligent supervision liability permits not just actual, but also constructive, knowledge. Were it otherwise, employers could avoid potential liability by sticking their heads in the sand and ignoring obvious signs that their employees were dishonest, or violent, or in some other way dangerous. That would be bad policy, and it is not the law.

In any event, even if Plaintiffs were required to allege that PJT actually *knew* about Caspersen's $8.1 million lie, and his stupendous day-drinking and online trading problems, the Complaint contains more than enough affirmative allegations to infer (certainly at the motion to dismiss stage) that PJT must have known, and did know, about these serious problems. [*See* R34-35, 37-38 ¶¶ 26-27, 33-37 (alleging that Caspersen drank heavily during work hours and attended work meetings while drunk; traded stock options obsessively while at work and using his work computer; and told a blatantly obvious lie to PJT to try to cover up for the $8.1 million fee he stole).] Plaintiffs are easily entitled to the inferences of knowledge at issue in this case, particularly at the motion to dismiss stage, based on the numerous (and disturbing) hard facts Plaintiffs have alleged. *See EBC I, Inc.*, 5 N.Y.3d at 19.

Finally, litigants are always permitted to plead in the alternative. *See* CPLR 3014; Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 3014:7; *see also Mitchell v. New York Hosp.*, 61 N.Y.2d 208, 218 (1984) (noting "the well-settled rule that a 'plaintiff is entitled to advance inconsistent theories in alleging a right to recovery'" (quoting *Cohn v. Lionel Corp.*, 21 N.Y.2d 559, 563 (1968))). For that additional independent reason, even if PJT were able to change the negligent supervision standard to require actual, and not constructive, knowledge, Plaintiffs' "knew or should have known" formulation should still suffice at the motion to dismiss stage under the "well-settled rule" governing pleading in the alternative.

CONCLUSION

For the foregoing reasons, the Appellate Division's order should be reversed, and Plaintiffs-Appellants should be permitted to proceed to discovery on their negligent supervision/retention claim.

Dated: December 30, 2020
New York, New York

Respectfully submitted,

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CERTIFICATION

I certify pursuant to 500.13(c)(1) that the total word count for all printed text in the body of the brief, exclusive of the statement of the status of related litigation; the corporate disclosure statement; the table of contents, the table of cases and authorities and the statement of questions presented required by subsection (a) of this section; and any addendum containing material required by subsection 500.1(h) of this Part is 9,982 words.

Dated: December 30, 2020
New York, New York