*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,*

—and—

ANDREW W.W. CASPERSEN,

*Defendant.*

## REPLY BRIEF FOR PLAINTIFFS-APPELLANTS

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This Court has established and repeatedly invoked a multi-factor balancing test to set "[t]he existence and scope of a tortfeasor's duty" in negligence cases—a "'balancing'" of "'factors'" that includes, for example, "'the reasonable expectations of parties and society generally.'" *532 Madison Ave. Gourmet Foods v. Finlandia Ctr.*, 96 N.Y.2d 280, 288 (2001) (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))). In their opening brief, Plaintiffs-Appellants applied that test, addressing each of its factors. Opening Br. 11-23. In its responsive brief, Defendant-Appellee PJT did not.[1] In fact, neither the word "balancing" nor the phrase "reasonable expectations" appears anywhere in PJT's brief, nor does PJT discuss or apply these concepts.

Instead, PJT spends much of its brief arguing the second question presented in Plaintiffs' brief: whether Plaintiffs sufficiently alleged PJT's knowledge of Caspersen's propensity to commit fraud. *See* PJT Br. 22-39. PJT's arguments here rest on a flat misreading of Plaintiffs' Complaint. When PJT does finally address the first question presented—the scope of duty employers owe in negligent supervision cases—PJT ignores most of the factors in this Court's test and instead focuses on "special relationship" requirements that are not supported by New York law.

[1] Plaintiffs-Appellants refer to both Defendants-Appellees collectively in this brief as "PJT."

A proper application of this Court's "scope of duty" analysis, and a fair reading of the allegations in Plaintiffs' complaint, require reversal of the First Department's decision below.

## I. The Court Should Disregard PJT's Efforts to Rewrite Plaintiffs' Complaint.

### A. Plaintiffs Clearly Alleged PJT's Actual Knowledge.

All of PJT's arguments on Plaintiffs' second question presented depend on PJT's contention that "[t]he 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." PJT Br. 34 (citing PJT Br. 15-18). That contention is simply not true, as the following allegations show:

> 7. … [PJT] missed ***or chose to overlook*** obvious warning signs regarding Caspersen's fitness to act on its behalf, including the facts that he often left the office for hours at a time during the business day to drink alcohol to excess, returning to the office inebriated; and that during the time he was present in the office, he spent substantial amounts of his time obsessively trading speculative securities on his own account rather than attending to his work.
>
> …
>
> 25. During his time as an employee of PJT, Caspersen engaged in several dangerous and destructive behaviors that ***were***, or should have been, apparent to his supervisors and co-workers at PJT.

> 26. … Signs of Caspersen's aberrant trading behavior ***were*** or should have been obvious to PJT….
>
> 27. … Signs of Caspersen's excessive drinking ***were*** or should have been obvious to PJT….
>
> …
>
> 87. Further, PJT Partners and Park Hill ***knew*** or should have known of Caspersen's propensity to engage in other risky behaviors, such as obsessive trading and his rampant and open alcohol abuse, which should have been '"red flags" and which ultimately motivated his fraudulent schemes.
>
> 88. In addition, PJT Partners and Park Hill ***knew*** or should have known of Caspersen's diversion of the fees owed to Park Hill in the original Irving Place transaction, and diversion of other fees including those referenced in Paragraph 49, that gave rise to his fraud upon Plaintiffs.

[R29, 34-35, 48-49 (emphasis added).]

PJT ignores all these allegations and focuses on other allegations in the Complaint that PJT "failed to notice," "failed to detect" or "failed to discover" certain conduct. PJT Br. 34-35. But PJT has no answer to the hornbook law Plaintiffs cited in their opening brief, that "litigants are always permitted to plead in the alternative." Opening Br. 41 (citing CPLR 3014; Patrick M. Connors, Practice Commentaries, McKinney's Cons Laws of NY, CPLR 3014:7; and *Mitchell v. New York Hosp.*, 61 N.Y.2d 208, 218 (1984)). Even worse, the fact that the allegations PJT seizes on were pled in the alternative is apparent *even from the same paragraphs PJT plucks them from*. Plaintiffs do not allege in paragraph 28,

for example, just that PJT "failed to notice" the dangerous behaviors, but that PJT "failed to notice ***or address*** these behaviors"—in other words, either failed to notice, or *did* notice and yet failed to *address*. [R35, ¶28 (emphasis added).] Similarly, in paragraph 29, while Plaintiffs do allege that PJT "failed to detect" certain behaviors, Plaintiffs make the alternative allegation in the very next sentence: "If PJT did detect Caspersen's drinking or trading, it did nothing to address the risks that these behaviors posed to PJT's business, clients, and counterparties, and its failure to address those issues was negligent." [R36, ¶29.]

Even if one were to ignore Plaintiffs' many express allegations of PJT's knowledge, Plaintiffs alleged more than enough facts from which it can fairly be inferred that PJT had actual knowledge of the relevant behavior. For instance, it can fairly be inferred that PJT would notice an employee—particularly a high-ranking employee at a financial services firm—who was not only engaging in personal stock trading but "obsessively monitor[ing] his positions," checking "every few minutes," all while at work. [R35, ¶26.] It can likewise fairly be inferred that PJT would notice an employee who would leave the office "[a]lmost every day" to "consume 10 to 15 alcoholic drinks," and would then "return to the office to continue working, including holding meetings with colleagues, while inebriated." [R35, ¶27.] PJT's attempt to summarize the drinking allegations as being "that [Caspersen] sometimes returned to the office for meetings after

drinking elsewhere" is a laughable example of PJT's mischaracterization of the complaint and improper attempt to draw inferences in its own favor. "On a motion to dismiss pursuant to CPLR 3211, [the court] must … accord plaintiffs the benefit of every possible favorable inference …." *Sokoloff v. Harriman Estates Dev. Corp.*, 96 N.Y.2d 409, 414 (2001).

In a further example of PJT's ridiculous parsing of the Complaint, PJT notes Plaintiffs' statement in their opening brief that Caspersen "'effectively made no attempt to conceal his gambling and drinking habits,'" then huffs that this fact "is not alleged in the Complaint." PJT Br. 19 (quoting Opening Br. 6). That exemplifies one of the main problems with PJT's brief: while the words PJT quotes do not appear verbatim in the Complaint, the Complaint alleges plenty of facts that illustrate precisely that point. An employee who nearly every workday drinks 10-15 alcoholic beverages over lunch and returns to work to participate in meetings while drunk [R35, ¶27], or who checks his personal stock accounts every few minutes while at work [R35, ¶26], is "effectively ma[king] no attempt to conceal his gambling and drinking habits." Plaintiffs are fairly entitled to the inference at the pleading stage that PJT noticed this dangerous behavior. *See Sokoloff*, 96 N.Y.2d at 414.

PJT's treatment of the stolen deal fee allegations is just as flawed as its treatment of the drinking and trading allegations. Plaintiffs allege that (1) the fee

became due in August 2015,[2] (2) PJT asked Caspersen about it in September 2015 (indicating PJT knew it should have come in already), and (3) Caspersen responded with an explanation for why the fee was missing that was false and that "PJT knew or should have known … was false." [R37 ¶¶33-35.] In response, PJT argues on appeal that its "back-office employees" may not have known "or had the market expertise to know" that Caspersen was lying. PJT Br. 17. First, this ignores that the Complaint expressly alleges that PJT knew Caspersen's explanation was false, and PJT is not entitled to rewrite the Complaint's allegations to fit its argument. Second, even if Plaintiffs had not expressly alleged PJT's knowledge, surely Plaintiffs are entitled to the inference that PJT's own accounting personnel understood PJT's standard payment terms with its clients—payment terms Plaintiffs attributed *not* to "market" practices, as PJT tries to pretend with its reference to "market expertise," but to PJT's own internal practices. [R37-38 ¶36.]

PJT then declares that "[n]o business … jumps to the conclusion of employee embezzlement simply because a receivable is overdue for three months," and asserts that "the primary purported reason that, Plaintiffs say, [PJT] 'should have known' of the embezzlement is that Park Hill received money from the

[2] In a footnote, PJT, citing a source outside of the Complaint, claims "Plaintiffs have exaggerated the duration that the fee was outstanding." PJT Br. 16 n.9. PJT is wrong. Even if Caspersen misappropriated the fee (*i.e.*, received the stolen funds) in September 2015, that is not inconsistent with Plaintiffs' allegation that the fee "became due … in August 2015."

'wrong account.'" PJT Br. 35-36. This is sleight-of-hand: the *primary* reason Plaintiffs assert (in paragraph 88 of the Complaint) that PJT knew—and certainly *should* have known—about the embezzlement is not the delay in payment or even the bank account switcheroo (which would still be enough), but the fact that when PJT asked about the missing multi-million-dollar fee, *Caspersen told a bald-faced, obvious lie about it, and PJT knew it*. The lie was a disturbing sign, proof of substantial dishonesty and a bright, technicolor red flag for fraud—or at least Plaintiffs are entitled to that inference at the pleading stage.

Discovery will resolve the question of precisely what PJT knew about Caspersen's dangerous behaviors, and when. At the pleading stage, Plaintiffs have pled far more than enough facts to attribute knowledge of these disturbing behaviors to PJT.

### B. PJT's Introduction of Its Own Preferred "Facts" Is Inappropriate, but Also Irrelevant.

Compounding this error, PJT's Counterstatement of Facts introduces material from outside of the Complaint, even though this appeal comes at the pleading stage. Sometimes PJT cites to the Record when asserting "facts" outside of the Complaint, *see, e.g.*, PJT Br. 7 (citing [R58, R63]), but those citations are to exhibits *PJT's counsel* submitted below, none of which the trial court relied on. At other times, PJT acknowledges that it is seeking to introduce material from outside of the Complaint. *See id.* at 10 nn. 4, 5; *id.* at 11 n.6. But PJT's requests for judicial

notice of such material are improper. *See Hamilton v. Miller*, 23 N.Y.3d 592, 603 (2014); *Crater Club, Inc. v. Adirondack Park Agency*, 86 A.D.2d 714, 715 (3d Dep't 1982), *aff'd*, 57 N.Y.2d 990 (1982).

Regardless, none of these extraneous materials helps PJT. Most of it is irrelevant to this appeal, apparently meant to color the Court's views of legal issues that are not before the Court, such as the reasonableness of Plaintiffs' reliance on Caspersen's lies. None of it undermines, let alone eliminates, Plaintiffs' well-pled facts showing that Caspersen's theft of millions of dollars from his employer, his severe day-drinking problem, and his stock-market gambling addiction were open and notorious at his workplace—facts entitling Plaintiffs to the inference (certainly at the pleading stage) that PJT knew about all of it (or, in the alternative, should have known). Nor do any of these materials change the fact that Caspersen approached Plaintiffs about investing in part of a deal that he said, truthfully, he was handling *as part of his work for his employer, PJT*, and that it was Caspersen's high-ranking position at PJT (and the trappings that came with it) that convinced Plaintiffs to invest. [R39 ¶41; R40 ¶46; R46 ¶71; R46 ¶75.]

At bottom, PJT's requests for judicial notice are as telling as they are improper. That PJT apparently believes it must rewrite the Complaint by injecting unpled facts into the record to prevail on appeal simply confirms that reversal is

required on the pleadings that exist.[3] The Court should consider Plaintiffs' appeal of the dismissal of their Complaint based on the full, well-pled contents of that Complaint. *See Sokoloff*, 96 N.Y.2d at 414.

## II. Whether PJT Was On Notice of Caspersen's Propensities Is a Factual Issue, Not a Legal Issue.

In the introduction to its Argument, PJT asserts that "[b]oth 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." PJT Br. 21. It

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[3] PJT has not told the whole story regarding this extraneous material. For instance, if the Court clicks on the two links PJT cites as reports about the closing of PJT's Irving Place deal (PJT Br. 10-11 nn. 4, 5), it will see that one of the reports is hidden behind a paywall, and the other is not even clearly about the deal in question (and does not mention PJT or Park Hill).

In addition, PJT's citation to the Caspersen email [R78] actually helps Plaintiffs. While the Complaint alleges that Caspersen had offered "a risk-free 15% rate of return" [R39, ¶ 41], PJT helpfully notes that the source of this allegation is the Caspersen email at R78. In the email, Caspersen did not promise a "risk-free" return, but rather offered "private equity returns (15% net) but *without the risk* or unpredictable cash flow," R.78 (emphasis added)—in other words, without *the same level of risk* as regular private equity investments. Caspersen's email also explains that "[t]he rate is well above market for relationship reasons"—an explanation that a jury in the aftermath of Occupy Wall Street could reasonably find credible.

Finally, the Court should disregard PJT's misreading of paragraph 43 of the Complaint. *See* PJT Br. 12-13. Plaintiffs never allege that they thought they were loaning money to Irving Place. They allege that they thought they were loaning money to Coller Capital, specifically to a "special purpose vehicle" ("SPV") named after Irving Place to reflect that it was being used by Coller to facilitate Coller's *investment in the Irving Place fund*. [*See* R39, ¶¶ 42-43.]

then suggests that each of these two issues is therefore "a legal issue for the courts." *Id.* (citation and internal quotation marks omitted). PJT is wrong. The second issue flagged by PJT—the scope of a defendant's duty of care—is indeed a question of law for the Court. *See Hamilton*, 96 N.Y.2d at 232. But the *first* issue flagged by PJT—whether the defendant was on notice of a tortfeasor employee's dangerous propensity—is a question of fact, normally for the jury to decide (unless a failure of pleading or evidence permits dismissal earlier). *See, e.g.*, *Nevaeh T. v. City of New York*, 132 A.D.3d 840, 842 (2d Dep't 2015) (finding triable issue of fact regarding defendants' knowledge of employee's propensity for sexual misconduct); *Kelly G. v. Bd. of Educ. of City of Yonkers*, 99 A.D.3d 756, 758 (2d Dep't 2012) (same). PJT's attempt to subsume the fact-intensive "propensity" question within the purely legal "scope of duty" question addressed in *Hamilton* is wrong.

## III. PJT's "Actual Knowledge" Rule Is Not the Law.

As shown above, Plaintiffs alleged PJT's "actual knowledge" of all the dangerous behaviors Caspersen engaged in at work before he defrauded Plaintiffs. PJT's extended arguments against a "constructive knowledge" standard in negligent supervision cases are thus irrelevant to the Complaint as pled. Those arguments are also legally wrong.

### A. The Caselaw Consistently Endorses a Constructive Knowledge or Notice Standard, When It Addresses the Issue At All.

Plaintiffs showed that to survive dismissal the Complaint only needs "to allege that PJT 'knew or should have known of the employee's propensity for the conduct which caused the injury.'" Opening Br. 37 (quoting *Kenneth R. v. Roman Catholic Diocese of Brooklyn*, 229 A.D.2d 159 (2d Dep't 1997)). Plaintiffs further showed that they pled an abundance of facts to satisfy such knowledge or notice requirements. *Id.* at 37-40.

In response, PJT tries to rewrite the rules. Its attempts should be rejected. PJT tries to brush aside the authorities on which Plaintiffs relied as cases in which defendants had "received prior complaints" about the tortfeasor employee. PJT Br. 28 (describing *Kenneth R.*, *Quiroz v. Zottola*, 96 A.D.3d 1035 (2d Dep't 2012), and *Doe v. Chenango Valley Cent. Sch. Dist.*, 92 A.D. 3d 1016 (3d Dep't 2012)). Yet the defendants in these cases were not alleged to have investigated the complaints and confirmed the prior misconduct. Thus, beyond ignoring the plain language in these cases—"knew or should have known" and "on notice"—PJT is also factually wrong to characterize them as "actual knowledge" cases. Employers are no more permitted to ignore obvious red flags that they themselves observe about their employees than they are to ignore credible complaints from third parties about those same employees.

In addition to mischaracterizing the cases Plaintiffs cited, PJT also cites cases that it contends establish that an employer "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." PJT Br. 27. The cases establish no such rule.

To the contrary, several cases cited by PJT, including from this Court, use a constructive knowledge or notice test, rather than demanding actual knowledge. In *Ford v. Grand Union Co.*, 268 N.Y. 243 (1935), for instance, this Court repeatedly framed the test as whether the defendant had "knowledge ***or notice*** of danger." *Id.* at 251, 253, 254 (emphasis added); *see* PJT Br. 25. More recently, in *Brandy B. v. Eden Central School District*, 15 N.Y.3d 297 (2010), upon which PJT also relies (PJT Br. 26-27), this Court said:

> Here, the alleged sexual assault against Brenna was an unforeseeable act that, without sufficiently specific knowledge ***or notice***, could not have been reasonably anticipated by the school district…. Therefore, because defendants demonstrated that they had no specific knowledge ***or notice*** of any similar conduct which caused the injury and plaintiff presented no triable issue of fact, the courts below properly granted them summary judgment.

15 N.Y.3d at 302-03 (emphasis added). If "actual knowledge" of prior conduct were the sole criterion, the Court would not have said "knowledge ***or notice***" in *Brandy B.* and *Ford*.

PJT also cites *Doe v. Alsaud*, 12 F. Supp. 3d 674 (S.D.N.Y. 2014), PJT Br. 27, but that case is likewise irreconcilable with an actual knowledge test. There, the court dismissed negligent supervision and retention claims relating to an employee's sexual assault on the grounds (among others) that the complaint "does not allege a fact to show that [the defendant] knew ***or should have known*** of any prior assault" by the employee tortfeasor. *Id.* at 681 (emphasis added).[4]

PJT cites several other cases in this section in support of its "actual knowledge" rule. Those cases do not help PJT, though, as courts decided them on their facts without taking a position on the "actual knowledge vs. notice" issue one way or the other. *See* PJT Br. 24-27 (citing *Judith M. v. Sisters of Charity Hosp.*, 93 N.Y.2d 932, 934 (1999) (mem.) (affirming summary judgment where plaintiff "presented mere speculation and unsubstantiated allegations"); *Hall v. Smathers*, 240 N.Y. 486, 491 (1925) (reversing dismissal and ordering new trial where defendants' agents had "full knowledge" of the tortfeasor's "habits and disposition"); *Hogle v. H.H. Franklin Manufacturing Co.*, 199 N.Y. 388 (1910); *Mucciarone v. Initiative, Inc.*, No. 18-cv-567, 2020 WL 1821116, at *4 (S.D.N.Y.

[4] PJT also asserts that "[s]ome lower courts have *required* actual knowledge of the [employee's] propensity," PJT Br. 31 & n.16 (emphasis added), but the authority it cites hardly goes that far. Neither case cited by PJT addressed the issue of actual versus constructive knowledge, much less turned on that distinction.

Apr. 10, 2020); *Haybeck v. Prodigy Services Co.*, 944 F. Supp. 326, 332 (S.D.N.Y. 1996)).[5]

In addition, virtually every case PJT cites in this part of its brief—all but *Alsaud* and *Haybeck*—were decided at summary judgment or trial. That underscores the fact-intensive nature of the propensity inquiry, and further supports denial of PJT's motion to dismiss in this case based on Plaintiffs' well-pled allegations.

### B. New York's Background Check Caselaw Embraces a Fact-Dependent Constructive Knowledge Standard.

PJT also cites a handful of background check cases that it claims supports its "actual knowledge" standard (PJT Br. 32-34), but PJT is wrong: New York courts apply a "constructive knowledge" rule in that context. In *Doe v. Goldweber*, 112 A.D.3d 446 (1st Dep't 2013), for instance, plaintiff brought a negligent hiring claim against the employer of an anesthesiologist after the anesthesiologist's medical malpractice caused plaintiff to contract hepatitis C. *Id.* at 446-47. Plaintiff alleged that a proper background check would have unearthed the employee's troubling disciplinary history. *See id.* at 447. The First Department reversed the trial court's dismissal of the negligent hiring claim against the employer, holding that "triable issues of fact exist as to" that claim, given the employer "failed to

[5] PJT admits that *Haddock v. City of New York*, 75 N.Y.2d 478 (1990), does not address the pleading standard for negligent supervision. *See* PJT Br. 25, n.11.

investigate a seven-month gap in [the employee's] employment, which would have revealed his disciplinary history." *Id.* Whether phrased as a case about constructive knowledge or notice or a "duty of inquiry," it is certainly *not* a case imposing a requirement that the employer have "actual knowledge" of the prior problematic conduct.

There are many similar cases in the negligent hiring and retention context. In *T.W. v. City of New York*, 286 A.D.2d 243 (1st Dep't 2001), for instance, the First Department reversed a summary judgment dismissal of plaintiff's negligent hiring and retention claims. It reasoned that the employer in that case "had a duty to conduct an investigation of [the employee's] background" and such an investigation would have unearthed the employee's "extensive criminal record." *See id.* at 245. "[A]n employer has a duty to investigate a prospective employee when it knows of facts that would lead a reasonably prudent person to investigate that prospective employee." *Id.*; *see also, e.g.*, *Chichester v. Wallace*, 150 A.D.3d 1073, 1075 (2d Dep't 2017) (affirming denial of summary judgment on negligent hiring, supervision and retention claims, where the evidence "reflected the existence of a triable issue of fact as to whether [the employer] negligently failed to investigate the [employee's] application for employment, including a gap in her

employment"); *Andersen v. Suska Plumbing*, 246 A.D.2d 475, 475 (1st Dep't 1998) (similar).[6]

The background check cases also endorse another rule that is just as relevant to negligent retention and supervision cases as it is to negligent hiring cases: "[T]he depth of inquiry prior to hiring, irrespective of convictions, may vary in reasonable proportion to the responsibilities of the proposed employment." *Sandoval v. Leake & Watts Servs., Inc.*, 192 A.D.3d 91, 99 (1st Dep't 2020) (internal quotation marks and citation omitted). An employer's duty to follow up on red flags (whether called constructive knowledge, notice, duty of inquiry, or something else) depends in part on "the responsibilities of the proposed employment." That rule is relevant in this case: the responsibilities of Caspersen's employment included dealing directly with private equity funds and current and potential investors in those funds, including on financial transactions worth many millions of dollars. [*See* R28-29 ¶¶4, 6; R33-34 ¶¶20, 22.] PJT's duties relating to retention and supervision of Caspersen should be assessed in that context.

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[6] These cases also address PJT's argument about the New York Correction Law (PJT Br. 33-34 & n.18), which is mistaken. The Correction Law "explicitly provides that discrimination [against ex-convicts when hiring] is permissible where 'the granting of the employment would involve an unreasonable risk … to the safety or welfare of specific individuals ….'" *T.W.*, 286 A.D. at 246 (quoting Correction Law § 752[2]). In *T.W.* the court held that, "[g]iven [the defendant's] failure to investigate [the employee's] background and consider the factors set forth in Correction Law § 753, a jury could reasonably conclude that [the defendant] was responsible for the injury to infant plaintiff." *Id.*

* * *

Given the long history of constructive knowledge in New York negligent supervision and retention cases, PJT's argument that such a rule "would be disastrous for employers and employees alike" (PJT Br. 32) rings hollow. Courts have already proved well equipped to draw lines regarding what sort of constructive knowledge is sufficient to render an employer potentially liable.

## IV. Caspersen's Excessive Day-Drinking and Obsessive Stock Market Gambling Is Relevant to Propensity.

PJT also argues that this Court should hold, as a matter of law, that "drinking and personal securities trading are not indicative of a propensity to commit fraud," because "[m]any people drink or trade securities without ever committing fraud." PJT Br. 38. This argument has no bearing on the allegations regarding the stolen deal fee, and in any event is wrong for many reasons.

For starters, PJT has erected a strawman. Plaintiffs allege far more than that Caspersen engaged in "drinking and personal securities trading," as explained above. *See supra*, pp. 4-5. A massive day-drinking problem coupled with a gambling compulsion is a dangerous mix, particularly when the person is entrusted to manage large financial transactions (including invoice-related processes). Plaintiffs are entitled to such an inference at the pleading stage. *See Sokoloff*, 96

N.Y.2d at 414 (court must "accord plaintiffs the benefit of every possible favorable inference").

PJT also complains that "there is no evidence that purging" persons with such problems "is an effective means to protect the public from fraudulent schemes," but courts considering a motion to dismiss do not deal in "evidence." Here, Plaintiffs' allegations establish (by inference and directly) a connection between Caspersen's excessive day-drinking and online trading compulsions and his propensity to commit fraud. [R35, 48, ¶¶26, 87.] Whether the "red flag" conduct is sufficiently connected to the tort suffered by the plaintiff is a factual question typically reserved for summary judgment or trial. *See, e.g.*, *Chichester*, 150 A.D.3d at 1075 (denying summary judgment on negligent supervision claim in sexual assault case, where defendant employer was aware the employee had previously been charged with grand larceny).

## V. PJT's "Special Relationship" Arguments Are Legally and Factually Unavailing.

When PJT finally gets to its "no duty" argument, it barely engages Plaintiffs' detailed analysis of the factors this Court set out in *532 Madison Avenue* for analyzing the scope of an alleged tortfeasor's duty. Instead, PJT marches through a haphazard array of cases it contends establish two different "special relationship" rules that should apply here: (1) a rule that "a duty to prevent a third party from

committing an intentional tort requires a special relationship," and (2) a rule that "a duty to avoid the negligent infliction of economic harm requires a special relationship." *See* PJT Br. 40-48. PJT then argues that these "special relationship" rules mean Plaintiffs must have been current customers of PJT to recover for negligent supervision. *Id.* Yet the cases PJT cites stand for no such rules, and other New York cases prove there are no such rules in New York law.

### A. There Is No Rule In New York That A Duty to Prevent a Third Party From Committing an Intentional Tort Requires a Special Relationship.

While this Court has in some cases declined to recognize a duty to prevent others from committing intentional torts (PJT Br. 42-43), that proves nothing other than that the Court considers each new "scope of duty" inquiry on its own merits. Implicitly recognizing this, PJT seeks a different rule than "it depends on the facts and circumstances."

PJT purports to have found such a rule in *532 Madison Avenue*, which PJT cites for the proposition that "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." (PJT Br. 43 (citing *532 Madison Ave.*, 96 N.Y.2d at 289)) (PJT short-cites *532 Madison Avenue* as "*Finlandia*"). But *532 Madison Avenue* says no such thing. At most, when describing some circumstances that can result in an "actionable duty"—and without distinguishing between

whether the underlying tort was intentional or negligent—the Court noted that "[a] duty *may* arise from a special relationship that requires the defendant to protect against the risk of harm to plaintiff." 96 N.Y.2d at 289 (emphasis added). Nowhere does the Court say a plaintiff "*must* allege a special relationship with [the] defendant." PJT Br. 43 (emphasis added).

To the contrary, in *Hamilton*—a case directly addressing a defendant's scope of duty for a third party's intentional torts, and upon which *532 Madison Avenue* relies—this Court held that a duty may also arise where there is a relationship "between defendant and a third-person tortfeasor," including "master and servant." 96 N.Y.2d at 233. That is the relationship between PJT and Caspersen in this case.

Nor is it true that every negligent retention or supervision case decided by this Court involved a "special relationship" between the victim and the defendant. (PJT Br. 43-44.) PJT gets the critical fact wrong in *Hogle* (PJT Br. 44): while the plaintiff resided next door to the defendant manufacturing company, the plaintiff was *not* the "lessee of defendant," as PJT represents. *See Hogle*, 199 N.Y. at 392-93. The plaintiff thus had no "special relationship" with the defendant, yet this Court affirmed the negligent supervision jury verdict, imposing a duty on the defendant based on the defendant's employment relationship with the tortfeasor employees. *See id.* at 392-93 (citing and quoting *Fletcher v. Baltimore & Potomac R.R. Co.*, 168 U.S. 135 (1897)).

Consistent with *Hamilton* and *Hogle*, Plaintiffs showed (Opening Br. 30-31 & n.6) that the lower courts in New York have repeatedly upheld negligent supervision liability where employees committed intentional torts against victims with no relationship at all to the employer. *See, e.g.*, *Selmani v. City of New York*, 116 A.D.3d 943, 943-45 (2d Dep't 2014). PJT ignores these cases when discussing its "intentional tort/special relationship" rule.

### B. There Is No Rule In New York That A Duty to Avoid Negligent Infliction of Economic Harm Requires a Special Relationship.

PJT also contends that a special relationship is required to impose any duty on a party to prevent economic harm. PJT Br. 46-49. But this Court has never announced such a rule. To the contrary, in the main case cited by PJT, *532 Madison Avenue*, this Court endorsed a rule that permitted victims with no relationship at all to the defendant to sue the defendant in negligence for economic losses. While the Court limited the scope of potential plaintiffs, it did so *not* with a "special relationship" requirement, but rather with a requirement that any such plaintiffs must *also* have "suffered personal injury or property damage." 96 N.Y.2d at 291-92. This Court's own precedent thus forecloses the rule PJT proposes.

Lower court decisions further demonstrate that PJT's proposed "economic harm/special relationship" rule has no place in New York law, because plenty of negligent supervision cases involve purely economic loss. For instance, in *Weinberg v. Mendelow*, 113 A.D.3d 485 (1st Dep't 2014), the First Department

reversed the dismissal of negligent retention and supervision claims against an employer where the harm was purely economic—the tort there, as here, was fraud. *See id.* at 487. And in *Selechnik v. Law Office of Howard R. Birnbach*, 82 A.D.3d 1077 (2d Dep't 2011), the Second Department affirmed the denial of a motion to dismiss negligent hiring and retention claims where the underlying harm was purely economic—again, the underlying tort was fraud. *Id.* at 1079-80; s*ee also Gansett One, LLC v. Husch Blackwell, LLP*, 168 A.D.3d 579, 580 (1st Dep't 2019) (holding plaintiff investors adequately pled claim for negligent supervision relating to losses from fraudulently obtained investments in medical companies).

Recognizing that New York cases did not hold much promise for a bright-line rule, PJT cites cases from other jurisdictions, as well as the Restatement (Third) of Torts and various treatises. A great many of the cases PJT cites, though, are the same type of "urban disaster" cases as *532 Madison Avenue*. And just like that case, many of these cases do not require a "special relationship" between the plaintiff and defendant, but rather set other rules to limit potential liability.

As for the treatises and the Restatement, they acknowledge there is no overarching rule. *See* Dan B. Dobbs et al., The Law of Torts § 607 (2d ed.) ("[T]he implication of references to 'the' economic loss rule that there is but a single overarching economic loss rule is misleading."); Restatement (Third) of Torts §1, cmt. b. These sources also identify two considerations for when to apply a rule

limiting recovery for economic losses: "whether recognizing a duty of care would expose the defendant to indeterminate or disproportionate liability," and "whether parties in the plaintiff's position can reasonably be expected to protect themselves against the loss by contract." Restatement (Third) of Torts §1, cmt. e. The first consideration is already part of this Court's test in *532 Madison Avenue*, and for reasons Plaintiffs explained in their opening brief, it does not justify imposing a "no economic losses" rule here. *See* Opening Br. 17-20. The second consideration also favors no such rule here, as prospective customer plaintiffs have no contractual means to protect themselves against economic losses caused by the employer's negligence, having not yet transacted any actual business with the employer.

### C. PJT's Arguments About "The Nature of Park Hill and PJT's Business and Caspersen's Job" Are Again Based on PJT Trying to Rewrite the Complaint, but Ultimately Help Plaintiffs' Case.

At the end of its "special relationship" argument, PJT argues that its particular business model further supports applying a "special relationship" requirement in this case. PJT Br. 49-51. The basis of this section is that "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)." *Id.* at 49. Yet again, though, PJT is trying to rewrite the Complaint to fit its own theories.

In truth, the Complaint plainly alleged that Caspersen's job managing PJT's "fund recap" business included dealing not just with private equity fund managers, but also with current or prospective investors in the funds ("limited partners"). [R32 ¶18; R33 ¶¶ 20-22.] That makes sense; a fund cannot be recapitalized without new investors, and Caspersen's job included trying to bring in those new investors. *See infra*, section VII.

Beyond mischaracterizing the nature and scope of Caspersen's job, this section of PJT's brief mostly just asserts that PJT's business is different than the other types of businesses Plaintiffs discussed in their opening brief. PJT devotes almost no effort, though, to engaging with Plaintiffs' numerous showings about the negative consequences of PJT's proposed "no duty to prospective customers" rule, instead basically just saying "those businesses are different."

What's more, the main difference PJT highlights here actually helps Plaintiffs' position. Any concerns about potential "proliferation of claims" or "unlimited or insurer-like liability," *532 Madison Ave.*, 96 N.Y.2d at 288, are far less pressing in an industry with a small, sophisticated and well-defined set of prospective clients or counterparties.

## VI. PJT's Attacks On Plaintiffs' Proposed Rule Do Not Hold Up.

When PJT finally gets around to addressing Plaintiffs' proposed test on its merits, PJT's arguments are very weak. PJT contends, for instance, that "[n]o precedent supports this test." PJT Br. 52. But that is just wrong, as the cases Plaintiffs cited in their opening brief attest. *See* Opening Br. 28-34. PJT's "nothing-to-see-here" assertion that "the stray phase 'potential customer'" just happened to appear in these cases (PJT Br. 52) is contradicted by these courts' use of the phrase over and over again in their holdings. Opening Br. 33.

PJT also argues that Plaintiffs' test would subject employers to "insurer-like liability" to an "indeterminate class" of potential victims, but that is not true—particularly for a business like PJT, which PJT itself admits has a fairly narrow and well-defined universe of potential customers (including private equity funds and private equity investors). *See supra*, section V.C. In fact, businesses like PJT already face liability to potential customers—and even complete strangers—through the doctrines of *respondeat superior* and apparent authority. Neither of those doctrines limit liability to current customers—a point Plaintiffs made about *respondeat superior* doctrine in their opening brief, and which PJT ignores. Opening Br. 24-25. That has not resulted in "insurer-like liability" to an "indeterminate class" of potential victims under either of those doctrines.

PJT also disparages the "capacity as an employee" formulation Plaintiffs offer, complaining that it is too close to the "scope of employment" formulation used in *respondeat superior*. PJT Br. 55-56. The crux of PJT's argument is that it would be "nonsensical" to treat "capacity as an employee" as "just a synonym for 'scope of employment'" (PJT Br. 56), apparently because PJT believes doing so would result in negligent supervision doctrine illogically duplicating *respondeat superior* doctrine. But that view fundamentally misconstrues *respondeat superior* doctrine. To prove *respondeat superior* liability, a plaintiff must prove *both* that the employee was acting "within the scope of employment," *and* "in furtherance of the employer's business." *Bowman v. State of New York*, 10 A.D.3d 315, 316 (1st Dep't 2004). That second requirement helps create a significant gap that is filled by a rule permitting negligent supervision claims against employers whose employees tortiously injure potential customers whom they encountered in (or because of) their "capacity as an employee."[7]

[7] Many cases use the shorthand "scope of employment" to encompass both whether the employee's conduct was sufficiently work-related, as well as whether it was "in furtherance of the employer's business" (rather than for purely personal reasons). *See Schilt v. New York City Tr. Auth.*, 304 A.D.2d 189, 193 (1st Dep't 2003) ("Regardless of the manner in which the rule is phrased [], an employee's actions are not within the scope of employment unless the purpose in performing such actions is to further the employer's interest."); *see also Gray v. Schenectady City Sch. Dist.*, 86 A.D.3d 771, 773-74 (3d Dep't 2011) (cited at PJT Br. 56). To the extent the "scope of employment" concept in the *respondeat superior* context includes "in furtherance of the employer's business," the "capacity as an

This case is a perfect example of that circumstance. Contrary to PJT's mischaracterization (PJT Br. 41, 58-59), the First Department's affirmance of the dismissal of Plaintiffs' *respondeat superior* claim does *not* foreclose Plaintiffs from contending that they encountered Caspersen "in his capacity as employee," or even "in the scope of his employment." Quite the opposite: the trial court held that "plaintiffs have pleaded sufficiently to state a claim that Caspersen was working within the scope of his employment when he made the pitch to the Foundation that the loan was intended to 'facilitate' the Irving Place transaction.'" [R181.] The trial court only ruled against Plaintiffs on *respondeat superior* based on the second requirement of the test, holding that "plaintiffs have not sufficiently alleged that [Caspersen's] actions benefited PJT." [R181.] The First Department affirmed on that same ground only: "Defendants' employee orchestrated a fraudulent scheme through a fictitious transaction ***solely for personal gain***. Thus, defendants are not liable for that fraud under the doctrine of respondeat superior." [R167-68 (emphasis added).][8]

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employee" formulation Plaintiffs propose for negligent supervision claims is certainly not a "synonym" for the concept.

[8] For similar reasons—namely, the difference in the elements of the two torts, including apparent authority's focus on specific conduct of the defendant—the First Department's ruling on apparent authority does not bar a finding that Plaintiffs encountered Caspersen because of his capacity as a PJT employee.

Finally, rather than engage Plaintiffs' policy arguments and reasoning in greater depth, PJT pivots to arguing that Plaintiffs "rely heavily on Section 317 of the Restatement (Second) of Torts" and then misrepresents the Restatement in multiple ways. PJT Br. 57-58. First, contrary to PJT's argument, Section 317 contains no "bodily harm" limitation when dealing with an employee's *intentional* torts; the "bodily harm" limitation only appears later in that section, addressing an employer's duty regarding an employee's *negligent* conduct. *See* Opening Br. 35 (quoting Section 317). Second, PJT wrongly tries to restrict Section 317's reference to "chattel" to just "dangerous chattel," but that is not what the Restatement says.

## VII. Plaintiffs "Pass Their Own Test."

Finally, PJT argues that Plaintiffs fail to allege that they were a "potential" or "prospective" customer of PJT. Once again, not true.

As explained above, Caspersen's job running PJT's "fund recap" business did not entail working only with PJT's "fee-paying clients"—the private equity funds who paid PJT to arrange recapitalization of their funds. Also central to Caspersen's job was working with potential investors whom PJT would bring in to participate in the recapitalization. For that reason, even though these potential investors may not have paid PJT in connection with the fund recap transactions

they invested in, they were every bit as foreseeable, and vital, a part of PJT's (and Caspersen's) fund recap work as were the private equity funds.

The Complaint makes this clear in numerous places:

> 18. … Caspersen's responsibilities included "lead[ing] Park Hill's effort to deliver capital solutions to mature funds by working directly with private equity fund managers ***and limited partners*** through structured [secondary][9] transactions." …
>
> 20. … PJT authorized and encouraged Caspersen … to carry out the business of PJT by engaging with clients ***and other market participants*** in an effort to market, broker, negotiate, and structure secondaries transactions worth millions or billions of dollars, and bring those transactions to closing; …
>
> 22. … PJT authorized and encouraged Caspersen to act as the main point of contact for fund recap deals that he had brought in. Indeed, in practice, PJT often allowed Caspersen to be the sole point of contact that any client ***or other outside party*** had with PJT on fund recap deals….

[R32-33 (emphasis added).]

Plaintiffs thus pled that they were "prospective customers" of PJT—not paying private equity fund customers, but rather prospective investors of precisely the type Caspersen would bring into a fund recap deal he was putting together. Plaintiffs fell squarely within one of the classes of third parties that Caspersen was encouraged to solicit as part of his work for PJT.

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[9] Plaintiffs inadvertently omitted this word from the quotation in the Complaint.

## CONCLUSION

For these reasons, the Appellate Division's order should be reversed.

Dated: March 24, 2021
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 6,998 words.

Dated: March 24, 2021
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