Appellate Division First Department Case No. 2018-3989
New York County Clerk's Index No. 654584/17

Court of Appeals

STATE OF NEW YORK

THE MOORE CHARITABLE FOUNDATION and KENDALL JMAC, LLC,

Plaintiffs-Appellants-Cross-Respondents,

—against—

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

Defendants-Respondents-Cross-Appellants,

—and—

ANDREW W.W. CASPERSEN,

Defendant.

MOTION FOR LEAVE TO APPEAL TO THE COURT OF APPEALS

WILLIAM CHRISTOPHER CARMODY
STEPHEN SHACKELFORD, JR.
MARK MUSICO
NICHOLAS C. CARULLO
SUSMAN GODFREY L.L.P.
1301 Avenue of the America, 32nd Floor
New York, New York 10019
Telephone: (212) 336-8330
Facsimile: (212) 336-8340

Attorneys for Plaintiffs-Appellants-Cross-Respondents

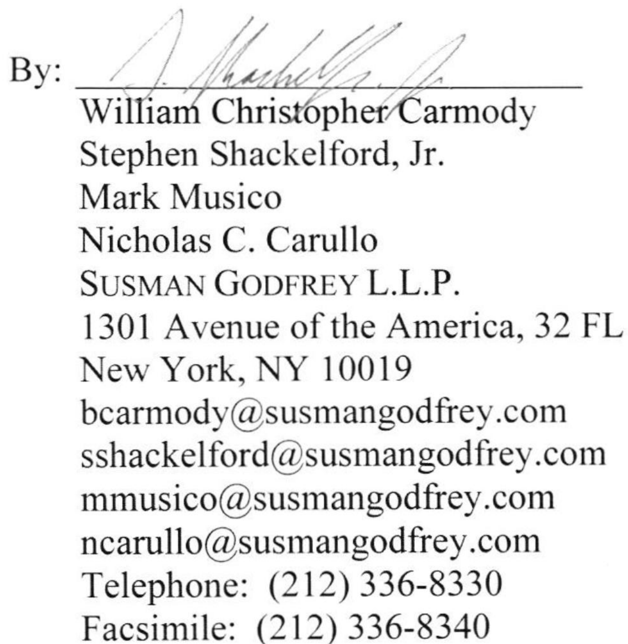
COURT OF APPEALS
OF THE STATE OF NEW YORK

THE MOORE CHARITABLE FOUNDATION and KENDALL JMAC, LLC, Plaintiffs-Appellants-Cross Respondents, -against- PJT PARTNERS, INC., PARK HILL GROUP, LLC and ANDREW W.W. CASPERSEN, Defendants-Respondents-Cross-Appellants.	Index No. 654584/17 Docket No. 2018-3989 NOTICE OF MOTION FOR PERMISSION TO APPEAL TO THE NEW YORK COURT OF APPEALS PURSUANT TO CPLR § 5602(a)(1)(i)

PLEASE TAKE NOTICE, that Plaintiffs-Appellants-Cross-Respondents The Moore Charitable Foundation and Kendall JMAC, LLC will move this Court, pursuant to CPLR § 5602(a)(1)(i) and Rule 500.22 of the Rules of Practice of the Court of Appeals, upon the record of the prior appeal in this case to the Appellate Division, First Department, and upon the papers submitted here, at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on May 18, 2020, for an order granting permission to appeal to this Court from a Decision and Order of the Appellate Division, First Department, entered on December 3, 2019.

Dated: May 7, 2020

Respectfully submitted,



By: ______________________

William Christopher Carmody
Stephen Shackelford, Jr.
Mark Musico
Nicholas C. Carullo
SUSMAN GODFREY L.L.P.
1301 Avenue of the America, 32 FL
New York, NY 10019
bcarmody@susmangodfrey.com
sshackelford@susmangodfrey.com
mmusico@susmangodfrey.com
ncarullo@susmangodfrey.com
Telephone: (212) 336-8330
Facsimile: (212) 336-8340

Attorneys for Plaintiffs-Appellants-Cross-Respondents The Moore Charitable Foundation and Kendall JMAC, LLC

COURT OF APPEALS
OF THE STATE OF NEW YORK

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THE MOORE CHARITABLE FOUNDATION and KENDALL JMAC, LLC,	
Plaintiffs-Appellants-Cross-Respondents,	Docket No. 2018-3989
-against-	Index No. 654584/2017
PJT PARTNERS, INC., PARK HILL GROUP, LLC and ANDREW W.W. CASPERSEN,	
Defendants-Respondents-Cross-Appellants.	

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MEMORANDUM IN SUPPORT OF PLAINTIFFS-APPELLANTS-CROSS-RESPONDENTS' MOTION FOR PERMISSION TO APPEAL TO THE NEW YORK STATE COURT OF APPEALS

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INTRODUCTION

Andrew Caspersen defrauded Plaintiffs-Appellants-Cross-Respondents The Moore Charitable Foundation and Kendall JMAC, LLC ("Petitioners") out of $25 million. Caspersen initiated the fraud by reaching out to Petitioners—using his work email that stated his position as a "Managing Director" for Defendant-Respondent-Cross-Appellants PJT Partners, Inc., formerly Park Hill Group, LLC (collectively, "Respondents")—to tell them about a real, publicly reported transaction his employer was managing, and to invite them to invest in a fake debt offering that he falsely said his employer was arranging to close that deal. (R36 ¶¶30-31; R39 ¶¶41-42). This is undisputed; Caspersen served several years in jail for it. What was disputed below is whether Caspersen's employers at the time of the fraud, Respondents, bear any responsibility whatsoever for the massive fraud. The First Department of the Appellate Division ("First Department") held on the pleadings that as a matter of law, Respondents bear no legal responsibility for the fraud. That was error for two independent reasons, one of which, if left uncorrected, will cause great mischief in New York jurisprudence going forward.

The first and more broadly consequential error was the First Department's ruling as a matter of law that Petitioners could not bring a negligent supervision claim against Respondents because they had not previously been customers of Respondents. Notice of Entry of the Decision and Order of the Appellate Division,

First Department ("Exhibit A") at 4. Though Petitioners had not yet been customers of Respondents, they (and particularly The Moore Charitable Foundation) were precisely the kind of investors whom Respondents sought out and marketed their services to. In other words, Petitioners fit squarely within the class of *potential* customers of Respondents. The First Department's ruling below, however, closes the courthouse door on negligent supervision claims by potential customers, even where those would-be customers are (as here) the type of customers the business actively targets, and even where (as here) the employer had expressly authorized the tortfeasor employee to recruit new customers. The ruling in effect gives businesses in New York a "free pass" when it comes to negligent supervision of their employees, so long as the would-be customer hurt by the negligently supervised employee's misconduct has not yet completed a transaction with the business.

In adopting this cramped view of the tort of negligent supervision, the First Department became the first New York appellate court to bar a *potential* customer from pursuing a negligent supervision claim against an employer, endorsing a rule that does not make sense from a public policy perspective, either. (Incidentally, the First Department made this particular ruling despite the fact that Respondents had not raised this argument until their reply brief in support of their motion to dismiss, and accordingly neither the trial court nor Petitioners had addressed it.)

The second error was the First Department's perfunctory ruling that the Complaint also "fails to state a cause of action for negligent supervision, because it 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." Exhibit A at 4. This ruling was flat wrong. The Complaint repeatedly alleges Respondents' awareness of "the facts" that Petitioners contend (rightly) "would have put [Respondents] on notice of the employee's criminal propensity," including most egregiously that Respondents *knew* Caspersen had given them a transparently false explanation when they asked him about a missing $8.1 million client fee owed to Respondents that Caspersen had diverted to his personal bank account—an incident that "put [Respondents] on notice of [Caspersen's] criminal propensity" well before Caspersen defrauded Petitioners. (R37-38 ¶¶33-37). The Complaint also expressly alleges Respondents' awareness of several other "facts" each of which, independently, would "have put [Respondents] on notice of the employee's criminal propensity," including Caspersen's extreme alcohol problems (for example, he "h[eld] meetings with colleagues while inebriated," (R35 ¶27), and he engaged in obsessive on-the-job high-risk securities trading, (R34-35, ¶26)). In light of these copious allegations, the First Department's ruling was simply wrong.

The Court of Appeals should grant leave to appeal to correct the First Department's unprecedented and dangerous narrowing of the negligent supervision

tort, which will also enable the Court to correct the First Department's erroneous ruling that Petitioners failed to plead Defendants' awareness of the key facts relating to Caspersen's criminal propensity.

JURISDICTIONAL BASIS FOR APPEAL

This action originated in the Supreme Court, New York County. Petitioners brought claims against Respondents asserting liability for Caspersen's fraud under apparent authority, negligent supervision, and *respondeat superior* theories. Respondents moved to dismiss the claims against them at the trial level pursuant to CPLR §§ 3211(a)(7) and 3016(b). The trial court dismissed Petitioners' negligent supervision and *respondeat superior* claims, but allowed Petitioners' apparent authority claim to proceed. Petitioners appealed and Respondents cross-appealed. The First Department dismissed the entirety of Petitioners' Complaint against Respondents. Respondents served Notice of Entry of the First Department's Decision and Order on December 3, 2019. Petitioners moved before the First Department for reargument or review by this Court of Petitioner's negligent supervision and *respondeat superior* claims and served Respondents on January 2, 2020. Respondents served Notice of Entry of the Appellate Division's denial of that motion on March 3, 2020.

Before Petitioners could file the present motion before this Court, the COVID-19 pandemic led Governor Cuomo to issue Executive Order 202.8, which

tolled "any specific time limit for the commencement, filing, or service of any legal action, notice, motion, or other process or proceeding" to April 19, 2020. Governor Cuomo subsequently issued Executive Order 202.14, which further tolled that time limit to May 7, 2020. Petitioners now move, on May 7, 2020, for this Court to review the First Department's denial of their negligent supervision claim. The motion is thus timely.

The First Department's Decision and Order is a final determination that disposes of the matter as to Respondents. This Court thus has jurisdiction over this motion pursuant to CPLR § 5602(a)(1)(i). *See also We're Associates Co. v. Cohen, Stracher & Bloom, P.C.*, 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."); *Barile v. Kavanaugh*, 67 N.Y.2d 392, 395 n. 2 (1986) (same).

STATEMENT OF 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?

Yes.

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?

Yes.

ARGUMENT

Permission for leave to appeal should be granted when, among other things, the issues raised are novel or of public importance or when the decision involves a conflict among the departments of the Appellate Division. 22 NYCRR 500.22(b)(4). For both those reasons, Petitioners should be permitted to appeal to this Court.

I. The First Department's Decision Applied a New Duty Requirement for Negligent Supervision Cases that Denies Relief to Prospective Customers of the Defendant-Employer.

As alleged in the Complaint, Andrew Caspersen was a senior employee whom Respondents "held . . . out to the world as a leader in secondaries"—a type

of private equity transaction facilitated by Respondents where private investors purchase and sell ownership interests in certain kinds of privately traded investment vehicles, such as private equity or hedge funds. (R28 ¶4; R32 ¶17). Respondents "encouraged [Caspersen] to reach out to potential clients directly to offer his services in that market," and conveyed to the public "that Caspersen had the authority to act for [Respondents] in connection with secondaries transactions." (R28 ¶ 4).

As also alleged in the Complaint, Caspersen routinely engaged in disturbing, and at times illegal, conduct while at work. This behavior put Respondents on notice of the dangers Caspersen posed to Respondents' clients, both current and potential—including, specifically, the high risk that he, whether out of dishonesty or desperation or both, might use his position to defraud those current or potential clients. Caspersen, for example, "would typically consume 10 to 15 alcoholic drinks each day, mostly during business hours," and "would return to the office to continue working, including holding meetings with colleagues, while inebriated." (R35 ¶27). Caspersen would also place highly speculative options trades and "obsessively monitor his positions" while at work, using his work computer and other work devices. (R34-35 ¶26). Finally, Caspersen diverted an $8.1 million client fee that was supposed to be paid to Respondents into a personal account he controlled, and gave a transparently false explanation when Respondents asked

about the delayed fee. (R37-38 ¶¶33-37). All of this happened well before Caspersen defrauded Respondents. (R34-38 ¶¶26-37). Respondents' total failure to address any (let alone all) of these flashing red-light warning signs meant Caspersen was able to stay in his position as Respondents' highest-ranking secondaries employee and use that position to defraud Petitioners.

The First Department held that Petitioners could not state a claim for negligent supervision on these facts because they had never before been customers of Respondents. Exhibit A at 4. Yet Petitioners—a nonprofit organization and investment vehicle both affiliated with a successful New York investment professional were well within the class of potential investors whom Respondents targeted, and whom Caspersen was expressly authorized to recruit, to participate in their secondaries transactions. (R28, ¶4; R30 ¶9-10) (Respondents "hired Caspersen to build its business of brokering deals in the secondary market for private equity interests" and authorized Caspersen to "reach out to potential clients directly to offer his services in that market"; Petitioners are "a private non-profit foundation" and "investment vehicle" both of which, as the $25 million investment at issue shows, were capable and interested in investing in private equity transactions) (R58). By refusing to permit these potential customers to pursue a negligent supervision claim, the First Department has narrowed the scope of New York's common law negligent supervision tort in a way and to a degree that no

appellate court has done before, and that makes no sense as a matter of sound legal policy.

Under the First Department's rule, New York businesses cannot be held accountable for even the most grossly negligent misconduct in supervising (or hiring) employees when those employees harm prospective first-time customers. The businesses in effect get a "free pass" for how their negligently managed or hired employees interact with any prospective customers, as long as those prospective customers are harmed before they close a legitimate transaction with the business. That makes no sense as a common law policy matter: why leave it to happenstance whether a New York business can be called to account for its negligence, based solely on whether a customer has yet successfully completed a legitimate transaction with the business?

Any number of businesses send employees out into the world to sign up new clients, especially in the sorts of service industries (like finance and law) for which New York is a world leader. Imagine any of these businesses sending an employee out into the world to sign up new clients, knowing that the employee has a propensity to commit sexual assault, or robbery, or (as here) fraud. Should New York courts really hold, as the First Department did here, that such businesses cannot be held responsible for negligently allowing such an employee to use the trappings and resources of his or her position to gain access to a victim—a victim

who reasonably believed he or she was being invited to become a client of the business, but just happened to not yet have done so? No. At the very least, in situations like this case, where an employee was indisputably authorized to recruit new clients, and the victims were legitimate potential clients of the business, those victims should be permitted under New York law to pursue negligent supervision (or negligent hiring) claims against the business.

To be clear, Petitioners are not advocating that New York's negligent supervision tort impose on employers a free-floating duty to every human being and company on the planet (or even just in New York). Rather, the duty should run to current *and* legitimate potential customers. Other states have so held, proving it is both a fair and a workable standard. *See McLean v. Kirby Co.*, 490 N.W.2d 229, 232, 234, 236-39 (N.D. 1992) (permitting negligence claim, referred to as "negligent selection", against employer whose salesperson gained entry into a prospective customer's home under the guise of doing an in-home demonstration of the employer's products, and then raped the prospective customer); *see also Doe v. Coe*, 135 N.E.3d 1, 13 (Ill. 2019) (employer owes duty to "act reasonably in hiring and retaining" and supervising employees "to ***all foreseeable individuals*** who might be impacted by the employee or his employment" (emphasis added)); *Keller v. Koca*, 111 P.3d 445, 450 (Colo. 2005) (finding that the evidence "supports a finding that [the employer] knew that [the tortfeasor employee's]

continued employment created a risk that young women working at the dry cleaners and ***potential customers*** would be subject to sexual contact and lewd behavior during business hours and [the employer] therefore had a duty to take reasonable steps to prevent *that* harm from occurring" (emphasis added)).[1] By contrast, Petitioners have not found a single case where an appeals court anywhere in the country has barred a legitimate potential customer from brining a negligent supervision (or hiring or retention) claim.

It is particularly important that the Court take up this case to reverse this narrowing of New York's negligent supervision tort because the First Department's ruling below represents the first time any New York appellate court has narrowed the tort in this way. The First Department cited only *Gottlieb v. Sullivan & Cromwell*, 203 A.D.2d 241 (2d Dep't 1994), in support of its ruling, but that case did not actually bar a potential client from bringing a negligent supervision claim. There, the plaintiff was a market-maker who sued the defendant law firm because he claimed his own independent trading activity was adversely affected by an illegal insider trading scheme perpetrated by the law firm's employees. *See id.* at 241. The Second Department held that the plaintiff

[1] This Court could save for another day whether to further limit the duty towards potential customers only to those situations where the employee in question was authorized to recruit new customers. The Court need not decide that with this case, because Caspersen was authorized to recruit new customers for Respondents, *see* (R33 ¶¶20-21), and thus Petitioners' claim would meet even that more restrictive rule.

could not maintain a negligent hiring or supervision claim against the law firm because he "was not a client of the defendant's," *id.* at 241-42, but there was no suggestion in the case (nor could there be, given the facts) that the plaintiff was suing for harm done to him as a legitimate *potential* client of the law firm. So while one could read language in *Gottlieb* as imposing a hard-and-fast "current clients only" rule for negligent supervision cases, the issue of whether a legitimate *potential* client is a proper plaintiff in such a case was not before the Second Department. The First Department is thus the first appellate court in the State to expressly close the door on negligent supervision claims brought against a business by a legitimate potential client, for harm caused by an employee authorized to recruit new clients just like Petitioners.[2]

II. The First Department's Decision Overlooked Allegations in the Complaint that Did Precisely What the First Department Held the Complaint Failed to Do.

In dismissing Petitioners' negligent supervision claim, the First Department also held 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

[2] Respondents will likely also cite the trial court's unreported decision in *Heffernan v. Marine Midland Bank*, No. 100589/1998 (N.Y. Supt. Ct. Jan. 27, 1999), as endorsing the First Department's cramped interpretation of the scope of the negligent supervision tort. When that case went up on appeal, the First Department held in a single sentence that "[r]egarding plaintiffs' negligence-based causes of action, we find they were properly dismissed as plaintiffs fail to allege any facts showing a special duty running from the bank to them." *Heffernan v. Marine Midland Bank*, 267 A.D.2d 83, 84 (1st Dep't 1999). However one might interpret that brief holding, it is in any event from the same court that ultimately expressly narrowed the scope of the negligent supervision tort in this case, and so adds nothing material to the analysis.

criminal propensity." Exhibit A at 4. That holding is error, because the Complaint made exactly the allegations the Court held to be missing, in spades.

For starters, the Complaint expressly alleged that Caspersen diverted from Respondents an $8.1 million fee they were owed by a client (R37 ¶33), that Respondents asked Caspersen about the missing fee and he told them they had not yet received the fee when expected because there was a "stub" closing on the deal (R37 ¶ 34), and that Respondents ***knew*** (or in the alternative should have known) that this explanation was false (R37 ¶ 35) ("This was false, and PJT ***knew*** or should have known it was false. PJT . . . ***knew*** or should have known that there was no stub closing on the deal." (emphasis added)).[3] In other words, the Complaint expressly alleged that Respondents ***knew*** that Caspersen lied to them about a missing $8.1 million fee, and the facts alleged in the Complaint must be accepted as true. *Goldin v. TAG Virgin Islands, Inc.*, 149 A.D.3d 467 (1st Dep't 2017). The Complaint went even further, also alleging that when Caspersen later transferred funds to Respondents to replace the missing $8.1 million client fee,

[3] Although no argument has been made at any stage of the case that the "knew or should have known" formulation is problematic, such an argument would be meritless given the well-settled rule that litigants are permitted to plead in the alternative. *See* CPLR § 3014 & cmt. (pleading in the alternative is permitted); *Mitchell v. New York Hosp.*, 61 N.Y.2d 208, 218 (noting "the well-settled rule that 'a plaintiff is entitled to advance inconsistent theories in alleging the right to recovery'" (quoting *Cohn v. Lionel Corp.*, 21 N.Y.2d 559, 563 (1968))) (1984). Petitioners have certainly pled sufficient facts from which, on the pleadings, it can be inferred that Respondents "knew" they were being lied to (and "knew" of the other unusual and risky behavior described below). At the pleading stage, then, neither this Court nor the courts below need decide whether the pleadings would have been sufficient had they asserted (as they do ***not***) that Respondents "did not know, but should have known" the relevant facts.

those funds arrived from the wrong bank account (from an account controlled by Caspersen rather than from Respondents' client's account). (R41 ¶47 ("PJT negligently either did not discern that the funds had arrived from the wrong account, ***or did detect the anomaly but ignored it***." (emphasis added)).) These facts—a senior executive telling Respondents what they *knew* was a bald-faced lie about why an $8.1 million fee was missing, and then transferring the money later from what they *knew* was the wrong bank account—are exactly the kinds of facts that put Respondents on notice of Caspersen's "propensity for the conduct which caused the injury": fraud. *See Doe v. Chenango Valley Central School Dist.*, 92 A.D.3d 1016, 1017 (3rd Dep't 2012).

Respondents' knowledge that Caspersen was lying to them about the stolen fee and the source of the funds to replace it is sufficient standing alone to support Petitioners' negligent supervision claim. But the Complaint also alleges other highly unusual and risky behavior that the Complaint expressly alleges Respondents knew about: that Caspersen engaged in obsessive high-risk securities trading during the workday, and that he routinely drank alcohol to excess during the workday and returned to work drunk. (R34-35 ¶¶ 25-28) ("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 [Respondents] . . . . Signs of Caspersen's aberrant trading behavior ***were***

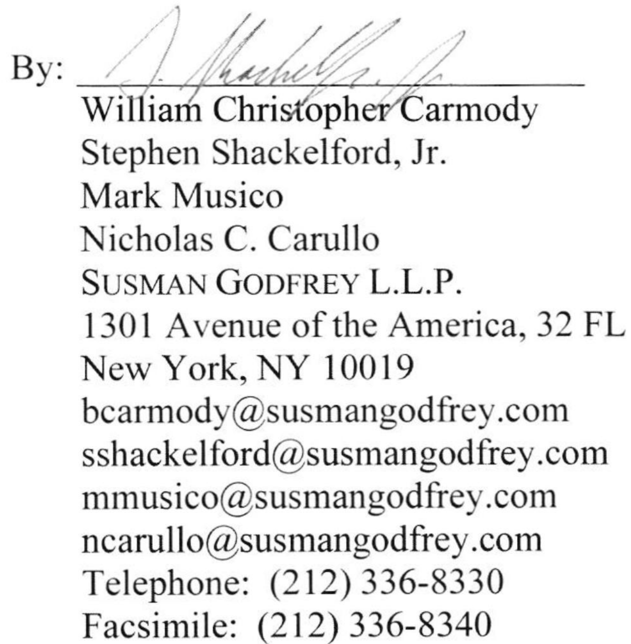
or should have been obvious to PJT. . . . Signs of Caspersen's excessive drinking ***were*** or should have been obvious to PJT. . . . After drinking, he would return to the office to continue working, ***including holding meetings with colleagues while inebriated***." (emphasis added)).

The First Department either missed or wrongly ignored these numerous allegations that Respondents "were aware of the facts that plaintiff contends would have put them on notice of the employee's criminal propensity." Exhibit A at 4. That was error, and if allowed to stand the First Department's decision would create a pleading standard in negligent supervision cases contrary to established law.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant Petitioners permission for leave to appeal the Decision and Order of the Appellate Division to this Court.

Dated: May 7, 2020 Respectfully submitted,



By: ______________________

William Christopher Carmody
Stephen Shackelford, Jr.
Mark Musico
Nicholas C. Carullo
SUSMAN GODFREY L.L.P.
1301 Avenue of the America, 32 FL
New York, NY 10019
bcarmody@susmangodfrey.com
sshackelford@susmangodfrey.com
mmusico@susmangodfrey.com
ncarullo@susmangodfrey.com
Telephone: (212) 336-8330
Facsimile: (212) 336-8340

Attorneys for Plaintiffs-Appellants-Cross-Respondents The Moore Charitable Foundation and Kendall JMAC, LLC

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

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

Exhibit A

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, COMMERCIAL DIVISION

THE MOORE CHARITABLE FOUNDATION and KENDALL JMAC, LLC,

Plaintiffs,

v.

PJT PARTNERS, INC., PARK HILL GROUP, LLC and ANDREW W.W. CASPERSEN,

Defendants.

Index No. 654584/2017

Hon. O. Peter Sherwood

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached is a true copy of a Decision and Order in this matter by the Supreme Court, Appellate Division, First Department that was entered in the office of the Clerk of the Appellate Division, First Department, on the 3rd day of December, 2019.

Dated: New York, New York
December 3, 2019

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP

By: s/ Aidan Synnott
Aidan Synnott
Amy L. Barton
Shane D. Avidan

1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3000
Facsimile: (212) 373-2399

Attorneys for Defendants
PJT Partners Inc. and Park Hill Group LLC

To: SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Floor
New York, New York 10019
(212) 336-8330
Attn: William Christopher Carmody
Jacob W. Buchdahl
Stephen Shackelford, Jr.
Mark Musico

Attorneys for Plaintiffs

Andrew W.W. Caspersen
141 East 56th St.
Apt. 9L
New York, NY 10023

Pro Se

Kern, J.P., Oing, Singh, Moulton, JJ.

10461 The Moore Charitable Foundation, et al., Index 654584/17
Plaintiffs-Appellants-Respondents,

-against-

PJT Partners, Inc., et al.,
Defendants-Respondents-Appellants,

Andrew W.W. Caspersen
Defendant.

Susman Godfrey L.L.P., New York (Stephen Shackelford Jr. of counsel), for appellants-respondents.

Paul, Weiss, Rifkind, Wharton & Garrison LLP, New York (Aidan Synnott of counsel), for respondents-appellants.

Order, Supreme Court, New York County (O. Peter Sherwood, J.), entered August 14, 2018, which granted the corporate defendants' motion to dismiss the causes of action for fraud based on respondeat superior and negligence, and denied the motion as to the cause of action for fraud based on apparent authority, and denied plaintiff's request to amend the complaint, unanimously modified, on the law, to dismiss the cause of action for fraud based on apparent authority, and otherwise affirmed, without costs. The Clerk is directed to enter judgment dismissing the complaint as against the corporate defendants.

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 (*see Bowman v State of New York*, 10 AD3d 315, 316 [1st Dept 2004]). It is of no moment that some of the fraudulently obtained funds were used to repay formerly embezzled funds so as to allow the employee to continue his fraudulent schemes undetected (*see Heffernan v Marine Midland Bank*, 267 AD2d 83 [1st Dept 1999]).

The complaint fails to state a cause of action for negligent supervision, because it 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 (*see Doe v Alsaud*, 12 F Supp 3d 674, 680 [SD NY 2014]).

Further, the complaint also fails to allege that plaintiffs were ever customers of defendants, which is fatal to a claim of negligent supervision (*see Gottlieb v Sullivan & Cromwell*, 203 AD2d 241 [2d Dept 1994]). Although defendants first raised this argument in reply on the motion, we consider it, because it is a question of law that can be resolved on the face of the existing record (*see Chateau D'If Corp. v City of New York*, 219 AD2d 205, 209 [1st Dept 1996], *lv denied* 88 NY2d 811 [1996]).

The court providently exercised its discretion in denying plaintiffs' unelaborated request for leave to amend (*see McBride v KPMG Intl.*, 135 AD3d 576, 580 [1st Dept 2016]).

The cause of action for fraud based on apparent authority should be dismissed, because the complaint does not identify any words or conduct of defendants that would give rise to a belief on plaintiffs' part that defendants' employee had authority to enter into the transaction (*see Hallock v State of New York*, 64 NY2d 224, 231 [1984]). At most, the allegations establish that defendants had imbued the employee with actual authority with respect to a somewhat related but different type of transaction (*see Standard Funding Corp. v Lewitt*, 89 NY2d 546, 551 [1997]).

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: DECEMBER 3, 2019

CLERK

Exhibit B

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK, COMMERCIAL DIVISION

THE MOORE CHARITABLE FOUNDATION and KENDALL JMAC, LLC,

Plaintiffs,

v.

PJT PARTNERS, INC., PARK HILL GROUP, LLC and ANDREW W.W. CASPERSEN,

Defendants.

Index No. 654584/2017

Hon. O. Peter Sherwood

NOTICE OF ENTRY

PLEASE TAKE NOTICE that the attached is a true copy of an Order in this matter by the Supreme Court, Appellate Division, First Department that was entered in the office of the Clerk of the Appellate Division, First Department, on the 3rd day of March, 2020.

Dated: New York, New York
March 3, 2020

Respectfully submitted,

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON LLP

By: s/ Aidan Synnott
Aidan Synnott
Amy L. Barton
Shane D. Avidan

1285 Avenue of the Americas
New York, NY 10019-6064
Telephone: (212) 373-3000
Facsimile: (212) 373-2399

Attorneys for Defendants
PJT Partners Inc. and Park Hill Group LLC

To: SUSMAN GODFREY L.L.P.
1301 Avenue of the Americas, 32nd Floor
New York, New York 10019
(212) 336-8330
Attn: William Christopher Carmody
Jacob W. Buchdahl
Stephen Shackelford, Jr.
Mark Musico

Attorneys for Plaintiffs

Andrew W.W. Caspersen
141 East 56th St.
Apt. 9L
New York, NY 10023

Pro Se

At a Term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York on March 3, 2020.

PRESENT: Hon. Cynthia S. Kern, Justice Presiding,
Jeffrey K. Oing
Anil C. Singh
Peter H. Moulton, Justices.

---------------------------------------X
The Moore Charitable Foundation, et al.,
Plaintiffs-Appellants-Respondents,

M-92
Index No. 654584/17

-against-

PJT Partners, Inc., et al.,
Defendants-Respondents-Appellants,

Andrew W.W. Caspersen,
Defendant.
---------------------------------------X

Plaintiffs-appellants-respondents having moved for reargument of, or in the alternative, for leave to appeal to the Court of Appeals, from the decision and order of this Court, entered on December 3, 2019 (Appeal No. 10461),

Now, upon reading and filing the papers with respect to the motion, and due deliberation having been had thereon,

It is ordered that the motion is denied.

ENTERED:

CLERK

Exhibit C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE MOORE CHARITABLE FOUNDATION and KENDALL JMAC, LLC, Plaintiffs, -against- PJT PARTNERS, INC., PARK HILL GROUP, LLC, and ANDREW W.W. CASPERSEN, Defendants.	Index No. 654584/2017 **NOTICE OF ENTRY**

PLEASE TAKE NOTICE that the attached is a true and correct copy of the Decision and Order, issued in the above-captioned action, and entered in the Office of the Clerk of the Supreme Court of the State of New York, New York County, Commercial Division on August 14, 2018.

Dated: New York, New York
August 14, 2018

SUSMAN GODFREY L.L.P.

By: ______________________

William Christopher Carmody
Jacob W. Buchdahl
Stephen Shackelford, Jr.
Mark Musico
1301 Avenue of the Americas, 32nd Floor
New York, NY 10019
Phone: (212) 336-8330
Fax: (212) 336-8340
bcarmody@susmangodfrey.com
jbuchdahl@susmangodfrey.com
sshackelford@susmangodfrey.com
mmusico@susmangodfrey.com

Attorneys for Plaintiff Louis Bacon

TO: Aidan Synnott
Amy L. Barton
Shane D. Avidan
PAUL, WEISS, RIFKIND, WHARTON & GARRISON LLP
1285 Avenue of the Americas
New York, NY 10019-6064
(212) 373-3000

Attorneys for Defendants PJT Partners Inc. and Park Hill Group LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the August 14, 2018, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's NYSCEF system.

SUPREME COURT OF THE STATE OF NEW YORK — New York COUNTY
PRESENT: O. PETER SHERWOOD **PART 49**
Justice

THE MOORE CHARITABLE FOUNDATION, *et al.*,

Plaintiffs,

-against-

PJT PARTNERS, INC., *et al.*,

Defendants.

INDEX NO. 654584/2017
MOTION DATE ______
MOTION SEQ. NO. 001
MOTION CAL. NO. ______

The following papers, numbered 1 to ______ were read on this motion to dismiss.

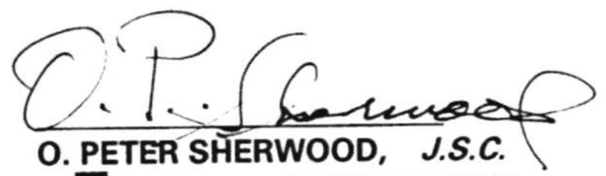
	PAPERS NUMBERED
Notice of Motion/ Order to Show Cause — Affidavits — Exhibits ...	
Answering Affidavits — Exhibits	
Replying Affidavits	

Cross-Motion: ☐ **Yes** ☐ **No**

Upon the foregoing papers, it is ordered that this motion to dismiss is decided in accordance with the accompanying decision and order.

MOTION/CASE IS RESPECTFULLY REFERRED TO JUSTICE FOR THE FOLLOWING REASON(S):

Dated: August 13, 2018



O. PETER SHERWOOD, *J.S.C.*

Check one: ☐ **FINAL DISPOSITION** ■ **NON-FINAL DISPOSITION**
Check if appropriate: ☐ **DO NOT POST** ☐ **REFERENCE**
☐ **SUBMIT ORDER/ JUDG.** ☐ **SETTLE ORDER/ JUDG.**

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: COMMERCIAL DIVISION PART 49
---------------------------------------X
THE MOORE CHARITABLE FOUNDATION and KENDALL JMAC, LLC,

Plaintiffs,

-against-

PJT PARTNERS, INC., PARK HILL GROUP, LLC and ANDREW W.W. CASPERSEN,

Defendants.
---------------------------------------X

DECISION AND ORDER
Index No.: 654584/2017

Motion Sequence No.: 001

O. PETER SHERWOOD, J.:

I. FACTS

As this is a motion to dismiss, these facts are taken from the complaint and are deemed true (see *Monroe v Monroe*, 50 NY 2d 481, 484 [1980]) (NYSCEF Doc. No. 2 ["Doc. No. __").

The complaint alleges that The Moore Charitable Foundation (the Foundation) is a nonprofit foundation with a mission to preserve and protect natural resources. The Foundation supports a variety of nonprofits in this field, and provides grants in the areas of education, health, and the arts. Plaintiff Kendall JMAC, LLC (JMAC) is an investment vehicle. Defendant PJT Partners (PJT) is an investment bank and advisory services firm. Defendant Park Hill Group, LLC (Park Hill) is a division of PJT which provides asset advisory and fundraising services (*id*, ¶ 11). Defendant Andrew W.W. Caspersen (Caspersen) was a managing director at PJT, specializing in secondary market work (*id*, ¶ 19)[1]. In December 2015, he was promoted to partner (*id*, ¶ 13). Caspersen solicited clients for PJT and marketed and shepherded transactions to closing. He was the main point of contact with clients on deals he brought into the firm. (*id*, ¶ 22). In 2014 Caspersen landed a large assignment to recapitalize a fund managed by Irving Place Capital ("Irving Place") and was the lead PJT executive on the transaction.

Plaintiffs claim PJT failed to notice Caspersen also engaged in personal high risk securities trading, lost a large amount of money, borrowed money and then stole money from

[1] In this Decision and Order, "Defendants" refers to PJT and Park Hill only. Caspersen has not responded to the complaint.

clients, including the Foundation (*id*, ¶ 26). Plaintiffs point to an August 2015 transfer of fees he received for work done on the Irving Place transaction which Caspersen then directed into his own account. He used the funds to purchase securities under his own name, which securities then lost all their value (*id*, ¶ 34). He lied to PJT about the whereabouts of the funds. Caspersen also started drinking excessively, including during the work day (*id*, ¶ 27).

In October-November 2015, Caspersen convinced the Foundation to invest $25 million in a fake investment purportedly related to the Irving Place transaction (*id*, ¶ 41). The Foundation transferred the money according to instructions given by Caspersen using a PJT email address to wire the funds to "Irving Place III SPV LLC", a real entity created by Caspersen to receive funds from the fake transaction (*id*, ¶ 43). He also used his PJT email account to send the Foundation a fake promissory note signed by "John Nelson", a fictitious person. He wired $8 million of the proceeds to PJT to cover up the Irving Place money he stole previously, and kept the rest (*id*, ¶ 47). The wire lacked the usual payment details that would identify the source of the payment (*id.*). In January 2016, Caspersen caused a payment to be made to the Foundation purporting to be an interest payment due under the fake promissory note. This was done to keep the Foundation from suspecting a problem (*id*, ¶ 50). In March 2016, Caspersen asked the Foundation to invest more money and provided a proposed promissory note to be signed by "John Nelson" (*id*, ¶ 52). When the Foundation asked to speak with Nelson, Caspersen disguised his voice and took the call. He then faked an e-mail address for Nelson. Suspicion aroused, the Foundation confronted Caspersen, and the fraud unraveled (*id*, ¶ 57).

Caspersen was arrested on March 26, 2016. He pled guilty and is currently a guest of the United States government (*id*, ¶ 59). The federal court that took the plea, also ordered restitution of $37.2 million to his victims. Plaintiffs have not received any restitution, as of the time of the complaint, and do not anticipate receiving any money from him (*id*, ¶ 60).

PJT returned $8.6 million to the Foundation (which PJT's insurer covered) (*id*, ¶ 61). The Foundation claims PJT is responsible for all of the money. It asserts causes of action for:

1- Fraud- against Caspersen;
2- Fraud- against PJT and Park Hill, having provided Caspersen with apparent authority;
3- Fraud- against PJT and Park Hill, a respondeat superior theory;
4- Negligent Supervision/Retention- against PJT and Park Hill;
5- Unjust Enrichment- against Caspersen;
6- Conversion- against Caspersen; and

7- Conversion- against PJT and Park Hill.

PJT and Park Hill seek dismissal of the entire complaint as against them for failure to state claims for which relief can be granted. On the fraud claims, Movants also allege failure to sufficiently plead the elements of fraud under CPLR 3016 (b).

II. DISCUSSION

A. Legal Standard

On a motion to dismiss a plaintiff's claim pursuant to CPLR § 3211 (a) (7) for failure to state a cause of action, the court is not called upon to determine the truth of the allegations (*see, Campaign for Fiscal Equity v State,* 86 NY2d 307, 317 [1995]; *219 Broadway Corp. v Alexander's, Inc.,* 46 NY2d 506, 509 [1979]). Rather, the court is required to "afford the pleadings a liberal construction, take the allegations of the complaint as true and provide plaintiff the benefit of every possible inference [citation omitted]. Whether a plaintiff can ultimately establish its allegations is not part of the calculus in determining a motion to dismiss" (*EBC I v Goldman, Sachs & Co.,* 5 NY3d 11, 19 [2005]). The court's role is limited to determining whether the pleading states a cause of action, not whether there is evidentiary support to establish a meritorious cause of action (*see Guggenheimer v Ginzburg,* 43 NY2d 268, 275 [1977]; *Sokol v Leader,* 74 AD3d 1180 [2d Dept 2010]).

B. Fraud Claims

"To state a cause of action for fraud, a plaintiff must allege a representation of material fact, the falsity of the representation, knowledge by the party making the representation that it was false when made, justifiable reliance by the plaintiff and resulting injury" (*Kaufman v Cohen*, 307 AD2d 113, 119 [1st Dept 2003] citing *Monaco v New York Univ. Med. Ctr.*, 213 AD2d 167, 169 [1st Dept 1995], *lv. denied* 86 NY2d 882 [1995]; *Callas v Eisenberg*, 192 AD2d 349, 350 [1st Dept 1993]).

Where the plaintiff seeks to impose responsibility on the theory that as agent of defendant, the acts of the fraudster are imputed to the principal, plaintiff must show that the agent had authority, either express or apparent to bind the principal. Whether apparent authority exists "depends upon a factual showing that the third party relied upon the misrepresentation of the agent because of some misleading conduct on the part of the principal – not the agent" *Ford v Unity Hospital*, 32 NY2d 464, 473 [1973]). It is the "words or conduct of the principal,

communicated to a third party, that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" *Hallock v State of New York*, 64 NY2d 224, 231 (1984).

Defendants contend that both fraud claims against them fail because of the lack of reasonable reliance pled by plaintiffs. They assert that the Foundation is a sophisticated investor, whose chair and founder runs an investment company holding almost $4 billion in assets. The Foundation does not claim to have performed any due diligence before investing in this too-good-to-be-true venture (Memo at 14). "New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations made during business acquisitions by investigating the details of the transactions and the business they are acquiring" (*Glob. Minerals and Metals Corp. v Holme*, 35 AD3d 93, 100 [1st Dept 2006]). After investing, when plaintiffs finally sought to speak with John Nelson, the fraud quickly unraveled.

Plaintiffs contend the question of reasonable reliance is one of fact and must await trial (Opp at 15). A duty of inquiry is the exception, rather than the rule (*id.*, citing Memo at 10). Accordingly, there is a threshold inquiry as to whether the duty of inquiry exists, and that inquiry requires the fact-intensive process of understanding the underlying transaction (Opp at 15, citing (*id.*). Whether the particular transaction falls within the *range* of transactions in which [the principal] or similarly situated institutions normally engage" (*Marathon Enterprises, Inc. v Schroter Gmbh & Co. KG*, 95 Fed Appx 364, 368 [2d Cir 2004]). The question of whether the plaintiffs' pre-investment due diligence was reasonable is not appropriate for resolution on a motion to dismiss (Opp at 16). In any event, having heard Caspersen's pitch, the Foundation responded prior to investing with questions, which Caspersen answered to its satisfaction, and presented facially valid documents that bore no indicia of fraud (*id.* at 17-18).

At this stage of the case, plaintiff must only allege it "has taken reasonable steps to protect itself against deception (*id.* at 22, quoting *Basis Yield Alpha Fund Master v Stanley*, 136 AD3d 136, 141 [1st Dept 2015]). Whether plaintiffs' reliance was justifiable is a question of fact for the jury. The Foundation does not deny being sophisticated. However, its sophistication was more than matched by the sophistication of Caspersen's fraud, his use of the legitimate Irving Place transaction and his position with PJT to mask the fraud (Opp at 22-23).

Citing *Heffernan v Marine Midland Bank, N.A.*, 267 AD 2d 83, 84 (1st Dept 1999), Defendants argue that the extraordinary rate of interest alone triggered a duty of inquiry and the failure of plaintiffs to inquire merits dismissal. In *Heffernan*, the court noted that "the guaranteed rate of return on risk-free bank notes that Helliwell [the fraudster in that case] promised was so extraordinary as to require plaintiffs to make reasonable inquiry into the scope of Helliwell's actual authority" (*id.*). Defendants here reason that in *Heffernan*, investment offered at issue a higher rate of return (18-20%, as opposed to the 15% here), but the *Heffernan* rate was no more than 3.4 times the then-current rate of US Treasury five-year bonds, while the investment here promised more than ten times the contemporary Treasury bond rate, risk free (Reply at 6). Further, the employee's representations in *Heffernan* were no more outrageous than Caspersen's here (*id.* at 7). The Foundation made no inquiries about Caspersen's authority, only asking him about the investment. They did not seek to speak to the putative borrower or to PJT, other than Caspersen (*id.*). The only due diligence alleged is that plaintiffs confirmed, using public information, that the Irving Place transaction was real. This is equivalent to a purchaser claiming that it would be sufficient, when offered the opportunity to buy the Brooklyn Bridge by an employee of the New York City Department Of Transportation, to confirm that the City does own a large bridge crossing the East River (*id.* at 10). More is required. When Caspersen asked for more money, the plaintiffs finally looked into the request, sought to speak with the alleged borrowers, and quickly uncovered the fraud.

It is a "well-established principle that a plaintiff suing for fraud (and particularly a sophisticated plaintiff . . .) must establish that it "has taken reasonable steps to protect itself against deception" (*Basis Yield Alpha Fund Master v Stanley*, 136 AD3d 136, 141 [1st Dept 2015] quoting *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]). "As a matter of law, a sophisticated plaintiff cannot establish that it entered into an arm's length transaction in justifiable reliance on alleged misrepresentations if that plaintiff failed to make use of the means of verification that were available to it" (*Ventur Group, LLC v Finnerty*, 68 AD3d 638, 639 [1st Dept 2009], quoting *UST Private Equity Invs. Fund v Salomon Smith Barney*, 288 AD2d 87, 88 [2001]). "New York law imposes an affirmative duty on sophisticated investors to protect themselves from misrepresentations . . . by investigating the details of the transactions" (*Global Mins. & Metals Corp. v Holme*, 35 AD3d 93, 100 [1st Dept 2006], *lv denied* 8 NY3d 804 [2007]).

In cases where plaintiffs have failed to perform independent appraisals of the risks, New York courts have "applied the doctrine of *caveat emptor* to preclude recovery on the rationale that, by his omission, a plaintiff has assumed the risk of loss that a proper investigation would have been likely to disclose" (*Lampert v Mahoney, Cohen & Co.*, 218 AD2d 580, 582–83 [1st Dept 1995]). An investor has an obligation to use "the means available to [it] of knowing, by the exercise of ordinary intelligence, the truth or the real quality of the subject of the representation," failing which the party "will not be heard to complain that [it] was induced to enter into the transaction by misrepresentations" (*Schumaker v Mather*, 133 NY 590, 596 [1892]).

Here, plaintiffs allege they made a $25 million investment in a security with a "risk-free 15% rate of return" based on emails and telephone calls with Caspersen, an actual annual report for Irving Place, which Caspersen sent them, a faked promissory note, security agreement and letter from the non-existent John Nelson, and a deceptively-named LLC which had been set up to receive Foundations funds (Complaint, ¶¶ 41-45). Plaintiffs do not claim to have performed any due diligence prior to making the investment. They claim the fraud was sophisticated, but, as the complaint shows, the moment the Foundation asked for more information, the fraud began to unravel, with the Foundation discovering they had been given a fake e-mail address for "John Nelson" the same day, and the rest of the fraud unraveling shortly thereafter (*id.* ¶¶ 52-57). The complaint alleges that plaintiffs made no inquiry into the Irving Place transaction before making their initial investment, failed to investigate the organization allegedly receiving the loan, and, in short, "have been so lax in protecting themselves that they cannot fairly ask for the law's protection"" (*Centro Empresarial Cempresa S.A. v Am. Movil, S.A.B. de C.V.*, 17 NY3d 269, 279 [2011] quoting *DDJ Mgt., LLC v Rhone Group L.L.C.*, 15 NY3d 147, 154 [2010]).

The court notes that unlike the facts in *Heffernan* where the fraudster could not be considered to have been working within the scope of his employment, Caspersen had all of the trappings of a reputable investment banker. He was a partner at a substantial private equity firm and was responsible for fund recap deals such as that involved in the alleged fraud (*see* opp mem p. 12). As stated in the Restatement (Third) of Agency, § 3.03 (2006) "[a] principal may . . . make a manifestation [of agency] by placing an agent in a defined position in an organization or by placing an agent in charge of a transaction or situation." His status at PJT enabled Caspersen to hold himself out legitimately as a PJT executive with authority to solicit investments in

secondary transactions (*see Prop. Advisory Gr., Inc. v Bevona*, 718 F Supp 209, 211 [SDNY 1989]). The Irving Place Capital deal and Caspersen's role as the senior PJT executive on the transaction were legitimate. The transaction closed. Applying the standards applicable to pleading reasonable reliance under CPLR 3016 (b) and to motions to dismiss under CPLR 3211 (a) (7). Plaintiffs have alleged facts sufficient to state a cause of action for fraud and the motion to dismiss for failure to satisfy CPLR 3016 (b) must be denied.

C. Apparent Authority Creating Liability for Caspersen's Fraud

As to the second cause of action for fraud against PJT and Park Hill, defendants also argue that the claims fail for (1) failure to allege words or acts of either PJT or Park Hill, other than Caspersen that created an appearance that Caspersen had authority to enter into the transaction at issue on their behalf and (2) failure to conduct a reasonable inquiry into Caspersen's actual authority given the "novel and extraordinary" nature of the transaction - - a liquid risk-free instrument with a 15% rate of return (Memo at 6). The governing legal principals are properly stated (*see Hallock v State of New York*, 64 NY2d 224, 231 [1984] [Apparent authority claims require a showing of [1] "words or conduct of the principal, communicated to [the plaintiff], that give rise to the appearance and belief that the agent possesses authority to enter into a transaction" and [2] that the plaintiff's reliance on the appearance of authority was reasonable]). PJT and Park Hill contend that allegations about Caspersen's misrepresentations and the Foundation's actions do not suffice, because "[a]pparent authority can only be created by the words or conduct of the principal addressed directly to the relying third party; what the purported agent says to or does vis-a-vis the third party is of no relevance" *4C Foods Corp. v Package Automation Co.*, 14 CIV. 2212 CM, 2014 WL 6602535, at *6 [SDNY Nov. 18, 2014]; *see also, 1230 Park Assoc., LLC v N. Source, LLC*, 48 AD3d 355, 355–56 [1st Dept 2008]). According to defendants "the complaint contains no allegation of any act or representation by the PJT defendants to plaintiffs or to the public that would have conferred upon Caspersen the appearance of authority to offer the specific transaction at issue", referring narrowly to the fraudulently obtained loan given by the Foundation which Caspersen represented was intended to help facilitate the closing of the legitimate Irving Place transaction. While not disputing that the Irving Place transaction and the fraudulent scheme may be related, the PJT defendants argue that for apparent authority to exist, more is required. "[T]he transaction at issue must *itself* appear to

be authorized as opposed to '*related*' (Reply at 4 citing *Edinburg Volunteer Fire Co., Inc. v Danko Emergency Equip. Co.*, 55 AD3d 1108, 1110 [3rd Dept 2008], and *Ford v Unity Hosp.*, 32 NY 2d, 464, 472 [1973]).

The complaint alleges that Caspersen was hired to "lead Park Hill's effort to deliver capital solutions to mature funds by working directly with private equity fund managers and limited partners through structured transactions" (Compl., ¶ 18, quoting Park Hill press release announcing hiring of Caspersen). According to the complaint, PJT's website "promoted Caspersen . . . as a person authorized to engaged in transactions related to the secondaries market in PJT's name and on its behalf" (*id.*, ¶ 20). He was "authorized and encouraged . . . to act as the main point of contact for fund recap[italization] deals [and] was often allowed . . . to be the sole point of contact that any client . . . had with PJT on fund recap deals" (*id.*, ¶ 22).

Caspersen brought in the Irving Place deal which deal is alleged to have been a legitimate recapitalization transaction in the secondary market. He was the lead PJT partner and was in a position to steal fees owed to PJT upon the closing. Caspersen devised the fraud against the Foundation, in part to obtain funds to replace the stolen fees. Thus, the complaint contains more than allegations about Caspersen's general employment duties which by themselves are insufficient. Park Hill hired Caspersen to build its presence in the "secondaries business," "brokering deals in the secondary market for private equity interests" (*id.* at 8, quoting Complaint, ¶ 4). Movants are alleged to have encouraged Caspersen to reach out to clients to work with them in that market (Memo at 9) and he did so. He landed the Irving Place transaction and was given a lead role as the PJT partner on the matter with free access to all of the relevant documents and players. The fraudulent loan transaction was closely related as it was intended to "facilitate" a legitimate transaction regarding which Caspersen had a broad leadership role.

Movants argue that "[b]y invoking the doctrine of apparent authority to justify the propriety of its actions, [plaintiffs] concomitantly assumed a duty of reasonable inquiry as to [Caspersen]'s actual perimeter of authority" (*Collision Plan Unlimited, Inc. v Bankers Tr. Co.*, 63 NY2d 827, 830 [1984]). Movants emphasize that this investment opportunity was extraordinary, offering a "risk-free 15% rate of return," as compared to US Treasury bonds, which offered 1.4% (Memo at 10). There were other unusual aspects, including the flexibility of the investment, which could be redeemed at any time, and that Caspersen's family and friends were participating

in the investment (*id.* at 11, citing Complaint, ¶¶ 63, 41). Plaintiffs have not alleged to have performed any due diligence prior to making the investment (Memo at 11).

Plaintiffs contend that an explicit communication between PJT and the Foundation was not necessary, as "[a] principal may also make a manifestation [regarding an agent's authority] by placing an agent in a defined position in an organization or by placing an agent in charge of a transaction or situation" (Opp at 12, quoting Restatement (Third) Of Agency § 3.03 [2006]). Caspersen's fraud arose out of his work on the genuine Irving Place deal, which Caspersen worked on for the defendants. Caspersen was authorized by PJT to use its name, an e-mail address, offices, and resources to solicit clients and broker transactions to generate fees for the firm (Opp at 13). While defendants argue the fraudulent transaction at issue was not the type of transaction over which Caspersen generally held actual authority, the facts supporting the assertion are not in the complaint and cannot be determined on a CPLR 3211 motion. As pled, the complaint alleges him to have been "working directly with private equity fund managers and limited partners through structured transactions" (*id.*; Complaint, ¶ 18).

Given the role Caspersen is alleged to have been assigned by PJT in connection with the Irving Place transaction, it cannot be said at this pre-answer stage of the case either that he was acting outside the scope of his employment or otherwise lacked apparent authority to solicit and close a loan which he misrepresented to be intended to help facilitate the much larger Irving Place. In that deal he was given broad authority by PJT. *Edinburg Volunteer Fire Co., Inc.* 55 AD3d at 110, cited by Movants for the proposition that "the transaction must *itself* appear to be authorized as opposed to related" (Reply at 4) is inapposite. In that case, the Third Department reviewed a judgment in favor of plaintiff following trial on the merits. Court ruled for defendant because "plaintiff failed to prove that [the fraudster] had apparent authority to enter into the contract at issue". In *dicta*, the court quoted *Ford,*, 32 NY 2d at 472 for the proposition defendants advance here. In *Ford*, where the issue was whether New York courts had jurisdiction over defendant, the court rejected plaintiff's attempt to invest a foreign insurance agent with authority to bind a nonresident insurer which had no contacts with New York and did not sell the line of insurance involved in the case. *Ford* is also inapposite. There the Court of Appeals found that New York courts had no jurisdiction over the insurer and there was no evidence of any grant of authority by the insurer to the agent.

Movants argue that the elements of this claim, like all facts required for a fraud-related claim, must be pled with specificity, pursuant to CPLR 3016(b) (Reply at 1-2). Conclusory allegations are insufficient in a fraud claim (*id.* at 2). Here, the relevant facts are peculiarly within the knowledge of the defendants, because the facts showing "actual authority, reliance, and due diligence" are peculiarly in plaintiffs' knowledge (*id.* at 3). Movants also contend that the authority given Caspersen to engage in certain transactions does not automatically create the apparent authority to engage in the transaction at issue here (*id.* at 4).

Although, "[t]he mere creation of an agency for some purpose does not automatically invest the agent with "apparent authority" to bind the principal without limitation" (*Ford,* 32 NY2d at 472) whether Caspersen had the authority to seek additional funds to help facilitate the Irving Place transaction cannot be determined at this early stage of the case. In any event, as the role of the court on a motion to dismiss under CPLR 3211 (a) (7) is to decide whether plaintiff as stated a cause of action, not whether plaintiff has one, the motion to dismiss the second cause of action must be denied.

D. Fraud on *Respondeat Superior* Theory (Claim 3)

Defendants argue that the fraud on a *respondeat superior* theory also fails, since Caspersen's actions were not taken in the scope of his employment and did not benefit his employer (*id.*). The facts alleged suggest that, although Caspersen was the lead PJT executive on the Irving Place deal, he was acting in his own interests when he defrauded plaintiffs.

Plaintiffs contend they need only allege that Caspersen was acting in the scope of his employment and for his employer's benefit (Opp at 19, citing *Schroeder v Pinterest Inc.*, 133 AD3d 12, 31 [1st Dept 2015] ["[t]he complaint alleges that Cohen was acting at all times in furtherance of NY Angels' business and within the scope of his authority as an NY Angels officer. At this pre-answer stage of the proceedings, these allegations are sufficient"]). Here, plaintiffs make conclusory allegations that Caspersen committed the fraud for PJT and Park Hill's benefit and that he transferred stolen funds to a PJT account (Opp at 19-20). Plaintiffs claim no additional detail is required to survive the motion to dismiss.

Defendants argue that, as discussed above, a higher standard of pleading (which has not been met) is required for fraud related claims (Reply at 8, citing *VFP Investments I LLC*, 49 Misc 3d 1210[A]). Further, the allegation that defendants benefitted from the fraud is insufficient,

because any funds that went to defendants were held only temporarily, and it is not enough to allege the employer received an indirect and incidental benefit (Reply at 9). Defendants also invoke the "adverse interest exception," which prevents imputation of an agent's scienter to his principal's company. The exception was applied in (*Barrett v PJT Partners Inc.*, 16-CV-2841 (VEC), 2017 WL 3995606, at *8 (SDNY Sept. 8, 2017) which involved some of Caspersen's other actions. "To come within the exception, the agent must have totally abandoned his principal's interests and be acting entirely for his own or another's purposes. It cannot be invoked merely because he has a conflict of interest or because he is not acting primarily for his principal" (*Ctr. v Hampton Affiliates, Inc.*, 66 NY2d 782, 784–85 [1985]).

Applying the standard applicable on a CPLR 3211 (a) (7) motion to dismiss, 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. However, plaintiffs have not sufficiently alleged that his actions benefitted PJT. The complaint alleges that some of the funds fraudulently obtained from the Foundation were used to cover up a separate theft. The fraud visited upon the Foundation did not benefit PJT. The claim based on a *respondeat superior* theory must be dismissed.

E. Negligent Supervision (Claim 4)

Defendants argue that the negligent supervision claim fails because plaintiffs have not alleged defendants "had any reason to suspect Caspersen had a propensity to commit fraud" (Memo at 16). Caspersen's alleged drinking and high risk trading behavior do not create inferences that he had a propensity to commit fraud (*id.*). Nor were defendants alleged to have actual knowledge of those behaviors. Defendants are only accused of being negligent for not knowing of them (*id.*). In fact, plaintiffs admit Caspersen functioned at the highest level in his job. He is alleged to have brought in a number of large transactions to PJT and earned the company millions of dollars in fees (*id.* citing Complaint, ¶ 24). Plaintiffs do not allege Caspersen had shown any propensity to commit fraud before he diverted the Irving Place transaction fees, and defendants could not be negligent in failing to investigate Caspersen's statements about why those fees were late, when he had shown no such prior propensity (Memo at 16-17).

Plaintiffs argue they are not required to plead negligent supervision with specificity (Opp at 23, citing *Kenneth R. v R.C. Diocese of Brooklyn*, 229 AD2d 159, 162 [2d Dept 1997] ["There is no statutory requirement that causes of action sounding in negligent hiring, negligent retention, or negligent supervision be pleaded with specificity"]). However, defendants can be held liable even without actual knowledge of Caspersen's fraud, if they should have known of his propensity (*id.*, citing *Kenneth R.*, 229 AD2d at 161). Plaintiffs argue that "a jury could easily find that the behaviors [drinking, risky personal trading] in which Caspersen was engaging were behaviors likely to correlate strongly with increased risk of fraud, and thus which put Defendants on notice of that propensity" *(sic)* (Opp at 24). Surely, they contend, Caspersen's diversion of the Irving Place fee from PJT to his own account would qualify, as would his transfer of the funds taken from the Foundation into PJT's account to conceal his fraud (*id.*). These should have been red flags, and ought to have started an investigation which would have avoided harm to the Foundation (*id.*).

Defendants contend that one kind of destructive behavior (risky personal trading and drinking) is insufficient to show a propensity for other kinds of destructive behavior (such as committing fraud) (Reply at 11, citing *Steinborn v Himmel*, 9 AD3d 531, 534 [3d Dept 2004] ["alleged improper use of alcohol and cigarettes . . . insufficient as a matter of law to constitute notice [of] a danger of [the agent] sexually assaulting plaintiffs"]). Further, plaintiffs' argument that Caspersen's diversion of defendants' funds illustrates Caspersen's propensity, without alleging defendants were aware of his actions, logically fails (Reply at 11). Similar alleged "red flags" were dismissed in the related federal securities class action case.

"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 AD2d at 161). Plaintiffs rely on Caspersen's actions in performing excessive high-risk personal trading from his office and his diversion of the Irving Place fee into his own account, as well as drinking alcohol while working, as conduct which should have put defendants on notice of Caspersen's alleged propensity.

Plaintiffs do not, however, allege defendants were aware of this conduct before Caspersen sold plaintiffs the fake investment. Engagement in high risk behaviors such as personal trading and excessive use of alcohol is not necessarily causally connected to fraudulent conduct. Further the complaint does not allege that the harm plaintiff suffered was related to Caspersens drinking habit or his personal trading. The negligent supervision claim shall be dismissed.

The elements of a negligence claim are "first, the existence of a duty owing by the defendant to the plaintiff; second, defendant's failure to discharge that duty; third, injury to plaintiff proximately resulting from such failure" (*Peresluha v City of New York*, 60 AD2d 226, 230 [1st Dept 1977]). In the Reply, defendants raise a new argument, which they claim is raised in a case attached by plaintiffs to their opposition papers, *Heffernan v Marine Midland Bank* (Sup Ct, New York County, January 27, 1999, Ramos, J., index No. 98/100589). Defendants argue the absence of a duty to the plaintiffs. In *Heffernan*, the Supreme Court noted that "although arguably [defendant] failed to fully investigate the first instance [of bad conduct], and admittedly committed "a gross error," plaintiffs were not [defendant's] clients, and "in the absence of any privity between the parties, [defendant] owed the plaintiff[s] no duty in hiring and/or supervision of its employees[.]" (*id.* at 8, quoting *Gottlieb v Sullivan & Cromwell*, 203 AD2d 241, 242 [2d Dept 1994]). The First Department affirmed (*Heffernan*, 267 AD2d at 84). The court has not considered this ground for dismissal as it has already concluded that an employer's failure to detect employee drinking behaviors or pattern of personal trading is not grounds for imposition of vicarious liability in this case.

F. Conversion (Claim 7)

"The tort of conversion is established when one who owns and has a right to possession of personal property proves that the property is in the unauthorized possession of another who has acted to exclude the rights of the owner" (*Republic of Haiti v Duvalier*, 211 AD2d 379, 384 [1st Dept 1995]). The elements of conversion are (1) plaintiff's possessory right or interest in certain property and (2) defendant's dominion over the property or interference with it in derogation of plaintiff's rights (*Colavito v New York Organ Donor Network, Inc.*, 8 NY3d 43 [2006]; *see also Employers' Fire Ins. Co. v Cotton*, 245 NY 102 [1927]). A plaintiff need only allege and prove that the defendant interfered with plaintiff's right to possess the property. The

defendant does not have to have taken the property or benefitted from it (*Hillcrest Homes, LLC v Albion Mobile Homes, Inc.*, 117 NYS2d 755 (4th Dept 2014). A conversion claim may not be maintained where damages are merely sought for a breach of contract (*see Sutton Park Dev. Trading Corp. v Guerin & Guerin*, 297 AD 2d 430, 432 [3d Dept 2002]). "Where the property is money, it must be specifically identifiable and be subject to an obligation to be returned or to be otherwise treated in a particular manner. The funds of a specific, named bank account are sufficiently identifiable" (*Republic of Haiti*, 211 AD2d at 384). Additionally, "where the original possession is lawful, a conversion does not occur until after a demand and refusal to return the property" (*D'Amico v First Union Nat. Bank*, 285 AD2d 166, 172 [1st Dept 2001] citing *MacDonnell v Buffalo Loan, Tr. & Safe Deposit Co.*, 193 NY 92, 101 [1908]).

Here, plaintiffs have alleged claims for breach of contract. They do not allege that plaintiff's funds held in trust or in escrow are being withheld (*see AQ Asset Mgt. LLC v Levine*, 111 AD 3d 245, 259 [1st Dept 2013]). While "[m]oney, specifically identifiable and segregated, can be the subject of a conversion action" (*Manufacturers Hanover Tr. Co. v Chem. Bank*, 160 AD2d 113, 124 [1st Dept 1990]), plaintiffs have not alleged the funds at issue to be identifiable or segregated. Accordingly, this claim fails.

III. CONCLUSIONS

Because plaintiffs have sufficiently stated a cause of action for fraud and alleged facts sufficient to state a claim of apparent authority against defendants, that branch of the motion seeking to dismiss the Second Cause of Action shall be denied. The motion to dismiss the Third and Fourth Causes of Action against defendants alleging fraud on *respondeat superior* and negligent supervision theories respectively shall be granted. The Seventh Cause of Action for conversion shall also be dismissed.

The request to amend the complaint to re-plead the dismissed claims is denied.

Accordingly, it is hereby

ORDERED that the motion of defendants, PJT Partners, Inc. and Park Hill Group, LLC to dismiss the complaint as to them is GRANTED as to the Third, Fourth and Seventh Causes of Action only and is DENIED as to the Second Cause of Action; and it is further

ORDERED that the Third, Fourth and Seventh Causes of Action are hereby DISMISSED; and it is further

ORDERED that defendants answer the complaint within twenty (20) days of service of this Decision and Order with Notice of Entry; and it is further

ORDERED that counsel for the parties shall appear for a preliminary conference on Tuesday, October 9, 2018 at 10:30 AM in Part 49, Courtroom 252, 60 Centre Street, New York, New York.

This constitutes the decision and order of the court.

DATED: August 13, 2018

ENTER,

O. PETER SHERWOOD J.S.C.