COURT OF APPEALS
OF THE STATE OF NEW YORK

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ASSURED GUARANTY (UK) LTD.,

Plaintiff-Appellant-Respondent.

-vs-

J.P. MORGAN INVESTMENT MANAGEMENT, INC.,

Defendant-Respondent-Appellant.

**NOTICE OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE***

**New York County**
**Index No.** 603755/08

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**PLEASE TAKE NOTICE,** that upon the annexed affirmation of Timothy J. O'Connor, dated the 12th day of July, 2011, and upon a copy of the proposed *Amicus Curiae,* and upon all the pleadings and prior proceedings in the above-styled case, the Public Investors Arbitration Bar Association (PIABA) by its Amicus Curiae Committee members and attorney Timothy J. O'Connor, will move this Court at the Court of Appeals Hall, 20 Eagle Street, Albany, New York 12207-1095, on July 25, 2011, at the opening of the Court on that day, or as soon thereafter as counsel may be heard, for an order for *amicus curiae* relief pursuant to 22 N.Y.C.R.R. § 500.23(a).

Dated: July 12, 2011
Albany New York

Respectfully Submitted,

LAW OFFICES OF TIMOTHY J. O'CONNOR

By: _____
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COURT OF APPEALS
OF THE STATE OF NEW YORK
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ASSURED GUARANTY (UK) LTD.,

Plaintiff-Appellant-Respondent.

-vs-

J.P. MORGAN INVESTMENT MANAGEMENT, INC.,

Defendant-Respondent-Appellant.

**AFFIRMATION OF TIMOTHY O'CONNOR IN SUPPORT OF MOTION OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION (PIABA) FOR *AMICUS CURIAE* RELIEF ALLOWING THE FILING OF AN *AMICUS CURIAE* BRIEF AND PARTICIPATION IN ORAL ARGUMENT**

**New York County**
Index No**.** 603755/08

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1. **TIMOTHY J. O'CONNOR,** an attorney admitted to practice law in the Courts of the State of New York affirms the following under penalty of perjury:

2. I am a member of the *Amicus* Committee of the Public Investors Arbitration Bar Association ("PIABA"), a not-for-profit organization headquartered in Norman Oklahoma whose purpose is to advance the interests of public investors in the financial and securities markets.

3. In preparation of the instant motion and accompanying *Amicus Curiae* Brief, I worked closely with Lisa A. Catalano, Chair of PIABA's Amicus Committee and Director of the Securities Arbitration Clinic at St. John's

University School of Law in New York, a not-for profit organization representing underserved investors in securities disputes.

4. The Public Investors Arbitration Bar Association (PIABA) has also appeared as *amicus curiae* in numerous other cases in State and Federal Courts throughout the United States, and it is submitted that the investing public has a significant stake in the outcome of the instant Appeal, particularly as the same relates to the position of the Appellant J.P. Morgan Investment Management, Inc. that aggrieved investors in the securities markets are not entitled to pursue civil claims for non-fraud-based civil causes of action (including breach of fiduciary duty, negligent misrepresentation, negligence, and gross negligence) based upon, *inter alia*, their contended preemption by the statutory provisions of the General Business Law of the State of New York, Art. 23-A, §§ 352, 353, *et seq.*, known as "the Martin Act."

5. The Public Investors Arbitration Bar Association seeks permission to file a brief as *amicus curiae* because it believes that this court's recent decision in *ABN AMBRO Bank, NV, Barclays Bank, PLC v. MBIA, Inc.*, --- N.E.2d ----, 2011 WL 2534059 (N.Y.) handed down on June 27, 2011 after the filing of the respective Briefs of the Plaintiff-Appellant-Respondent (Assured Guaranty (UK) Ltd.) and the Brief of the Defendant-Respondent-Appellant, (J.P. Morgan Investment Management, Inc.) has not been explored.

6. PIABA also seeks permission to file a Brief as *amicus curiae*, as we believe the underpinnings of the New York State Constitution applicable to the rights of victimized investors and private litigants to pursue their claims for civil relief for the aforementioned non-fraud causes of action have likewise not been addressed as comprehensively as those in the accompanying *Amicus Curiae* Brief.

7. PIABA is also desirous of bringing to the Court's attention various rules, provisions and pronouncements of the Financial Industry Regulatory Authority (FINRA), which have long afforded investors a forum for the pursuit of non-fraud tort claims.

8. Finally, the Public Investors Arbitration Bar Association submits that long-established *stare decisis* of this court affording victimized investors access to the courts for civil redress for non-fraud tort claims (including breach of fiduciary duty, negligent misrepresentation, negligence, and gross negligence) has likewise not been as comprehensively addressed.

**WHEREFORE,** your Affirmant respectfully prays and requests an order and judgment of this court permitting the Public Investors Arbitration Bar Association to appear as *amicus curiae* in the instant Appeal, together with the acceptance of the filing and service of the *Amicus Curiae* Brief accompanying herewith.

Dated: Albany, New York
July 12, 2011

TIMOTHY J. O'CONNOR

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**New York County Clerk's Index No. 603755/08**

# Court of Appeals

**STATE OF NEW YORK**

**ASSURED GUARANTY (UK) LTD.,**

***Plaintiff-Appellant-Respondent,***

**-against-**

**J.P. MORGAN INVESTMENT MANAGEMENT INC.,**

***Defendant-Respondent-Appellant.***

## *AMICUS CURIAE BRIEF OF PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION*


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Date Completed: July 12, 2011

## COURT OF APPEALS RULE 500.1(f) DISCLOSURE STATEMENT

Pursuant to Rule 500.1(f) of the Rules of the Court of Appeals of the State of New York, Amicus Curiae, the Public Investors Arbitration Bar Association ("PIABA") states that it has no parents, subsidiaries or affiliates.

## INTRODUCTION

Pursuant to Rule 500.23 of the Rules of this Court, the Public Investors Arbitration Bar Association ("PIABA") respectfully submits this, its brief *amicus curiae*, in support of Assured Guaranty (UK) Ltd.'s ("Assured") response to the appeal of J.P. Morgan Investment Management Inc. ("JP Morgan") seeking to reverse the decision of the Appellate Division, First Department (Sweeny, J.) entered on November 23, 2011 modifying the order of the Supreme Court, New York County entered on January 29, 2010 (Kapnick, J.) and reinstating Assured's breach of fiduciary duty and gross negligence claims on the grounds that these claims are not preempted by the Martin Act.[1]

[1] No counsel for a party or party to this proceeding authored this Brief, in whole or in part, and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than PIABA, its members, or its counsel made a monetary contribution to the preparation or submission of this Brief.

## STATEMENT OF INTEREST

PIABA is a national bar association established in 1990 as an educational and networking organization for attorneys representing the public investor in securities disputes. The mission of PIABA is to promote the interests of the public investor in securities arbitration by protecting public investors from abuses prevalent in the arbitration process; making securities arbitration just and fair; and creating a level playing field for the public investor in securities arbitration.

PIABA has particular interest in this litigation, given its goal of assuring that victimized investors have recourse for non-fraud tort claims sounding in, *inter alia*, breach of fiduciary duty and negligence. The interpretation sought to be imposed by JP Morgan on New York State's Martin Act would preclude victimized investors from seeking civil redress for such claims, including remedies now available to them for civil claims, such as breach of fiduciary duty and negligence.

## SUMMARY OF ARGUMENT

The Appellate Division, First Department correctly decided that non-fraud common law tort claims such as breach of fiduciary duty and gross negligence are not preempted by the Martin Act. PIABA urges this Court to affirm the First Department's decision. A finding of no Martin Act preemption of non-fraud common law tort claims would be consistent with this Court's recent decision in *ABN AMBRO Bank, N.V. v. MBIA Inc., et al.,* No. 2001-124, --- N.E. ----, 2011 WL 2534059 (N.Y. Ct. App. June 28, 2011), as well as other New York State case law recognizing legally cognizable causes of action for non-fraud common law tort claims. Such claims are also recognized by the Code of Arbitration Procedure of the Financial Industry Regulatory Authority (FINRA).[2]

A finding of Martin Act preemption would leave a large gap in investor protection. Investors would be left wholly without a remedy for such tortious conduct as negligence and breach of fiduciary duty. Following JP Morgan's argument to its illogical conclusion, and by way of analogy, would be as follows - because New York statutory law makes securities fraud a crime for which the

[2] The Financial Industry Regulatory Authority (FINRA) was formerly known as the National Association of Security Dealers (NASD). The FINRA Office of Dispute Resolution has long recognized the right of investors to pursue non-fraud tort claims. See NASD Notice to Members (NTM) 99-90, Misrepresentation/Omissions (List 7, p. 696), Negligence/Breach of Fiduciary Duty (List 9, p. 695), Authorized Trading (List 11, p. 696), and Unsuitability (List 13, p. 696). The FINRA Discovery Guide was consolidated, as indicated in FINRA Regulatory Notice 11-17, effective May 16, 2011, Exchange Act Release No. 64166 (April 1, 2011) 76 Federal Register 19155 (April 6, 2011).

appropriate authorities can seek criminal and regulatory prosecution, victims of such crimes are therefore not afforded the right to pursue non-fraud civil tort claims as against wrongdoers. This logic is irrational and would be wholly unjust for victimized investors.[3]

A finding of Martin Act preemption would also encourage brokerage firms to arbitrarily include New York choice of law provisions in their agreements with their customers to limit their liability. Additionally, because of the limited discovery available in arbitration, investors would be gravely disadvantaged by being essentially limited to a claim for fraud which is one of the most difficult claims to prove because of the element of *scienter*.

Finally, it is submitted that the interpretation sought by JP Morgan here is contrary to Article I, § 14 (respect for and continuation of the common law), as well as Article VI, § 7(a) (Supreme Court jurisdiction over common law civil disputes of private litigants) of the New York State Constitution.

[3] Appellant's Brief brazenly states: "Investors cannot, however, pursue any common-law claims that do not require proof of intentional deceit as an element of the plaintiff's *prima facie* case – such as negligence, breach of fiduciary duty and negligent misrepresentation" (JPM Br. at 46).

## ARGUMENT

## I. THIS COURT'S RECENT DECISION IN *ABN AMBRO BANK, N.V.* AND PUBLIC POLICY MILITATE IN FAVOR OF A FINDING OF NO PREEMPTION OF NON-FRAUD COMMON LAW TORT CLAIMS

### A. Preemption Was Not Contemplated and Would Leave a Large Gap in Investor Protection

Assured's argument that preemption of non-fraud common law claims would provide less investor protection than contemplated by the Martin Act is well-founded. If JP Morgan's assertion that all non-fraud common law tort claims are preempted by the Martin Act was taken to its illogical conclusion, then there would be absolutely no remedy available to investors victimized by negligent behavior, including gross negligence and negligent misrepresentation, and breaches of fiduciary duty, in contravention of well-established law and self-regulatory organization (SRO) rules and regulations.

As this Court recently recognized in *ABN AMBRO Bank, N.V. v. MBIA Inc., et al.*, No. 2011-124, --- N.E. ---, 2011 WL 2534059 (N.Y. Ct. App. June 28, 2011), in its analysis of preemption and the Insurance Law, and in outright rejecting defendants' preemption argument there, the fact that the Superintendent of Insurance had exclusive original jurisdiction under the relevant provisions of that statute, does not mean that "he is also the exclusive arbiter of all private claims that may arise . . . . [and] taken to its logical conclusion, [defendants' contention] would preempt plaintiffs' . . . common law claims." *Id.* In rejecting defendants'

preemption argument, this Court reasoned that, in the absence of an indication "from the statutory language and structure of the Insurance Law or its legislative history that the Legislature intended to give the Superintendent such broad preemptive power . . .," this Court would not find preemption of common law claims.

Similarly in the instant case, even assuming that the Attorney General had exclusive original jurisdiction under the relevant provisions of the Martin Act at issue in this case, this does not make the Attorney General the sole arbiter of all private claims that may arise in securities cases.[4] Indeed, the Attorney General has denounced such a position (s*ee* Assured Br., dated June 1, 2011 at pp. 29-30). Thus, in the absence of an indication from the statutory language and structure of the Martin Act or its legislative history that the Legislature intended to give the Attorney General broad preemptive power which they do not, (*id.*, at pp. 30-36,) rejecting JP Morgan's preemption argument is perfectly consistent with this Court's holding and rationale in the *ABN AMBRO Bank, N.V.* case.

New York courts have long recognized that investors may maintain legally cognizable claims for negligence, (*Scott v. Dime Sav. Bank of NY, FSB*, 886 F. Supp. 1073 (S.D.N.Y. 1995)), negligent misrepresentation, (*Ossining Union Free*

[4] While this Court did not address the specific provisions of the Martin Act at issue in this proceeding, this Court explained that section 352-e of the General Business Law did not preclude the tenants from commencing a private lawsuit against their landlord with respect to a cooperative building conversion plan.

*School Dist. v. Anderson LaRocca Anderson,* 539 N.E. 2d 91 (1989); *Kimmell v. Schaefer,* 675 N.E.2d 450 (1996)),[5] and breach of fiduciary duty (*U.S. v. Skelly*, 442 F.3d 94, 98 (2d Cir. 2006) (fiduciary duty generally exists where the broker has discretionary authority.) *Cf. De Kwiatkowski v. Bear, Stearns & Co., Inc.*, 306 F.3d 1293 (2d Cir. 2002), even in the absence of discretionary authority, a broker may owe a fiduciary duty to its customers where "special circumstances" exist such as the client has impaired faculties or has a closer than arm's length relationship with the broker.))

In addition to judicial recognition of claims sounding in negligence, SRO rules also recognize a duty on the part of brokers to act in a non-negligent manner. NASD Rule 2310 (known as the "suitability rule",) for example provides in part that "[i]n recommending to a customer the purchase, sale or exchange of any security, a member shall have reasonable grounds for believing that the recommendation is suitable for such customer upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial

[5] Recognition of a claim for negligent misrepresentation for investors is significant and closes a large gap in the law for investors. "Recognition of a negligence-based tort for investment professionals making investment recommendations requires such professionals to exercise due diligence with regard to any representation or recommendation even when a fiduciary duty is absent." Seth E. Lipner and Lisa A. Catalano, *The Tort of Giving Negligent Investment Advice*, 39 U. Mem. L. Rev. 663, 667 - 668 (2009).

situation and needs."[6] Violations of NASD and NYSE Rules have been held to be evidence of a breach of a standard of care, or negligence. *See e.g.*, *McDaniel v. Bear Stearns & Co.*, 196 F.Supp.2d 343, 361 (S.D.N.Y. 2002) (NASD and NYSE rules impose a duty to follow "a standard of care consistent with sound business practices."); *Siedman v. Merrill Lynch, Pierce Fenner & Smith, Inc.*, 465 F. Supp. 1233, 1236 (S.D.N.Y. 1979) (violations of NYSE rules are subject to state common law negligence rules.)

Abrogation of common law remedies as suggested by JP Morgan would strip investors of a whole host of remedies presently recognized and leave aggrieved investors victimized by negligence and violation of fiduciary duties without a remedy. Investors routinely assert claims for breach of fiduciary duty and negligence in Financial Industry Regulatory Authority ("FINRA") arbitrations.[7] Between 2007 and 2010, investors raised breach of fiduciary duty claims in 50% or more of the cases and negligence claims in between nearly 30 and 50% of the

[6] NYSE's analogue to NASD Rule 2310 is NYSE Rule 405 known as the "Know Your Customer Rule." The SEC has approved new rules governing know your customer and suitability obligations. The new rules are FINRA Rule 2090 (Know Your Customer) and FINRA Rule 2111 (Suitability) and will become effective on July 9, 2012.

[7] The Financial Industry Regulatory Authority ("FINRA"), the largest independent regulator for securities firms and their personnel doing business in the United States oversees approximately 4,500 brokerage firms, about 163,675 branch offices, and approximately 631,725 registered securities representatives. These numbers are in addition to approximately 8,100 SEC Registered Investment Advisors and approximately 15,000 Investment Advisors registered in one or more states, in addition to state-Registered Investment Advisors and representatives of SEC-Registered Investment Advisors. Source: Investment Advisor Registration Depository website, www.IARD.com "Regulatory and Legal Information about IARD."

cases.[8] Moreover, because enforcement of the Martin Act by the Attorney General is discretionary,[9] in the event that the Attorney General chooses not to pursue a negligent broker, that individual would get a free pass. PIABA urges that this Court not countenance such inequitable results.

### B. The Nuances of FINRA Arbitration Would Make it Virtually Impossible for Investors to Obtain Redress, Should Their Tort Claims Be Limited to Fraud

Since the United States Supreme Court's decision in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220 (1987) and its progeny, all investors with pre-dispute arbitration clauses with their broker-dealer must arbitrate their disputes.[10] After the consolidation of the enforcement arm of the New York Stock Exchange ("NYSE"), NYSE Regulation Inc. and the National Association of

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[8] FINRA arbitration statistics reflect as follows: in 2007, breach of fiduciary duty claims were raised in 50% of the cases and negligence in 28%; in 2008, breach of fiduciary duty claims were raised in 57% of the cases and negligence in 32%; in 2009, breach of fiduciary duty claims were raised in 59% of the cases and negligence in 48%; and in 2010, breach of fiduciary duty claims were raised in 56% of the cases and negligence in 48%. *See*, http://www.finra.org/ArbitrationMediation/AboutFINRADR/Statistics/ (last visited June 19, 2011.)

[9] "Whenever the attorney-general shall believe from evidence satisfactory to him that any person . . . has engaged in, is engaged or is about to engage in any of the practices or transactions heretofore referred to as and declared to be fraudulent practices, *he may* bring an action in the name and on behalf of the people of the State of New York against such person . . . to enjoin such person . . . from continuing such fraudulent practices or engaging therein or doing any act or acts in furtherance thereof . . . ." N.Y. Gen. Bus. Law, Art. 23-A, § 353 (1) (emphasis added.)

[10] In *Smith Barney Harris Upham & Co., Inc. v. Luckie*, 85 N.Y.2d 1033 (1995), this Court, *citing Shearson/American Express v. McMahon*, *supra*, acknowledges enforceability of agreements to arbitrate broad categories of civil claims brought by investors. The interpretation sought by JP Morgan would effectively nullify this Court's prior ruling that claims of this nature must be arbitrated. *See also Singer v. Jefferies & Co, Inc.*, 78 N.Y.2d 76 (1991).

Securities Dealers ("NASD") in 2007, resulting in a new self-regulatory organization known as the Financial Industry Regulatory Authority ("FINRA"), the only forum before which investors may arbitrate their disputes is the FINRA.

FINRA arbitration has its own unique nuances that distinguish these proceedings from civil litigation. For example, discovery in FINRA arbitrations is much more restrictive. Parties are not permitted to take depositions except under very limited circumstances such as to preserve the testimony of ill or dying witnesses. *See* FINRA Code of Arbitration Procedure ("CAP") for Customer Disputes Rule ("CAP Rule") 12510.

Additionally, parties are permitted very limited requests for information which are "generally limited to identification of individuals, entities, and time periods related to the dispute; such requests should be reasonable in number and not require narrative answers or fact finding." FINRA CAP Rule 12507. Therefore, discovery in FINRA arbitrations is predominantly confined to discovery of documents. These unique restrictions on discovery in FINRA arbitration proceedings would make it virtually impossible for investors to obtain redress were their tort claims confined to common law fraud.

In order to successfully maintain a common law fraud claim in New York, investors must meet a very stringent burden of proof. To maintain a cause of action, an investor must prove by clear and convincing evidence the following:

"'(1) a misrepresentation or an omission of material fact which was false and known to be false by the defendant, (2) the misrepresentation was made for the purpose of inducing the plaintiff to rely upon it, (3) justifiable reliance of the plaintiff on the misrepresentation or material omission, and (4) injury.'" *Ozelkan v. Tyree Bros. Envtl. Servs., Inc.*, 815 N.Y.S.2d. 265, 267 (App. Div. 2d Dep't 2006) (citation omitted).

In order to support the first element for common law fraud, investors would have to demonstrate that their broker acted with *scienter*, that is either intentionally or with reckless disregard.[11] *Scienter* is one of the most difficult elements to prove and is unique to fraud claims.[12] Hence, fraud is one of the most, if not the most, difficult claims for investors to establish[13] particularly in light of the limited

[11] Liability for fraud may be sustained "even where there is lacking deliberate or active fraud. A representation certified as true to the knowledge of the [defendants] . . . when knowledge there is none, a reckless misstatement, or an opinion based on grounds so flimsy as to lead to the conclusion that there was no genuine belief in its truth, are all sufficient upon which to base liability. A refusal to see the obvious, a failure to investigate the doubtful, if sufficiently gross, may furnish evidence leading to an inference of fraud so as to impose liability for losses suffered by those who rely on the [representation] . . . . In other words, heedlessness and reckless disregard of consequence may take the place of deliberate intention." *State Street Trust Co. v. Ernst*, 278 N.Y. 104, 112 (1938).

[12] *See e.g.*, Lewis D. Lowenfels and Alan R. Bromberg, *Suitability in Securities Transactions*, 54 Bus. Law. 1557, 1585 (1999). "[B]reaches of standards of duty and care under SRO rules . . . does not require scienter or recklessness. In addition, there have been actions under state statutes and common law claims for negligence and breach of fiduciary duty that also do not require a claimant to establish scienter or recklessness."

[13] *See e.g.*, George Lee Flint, Jr., *Securities Regulation*, 63 SMU L. R. 795, 803 (2010). "One of the major reasons legislatures passed securities acts was to facilitate investors' actions to recover their money through a simplified fraud action that removed the most difficult elements to prove in a common law fraud action, namely scienter and privity."

discovery that investors are entitled to under the FINRA CAP. For these reasons, public policy again militates in favor of a finding of no preemption.[14]

### C. Martin Act Preemption Would Encourage Brokerage Firms to Include New York Choice of Law Provisions in an Attempt to Limit Liability

Brokerage firms routinely include a choice of law clause in their predispute arbitration agreements with their customers and many large brokerage firms include New York as the governing law.[15] A decision in favor of preemption would provide incentive for firms to arbitrarily include a New York choice of law provision in their predispute arbitration agreements in order to attempt to limit their liability to aggrieved investors. Article III, § 21 (f) of the NASD Rules of Fair Practice prohibits customer agreements from including language that "(a) limits or contradicts the rules of the NASD or any other self-regulatory organization; (b) limits the ability of a party to file a claim in arbitration; or (c) limits the ability of

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[14] "Moreover, it is a general rule of statutory construction that a clear and specific legislative intent is required to override the common law." *Hechter v. New York Life Insurance Company*, 46 N.Y.2d 34 (1978). Such is not the case here. *See* Assured's Br., dated June 1, 2011 at 24 – 34.

[15] *See* Report of the Arbitration Policy Task Force to the Board of Governors of the National Association of Securities Dealers (Arbitration Policy Task Force Report), at 16. The Arbitration Policy Task Force, chaired by David S. Ruder, a former Chairman of the SEC, was appointed by the Board of Governors of the NASD in September 1994 for the purpose of studying the securities arbitration process and making recommendations for its reform. The Task Force submitted the Report to the NASD Board of Governors in January 1996.

the arbitrators to make an award under the arbitration rules of a self-regulatory organization and applicable law."

The NASD (now FINRA) and NYSE have advised member firms that a choice of law, or governing law, clause that limits an award violates Section 21 (f) of the NASD Rules of Fair Practice and NYSE Rule 636.[16] Should this Court hold that the Martin Act preempts non-fraud common law tort claims, arbitrary New York choice of law clauses would be encouraged and would appear to be valid and not violative of NASD and NYSE, now FINRA, rules when read in conjunction with such a holding. PIABA urges that this Court not countenance such a result.

Furthermore, a finding of preemption would virtually render moot this Court's long-standing view that the mere inclusion of a New York choice of law provision does not foreclose the parties from arbitrating all disputes between them (assuming they are eligible under FINRA CAP.)

> We, therefore, conclude that the New York choice of law provision in the subject agreements did not diminish the parties' intention to arbitrate 'any and all controversies.' While a choice of law clause incorporates substantive New York principles, it does not also pull in conflicting restrictions on the scope of the authority of arbitrators and the competence of parties to contract for plenary alternative dispute resolution.

[16] *See* NASD Notice to Members (NTM) 95-16 and NYSE Information Memorandum 95-16. Choice of law clauses are permitted where "(a) there is an appropriate contact or relationship between the transaction at issue or the parties and the law selected; and (b) . . . the clause is otherwise consistent with the aforementioned NYSE or NASD rules." NASD NTM 95-85.

*Smith Barney Shearson, Inc. v. Sacharow,* 91 N.Y.2d 39, 49 (1997). This holding supports that "any and all controversies" includes non-fraud tort causes of action such as breach of fiduciary duty, negligence and gross negligence.

## II. THE CLAIMED PREEMPTION BY THE MARTIN ACT OF CIVIL CLAIMS BY PRIVATE INVESTORS IS REPUGNANT TO ARTICLE I, § 14 AND ARTICLE VI, § 7(a) OF THE NEW YORK STATE CONSTITUTION

### A. Article I, § 14

JP Morgan argues that the Martin Act preempts any redress of private litigants in the Courts as against investment advisors engaging in fraudulent sales practices under long-established common law causes of action sounding in negligence and breach of fiduciary duty. This unfounded interpretation of the Martin Act is violative of § 14 of Article I of the New York State Constitution, which provides in pertinent part as follows:

> Such parts of the common law, and of the acts of the legislature of the colony of New York, as together did form the law of the said colony, on the 19th day of April one thousand seven hundred seventy five, and the resolutions of the said colony, and of the convention of the State of New York, in force on the 20th day of April one thousand seven hundred seventy seven which have not since expired, or been repealed or altered; and such acts of the legislature of this state as are now in force, shall be and continue the law of this state, *subject to such alterations as the legislature shall make concerning the same*. But all such parts of the common law, and such of the said acts, or parts thereof, as are repugnant to this Constitution, are hereby abrogated.

N.Y.S. Constitution, Article I, § 14 (emphasis added). Thus, those laws and statutes in effect in 1777 and thereafter remain a part of the common law of the State of New York. *See Harmon v. Alfred Peats Co.*, 216 A.D. 368 (1st Dep't 1926), *rev'd on other grounds* 243 N.Y. 473 (1926); *Horace Waters & Co. v. Gerard*, 189 N.Y. 302 (1907).

The Supreme Court of the State of New York was created by "An Act for the Establishing Courts of Judicature for the Ease and benefit of each respective City Town and County within this Province," May 6, 1691, 1 NY Col Laws 226, which gave the New York Supreme Court the same jurisdiction as was exercised by the English courts of the King's Bench Common Pleas and Exchequer. This statutory enactment of 1691 was continued in force by the predecessor provision of Article I, § 14 of the New York State Constitution (former § 16). Additionally, the Supreme Court has, in addition to its chancery jurisdiction which was later conferred, the general jurisdiction exercised by these several English courts prior to 1775. *See Montgomery v. Daniels*, 38 N.Y.2d 41 (1975); *In Re Steinway*, 159 N.Y. 250, 53 N.E. 1103 (1899).

Any change to the common law and remedies, including civil remedies available to aggrieved parties, inclusive of victimized investors, requires express, legislative, intentional enactment. In *Woods v. Lancet*, 303 N.Y. 349 (1951), this court noted:

> We act in the finest common-law tradition when we adopt and alter decisional law to produce common-sense justice . . . Legislative action there could, of course, be, but we abdicate our own function in a field peculiarly non-statutory when we refuse to consider an old and satisfactory court-made rule.

The Court found that it could not constitutionally change the law and, therefore, held that it should not change the law.

The interpretation sought by JP Morgan would unconstitutionally deny victimized investors a fundamental right of access to the courts, *Boddie v. Connecticut*, 401 U.S. 371, 91 S.Ct. 780, 28 L.Ed.2d 113 (1971), or FINRA-venued arbitration where most investors are contractually bound to pursue their remedies. The abolition of securities fraud victims' right to sue for damages for non-fraud tort claims deprives them of a right and interest protected by the due process clause of both the New York State Constitution and the Federal Constitution. The rights sought to be protected by Assured, (or any aggrieved investors for that matter,) are entitled to constitutional protection. The argument advanced by JP Morgan provides virtually no alternative method to investors for recovery for negligent behavior or breaches of fiduciary duty.

### B. Article VI, § 7(a)

*ABN AMBRO Bank, NV, Barclays Bank, PLC v. MBIA, Inc. supra, citing* Article VI of Section 7 of the New York State Constitution and additional case

law,[17] addressed claims of preemption of New York State statutory and common law claims (Debtor & Creditor Law, Breach of Contract) based upon a breach of the implied covenant of good faith and fair dealing and abuse of corporate form to support a declaration piercing the corporate veil. This Court ruled against an analogous preemption argument involving New York's Insurance Law advanced by the Appellants there. (*Citing Sohn v. Calderon*, 78 N.Y.2d 755, 766 (1991), *quoting Thrasher v. United States Liability Ins. Co.*, 19 N.Y.2d 159, 166 (1967) and *Richards v. Kaskel*, 32 N.Y.2d 524 (1978) (a case arguing against preclusion of Plaintiff's claims for fraudulent misconduct under the Martin Act: "We reject this argument and conclude that there is no indication from the statutory language and structure of the Insurance Law or its legislative history to the Legislature intended to give the Superintendent such broad preemptive power," *citing Matter of Zuckerman v. Board of Education of City School District of New York*, 44 N.Y.2d 336, 342-343 (1978)).

[17] Article VI, § 7(a) of the New York State Constitution provides in pertinent part as follows: "The Supreme Court shall have general original jurisdiction in law and equity and the appellate jurisdiction herein provided."

## CONCLUSION

The fallacy of JP Morgan's single question presented on appeal is clearly set forth on page 30 of JPM Br.: "In light of the vigorous enforcement of the Martin Act by the Attorney General on behalf of investors – especially in recent years, the public good is well served by the Attorney General's exclusive authority over civil enforcement of the Act."[18] The argument that the government, and the government alone, is best and exclusively suited to pursue non-fraud tort claims (breach of fiduciary duty, negligence and gross negligence) on behalf of victimized investors is perhaps best exemplified by the wholesale failure of any meaningful intervention of governmental authorities to timely and successfully pursue civil damages on behalf of thousands of victims in the wake of the Bernard Madoff fraud.

Neither the Attorney General, nor any other governmental entity has ever been delegated, in the first instance, the exclusive task of collection agent on behalf of the non-fraud civil tort claims of investors in the financial markets. This contrasts with JP Morgan's assertion that: "This grant of exclusive regulatory authority [under the Martin Act] served the important purposes of insuring

[18] A claim which is supported, in turn, merely by press releases of the Attorney General's office – dubious authority at best. The most recently available paper copy of the telephone directory of the New York State Attorney General's Office printed in 2008 indicates that a mere 20 attorneys are listed in its Investor Protection Bureau, which handles various categories of jurisdictional, enforcement, regulatory, administrative, injunctive and litigation related proceedings covered by said Bureau's jurisdiction – separate and apart from pursuing non-fraud tort claims against responsible entities and individuals effecting the interests of New York State's 19,378,102 residents. (Population source: United States 2010 Census)

uniformity and certainty in the regulation of securities transactions in New York" (JPM Br. at 32).[19] This very assertion exposes JP Morgan's confusion of the regulatory component of The Martin Act with the rights of victimized investors to seek civil redress for non-fraud tort claims – two very different concepts.

For all of the reasons previously stated, PIABA urges this Court to hold that the Martin Act does not preempt non-fraud common law tort claims consistent with its holding in *ABN AMBRO Bank, N.V., Barclays Bank, PLC v. MBIA, Inc., supra* and sound public policy, statutory construction and constitutional principles.

Respectfully Submitted,

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[19] This same distortion continues with the unsupported claim that ". . . thus, allowing private plaintiffs to pursue private non-fraud claims in the securities context would undermine the legislature's deliberate decision to rely exclusively on enforcement of the Act by the Attorney General," (JPM Br. at 36).

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