STATE OF NEW YORK
COURT OF APPEALS

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ANITA L. APT, THE ESTATE OF NELLIE APT by Anita L. Apt, Administrator, and THE NELLIE APT REVOCABLE TRUST by Anita L. Apt, Trustee

Plaintiffs/Appellants.

-vs-

MORGAN STANLEY DW, INC., MORGAN STANLEY & CO., INC., and ARUNABHA SENGUPTA,

Defendants/Respondents.

---X

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

New York County Clerk's Index No. 100594/23
APL-2014-00136

COPY OF ORIGINAL WITH PROOF OF SERVICE

PLEASE TAKE NOTICE, that upon the annexed affirmation of Timothy J. O'Connor, dated the 17th day of November, 2014, and upon a copy of the proposed *Amicus Curiae* Brief, 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 Monday, December 1, 2014, 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: November 17, 2014
Albany, New York

Respectfully Submitted,

LAW OFFICES OF TIMOTHY J. O'CONNOR

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STATE OF NEW YORK
COURT OF APPEALS

---X

ANITA L. APT, THE ESTATE OF NELLIE APT by Anita L. Apt, Administrator, and THE NELLIE APT REVOCABLE TRUST by Anita L. Apt, Trustee Plaintiffs/Appellants. -vs- MORGAN STANLEY DW, INC., MORGAN STANLEY & CO., INC., and ARUNABHA SENGUPTA, Defendants/Respondents.	**AFFIRMATION OF TIMOTHY O'CONNOR IN SUPPORT OF MOTION OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION FOR *AMICUS CURIAE* RELIEF, ALLOWING THE FILING OF AN *AMICUS CURIAE* BRIEF** New York County Clerk's Index No. 100594/23 APL-2014-00136

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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:

1. 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.

2. In preparation of the instant motion and accompanying *Amicus Curiae* Brief, I worked closely with numerous volunteer attorneys on PIABA's *Amicus* Committee.

3. 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

because investors must be able to pursue claims for breach of fiduciary duty.

4. I have also had assistance on the annexed *Amicus Curiae* Brief from Benjamin P. Edwards, Director of the Investor Advocacy Clinic of the Michigan State University College of Law and from other fellow members of the Public Investors Arbitration Bar Association.

5. PIABA seeks permission to file an *Amicus Curiae* Brief because it believes that this Court's decisions in *Roni LLC v. Arfa*, 18 N.Y.3d 846 (2011); *People v. Coventry First LLC*, 13 N.Y.3d 108 (2009); *EBC I, Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11 (2005); and *Simcuski v. Salei,* 44 N.Y.2d 442 (1978) merit the reversal of the lower court.

6. PIABA also seeks permission to file an *Amicus Curiae* Brief, as it believes that the underpinnings of the New York State common law and the New York State Civil Practice Law and Rules applicable to the rights of victimized investors and private litigants to pursue their claims for civil relief must be comprehensively addressed as articulated in the accompanying *Amicus Curiae* Brief.

7. PIABA also desires to bring to the Court's attention various rules, provisions, publications and pronouncements of the Financial Industry Regulatory Authority and the Securities Exchange Commission, which primarily regulate the financial services industry.

8. PIABA submits that the named parties have not fully presented the

issues raised herein and that the additional context provided by the accompanying *Amicus Curiae* Brief will serve to remedy this deficiency.

9. It is further submitted that the case law and authorities cited in the accompanying *Amicus Curiae* Brief and other arguments contained therein might otherwise escape the Court's consideration.

10. It is further submitted that the proposed *Amicus Curiae* Brief will otherwise be of assistance to this Court in its deliberations.

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

Dated: November 17, 2014
Albany, New York

TIMOTHY J. O'CONNOR

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EXHIBIT A

APL 2014-00136
New York County Clerk's Index No. 100594/12

Court of Appeals

of the

State of New York

ANITA L. APT, THE ESTATE OF NELLIE APT, by Anita L. Apt, Administrator, and THE NELLIE APT REVOCABLE TRUST, by Anita L. Apt, Trustee,

Plaintiffs-Appellants,

– against –

MORGAN STANLEY DW, INC., MORGAN STANLEY & CO., INC. and ARUNABHA SENGUPTA,

Defendants-Respondents.

AMICUS CURIAE BRIEF OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF PLAINTIFFS-APPELLANTS

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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 *Amicus Curiae* Brief, to aid the Court in its deliberation of this matter. For the reasons that follow, the Appellant's Complaint and claims thereunder should be reinstated to allow her to pursue her claim for breach of fiduciary duty.

STATEMENT OF INTEREST

PIABA is a national bar association established in 1990 as an educational and networking organization for attorneys representing public investors in securities disputes. PIABA's mission is to promote the interests of the public investor in securities arbitration by protecting the public investor 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 because the law has not kept pace with developments in the financial services industry, thanks in large part to the fact that nearly all customer disputes are heard in arbitration, not court. In recent decades, industry professionals have increasingly assumed new roles as financial advisers, and often market themselves as trustworthy advisers. For ordinary brokers, this new role differs significantly from their prior role as persons primarily providing execution services. The law which developed around their execution role did not ordinarily recognize a fiduciary duty as they were often merely "brokering" transactions. PIABA seeks to put information about the changing roles of financial professionals before the Court to allow it to evaluate this dispute in context.

PRELIMINARY STATEMENT

A. The alleged facts

The underlying Complaint alleges that Respondents employed a financial advisor named Charles Winitch at a branch office rife with securities fraud. As outlined in the Complaint, persons at this branch office often engaged in inappropriate "short-term trading" and churned customer accounts. (¶10-11, R32-33). As a result of these and other problems, the New York Stock Exchange found that Respondents failed to properly supervise their personnel or report customer complaints, resulting in a fine levied against Respondents for $500,000.00. (¶13, R33).

The Complaint alleges that persons at this branch office also wronged the now-deceased Nellie Apt, who was at the time an elderly resident of Queens. (¶1, R29). According to the Complaint, the elderly Ms. Apt lacked financial sophistication and relied on Respondents to manage her accounts and affairs. (¶8, R31). Ms. Apt trusted Respondents so completely that she allowed their registered representative, Winitch, to serve as the trustee of The Nellie Apt Revocable Trust (the "Revocable Trust").

While Respondents controlled Ms. Apt's finances and the Revocable Trust, the Complaint alleges that Respondents betrayed Ms. Apt's trust by churning her accounts and engaging in unauthorized trading activity to secure additional commissions. (¶¶8-9, R31).

As further laid out in the Complaint, Respondents concealed the true extent of the damage from Ms. Apt. (¶39, R39). According to the Complaint, Plaintiffs did not know about the unlawful conduct or know of facts which would have led to the discovery of the misconduct until after the death of the elderly Ms. Apt. (*See also*, ¶41, R39). In sum, Plaintiffs allege Respondents abused the great trust placed in them and concealed their wrongdoing until it was discovered, after Ms. Apt's death.

B. The Affidavit submission of Louis L. Straney before the lower court

In addition to the allegations in the Complaint (which the lower court should have accepted as true and correct as a matter of law in evaluating the Motion to Dismiss), Appellants provided further support for the fact that Respondents' wrongdoing was not easily detectible and argued to the lower court that the information made available to her in the form of confirmation slips would not have put her on notice of the full extent of the Respondents' misconduct. To substantiate this argument, the Appellants submitted an affidavit from a securities expert, Louis L. Straney, to explain why Ms. Apt would not have discovered the true extent of the misconduct from the confirmation slips. That affidavit explained:

> However, it is widely recognized, that because of the limited information provided in confirmation slips, Plaintiffs would not have been able to see or detect any fraudulent pattern of trading activity from looking at a single confirmation slip or occasionally examining

> confirmation slips as they arrived in the mail. This is so because each confirmation slip contains only the transaction and commission information *for a single agency transaction*. To discern a pattern of activity in an account, customer would have needed to review and analyze all of the confirmations and advisor commission blotters for the Apt Accounts as a group. (R152-R167).

Mr. Straney went on to opine that additional undisclosed transactional costs included "undisclosed so-called net or principal trades" and "transactional charges," which disclosed only a portion of the commissions "but failed to disclose additional firm and advisor compensation derived from the broker-dealer inside market." (¶10, R155).[1]

C. The lower courts erred by summarily dismissing this matter

Notwithstanding the allegations of the Complaint, as well as the affidavit submissions of expert witness Louis L. Straney before the lower court at the Supreme Court level, the Appellate Division affirmed the lower court's ruling dismissing the Appellant's Complaint pursuant to CPLR Rule 3211(a)(5). When it dismissed the Complaint, the Supreme Court mistakenly asserted that "the wrongful conduct occurred at the latest on August 29, 2005 when Morgan Stanley terminated Winitch." (R199). Disregarding the Respondents' fiduciary duties and

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[1] Mr. Straney went on to note at ¶10, R155:

> I can conclude that there were additional and substantial undisclosed commissions and charges in the Apt accounts, which total probably equal to at least $100,000.00. Based on my analysis of the 611 pages of confirmation slips that I reviewed, I have concluded that Morgan Stanley charged the Apt accounts at least $450,000.00 in total commissions listed therein, much of which was not disclosed.

accompanying affirmative duties to disclose misconduct, the Supreme Court also erroneously found that the Appellants had not alleged facts indicating that Respondents fraudulently concealed misconduct "so as to toll the statute of limitations." (R199). The Appellate Division also failed to address the obligations imposed by fiduciary duties or the propriety of discovery as to the existence of a fiduciary duty. These errors warrant reversal.

ARGUMENT

POINT I

RESPONDENTS, AS FINANCIAL ADVISORS, OWED APPLELLANTS FIDUCIARY DUTIES

The Court of Appeals should reverse the Appellate Division because it and the lower court failed to consider whether a fiduciary duty existed on the facts alleged in the Complaint. Instead, the Appellate Division simply relied on the general and outdated proposition that "no fiduciary relationship aris[es] from an *ordinary* broker-client relationship so as to give rise to a duty to disclose." (R199-R200) (emphasis added). The Court of Appeals, however, has specifically and repeatedly held that fiduciary duties arise when clients rely on financial professionals for advice and that courts must consider the underlying facts to determine whether a fiduciary duty existed. *See, e.g., Roni LLC v. Arfa*, 18 N.Y.3d 846, 848 (2011) ("[a]scertaining the existence of a fiduciary relationship inevitably requires a fact-specific inquiry"), citing *AG Capital Funding Partners L.P. v. State Street Bank & Trust Co.*, 11 N.Y.3d 146, 158, 866 N.Y.S.2d 578, 896 N.E.2d 61

(2008). *See also Eurycleia Partners, LP v. Seward & Kissel LLP*, 12 N.Y.3d 553, 561, 883 N.Y.S.2d 147, 910 N.E.2d 976 (2009). The lower court failed to perform the required analysis for determining whether a fiduciary duty existed and, therefore, should be reversed to allow for a proper factual finding.

A. Financial professionals owe fiduciary duties when clients rely on them for expert advice.

New York recognizes that a fiduciary duty exists whenever clients trust and rely on financial professionals for expert advice. In *People v. Coventry First LLC*, 13 N.Y.3d 108 (2009), for example, the Court of Appeals permitted the Attorney General to bring a breach of fiduciary duty claim against life insurance brokers holding themselves out as highly-skilled experts on whom their clients could depend for advice, stating that "high level of confidence and reliance in another, who thereby exercises control and dominance over him" can give rise to a fiduciary duty.

Similarly, in *EBC I. Inc. v. Goldman Sachs & Co.*, 5 N.Y.3d 11, 20 (2005), the Court of Appeals also explained that when rendering expert advice, securities professionals owe fiduciary duties because they are not simply commercial parties operating at arm's length. *See also Bullmore v. Ernst & Young Cayman Islands*, 45 A.D.3d 461 (1st Dept. 2007) (finding that a professional investment advisor had fiduciary duty to client in connection with hedge fund collapse).[2] As a result, New

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[2] The Second Circuit has also read New York law as imposing a fiduciary duty when "a relationship of trust and confidence [exists] between broker and a customer with respect to those

York Courts have consistently found instances where a fiduciary duty exists between a broker and client when the circumstances of the relationship show the client was relying on the broker for professional advice.

B. The "ordinary" broker-customer relationship assumption is outdated.

The lower court's statement that the *ordinary* broker-client relationships do not give rise to fiduciary duties should be modified because today's ordinary broker-client relationships differ significantly from the ordinary relationships of earlier times. *See* Arthur B. Laby, *Selling Advice and Creating Expectations: Why Brokers Should be Fiduciaries*, 87 WASH. L. REV. 707, 729-731 (2012) (explaining that "[s]tock brokerage looked very different in the 1990s than it did in the 1930s and 1940s"). When Congress erected the modern securities regulatory framework in the 1930s, brokers largely provided execution services and did not market themselves primarily as financial advisers. *Id.*

Today, a broker's role differs significantly from what it was eighty years ago. In the 1930's, brokers mainly executed trades. *Id.* At 729. Clients placed orders to buy or sell securities, and brokers physically carried or transmitted orders to specialists in the market. In that age, any broker's advice was less significant because brokers provided execution service and the investing public understood that brokers provided execution services rather than financial advice, which was

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matter[s] that have been entrusted to the broker." *United States v. Skelly*, 442 F.3d 94, 98 (2d Cir. 2006).

left more to the purview of "financial advisors." *Id.* Even if brokers rendered advice, the advice was ordinarily considered "incidental" to the brokers' role in executing the transaction. *Id.* at 730. Reflecting this history, the Investment Advisers Act of 1940, 15 U.S.C.A. § 80b-2(a)(11)(c), excludes brokers from its scope so long as: (i) their performance of investment advisory services is "solely incidental" to their business as a broker; and (ii) the brokers receive no "special compensation" for providing investment advice, i.e. a payment expressly for investment advice. *See Thomas v. Metro. Life Ins. Co.*, 631 F.3d 1153, 1162 (10th Cir. 2011).

Because brokers receive payments from transactions, brokers providing investment advice today frequently advise their clients to purchase mutual funds or other products that pay commissions, allowing brokers to receive indirect, transaction-based compensation for their investment advice. While some investors understand this conflict, many have grown to depend on their brokers for financial advice.

The increase in client trust is unsurprising. The brokerage business now advertises itself as a source of financial advice for retail customers. As Professor Arthur Laby has noted, the brokers "increasingly emphasiz[e] advice" (Laby, *supra* at 754), and brokers today primarily characterize themselves as financial advisers. *Id.* at 757-58. The Securities and Exchange Commission has also found that financial services firms now use titles such as "financial adviser," "financial

consultant," or "advisor" to describe their personnel.[3] These titles emphasize that customers may depend on and trust brokers for advice.

In a recent study, the staff of the Securities and Exchange Commission noted that today's customers "have a reasonable expectation that the advice that they are receiving is in their best interest." *Id.* at 101 (stating that customers "should not have to parse through legal distinctions to determine whether the advice they receive was provided in accordance with their expectations").

In the current *ordinary* broker-customer relationship, customers regularly rely on their brokers for advice. *Id.* New York law has long recognized that a fiduciary duty arises when customers repose trust and confidence and rely on a broker for financial advice. Thus, the default assumption about whether the broker-customer relationship involves a fiduciary duty should change.

The continuing assumption that *ordinary* customers do not rely on their brokers for expert advice and guidance does significant harm. In reaching its conclusion that the Respondents did not owe Ms. Apt a fiduciary duty, the Appellate Division relied on the outdated assumption that "there is no fiduciary relationship arising from an ordinary broker-client relationship." (R199-R200). The application of this outdated assumption seemingly diverted the Court's attention from examining the actual nature of the parties' relationship. While

[3] U.S. Sec. & Exch. Comm'n, *Study on Investment Advisers and Broker-Dealers: As Required by Section 913 of the Dodd-Frank Wall Street Reform and Consumer Protection Act*, at 99 (2011) [hereinafter "*Fiduciary Study*"], available at http://www.sec.gov/news/studies/2011/913studyfinal.pdf.

many cases have reiterated the received wisdom that the ordinary broker-customer relationship is not a fiduciary one, its underlying assumption—that most customers do not trust or rely on mere brokers—no longer holds.

Revising this outdated assumption would do much good. At present, courts, such as the Appellate Division below, may mistakenly presume that ordinary customers do not rely on their brokers for expert financial advice and forgo examining the actual facts and circumstances. By disavowing this outdated factual assumption, New York may better protect the well-documented expectation that brokers (who now call themselves financial advisors) will provide advice in their clients' best interests.

C. Determining whether a fiduciary duty exists requires a fact-specific inquiry.

Regardless of the assumptions made about ordinary broker-customer relationships, New York law requires courts to conduct "a fact-specific inquiry" to determine whether a fiduciary duty existed. *Roni,* N.Y. at 125; *see Carbon Capital Mgmt. v. Am. Express Co.*, 932 N.Y.S.2d 488, 496 (2d Dept. 2011) ("the actual relationship between parties determines the existence of a fiduciary duty"). In *Wiener v. Lazard Freres & Co.*, 241 A.D.2d 114, 122, 672 N.Y.S.2d 8, 11 (1st Dept. 1998), the First Department reversed the Supreme Court for simply assuming that no fiduciary duty existed because it was not stated in the written lender-borrower provisions, declaring that an "inquiry into whether such obligation exists is necessarily fact-specific to the particular case." *Id.*

Similarly in *Frydman & Co. v. Credit Suisse First Boston Corp.,* 272 A.D.2d 236, 238,708 N.Y.S.2d 77, 79 (1st Dept. 2000), the First Department reinstated a cause of action for breach of fiduciary duty because "ongoing conduct between the parties may give rise to a fiduciary relationship that will be recognized by the courts." *See also Mandelblatt v. Devon Stores,* 132 A.D.2d 162, 168, 521 N.Y.S.2d 672 (1st Dept. 1987) (a fiduciary relationship exists when one person "is under a duty to act for or to give advice for the benefit of another upon matters within the scope of relation" (quoting Restatement {Second} of Torts §874])).

As a result, the lower court and Appellate Division made reversible error in failing to conduct the appropriate factual inquiry as to the relationship between the parties to determine whether a fiduciary relationship existed.

D. The facts alleged in Appellants' Complaint sufficiently gave rise to a fiduciary duty.

The Appellants' Complaint alleged facts indicating that Respondents owed her a fiduciary duty. As explained above, New York law recognizes that financial professionals owe fiduciary duties when their clients trust them and rely on them for advice. See *EBC I*, Supra, 5 N.Y. at 20. The Complaint alleged numerous facts indicating that Ms. Apt trusted and relied on Respondents for advice. Upon further discovery, affidavits from Ms. Apt revealed that: (i) Ms. Apt designated Winitch, Respondents' Registered Representative, as the trustee of her living trust (R102); (ii) Ms. Apt lacked the financial sophistication and education to protect her own interests (R129); Ms. Apt allowed Winitch to conduct a clearly excessive

number of transactions and was unaware of the excessive commissions until after her lawyers had told her (R128); Ms. Apt regularly acceded to Winitch's recommendations and was one of the "vulnerable customers" that Winitch normally targeted (R108); and Winitch conducted transactions without Ms. Apt's authorization by writing checks in Ms. Apt's name and using Ms. Apt's credit cards for his personal expenses (R105).

While any of these alleged facts should give rise to a fiduciary duty, one appears particularly compelling: Ms. Apt allowed Winitch to serve as the trustee of her living trust (R102). As a trustee, Winitch controlled over $8 million dollars within Ms. Apt's trust account. Additionally, Winitch was named as one of the beneficiaries to Ms. Apt's retirement account entitled to an amount of $800,000.00. These alleged facts indicate Ms. Apt placed significant trust in Winitch and that her relationship with Winitch differed from the supposed "ordinary" relationship.

Because the lower courts never considered these facts and whether they gave rise to a fiduciary duty, the Court of Appeals should reverse to allow for a factual inquiry into whether the Defendants-Respondents owed a fiduciary duty.

POINT II

THE DOCTRINE OF EQUITABLE ESTOPPEL, AS WELL AS THE PROVISIONS OF THE NEW YORK GENERAL OBLIGATION LAW 17-103(4)(b), MILITATE AGAINST THE LOWER COURT'S DISMISSAL OF THE APPELLANTS' COMPLAINT PURSUANT TO CPLR §3211(a)(5)

In addition to the fiduciary relationship supporting reversal, the doctrine of equitable estoppel bars a statute of limitations defense where a plaintiff "was induced by fraud, misrepresentations or deceptions to refrain from filing a timely action." *Simcuski v. Salei,* 44 N.Y.2d 442, 448-449 (1978); *Balance Return Fund Ltd. v. Royal Bank of Canada*, 83 A.D.3d 429, 921 N.Y.S.2d 38 (1st Dept. 2011), citing *Swersky v. Dreyer & Traub,* 219 A.D.2d 321, 326, 643 N.Y.S.2d 33 (1996), appeal withdrawn 89 N.Y.2d 983, 656 N.Y.S.2d 741, 678 N.E.2d 1357 (1997) (fraudulent concealment claim). The doctrine prevents a defendant from escaping liability on a statute of limitations defense when the plaintiff was prevented from commencing a timely action by reasonable reliance on the defendant's fraud, misrepresentation or other affirmative misconduct. *See Zumpano v. Quinn*, 6 N.Y.3d 666, 673-674, 816 N.Y.S.2d 703, 849 N.E.2d 926 (2006); *Pulver v. Dougherty*, 58 A.D.3d 978, 979-980, 871 N.Y.S.2d 495 (2009); *Cellupica v. Bruce,* 48 A.D.3d 1020, 1021, 853 N.Y.S.2d 190 (2008).

Even in the absence of fiduciary relationship, there is an affirmative duty to disclose where one party's knowledge of underlying facts serves to render the underlying transactions complained of inherently unfair, unless fully disclosed.

See Swersky v. Dreyer & Traub, 219 A.D.2d 321, 643 N.Y.S.2d 33 (1st Dept. 1996). The question of whether a duty to disclose exists is a question of law for determination by the Court. *Indus. Risk Insurers v. Ernst,* 224 A.D.2d 389, 638 N.Y.S.2d 109 (2d Dept. 1996). Improper disclosure of fees and extra expenses associated with securities investments has been deemed a sufficient basis to support fraud claims. *People v. H&R Block, Inc.,* 58 A.D.3d 415, 870 N.Y.S.2d 315 (1st Dept. 2009).

Here, the lower court erred both in failing to afford the Appellants discovery on the issue of equitable estoppel, which was clearly pled in the underlying Complaint (R¶¶39-43, R39), and in dismissing the Complaint pursuant to CPLR Rule 3211(a)(5). *See* New York General Obligation Law 17-103(4)(b) and *General Stencils, Inc. v. Chiappa*, 18 N.Y.2d 125, 128 (1996), quoting *Glus v. Brooklyn Eastern Term.*, 359 U.S. 231, 232-233 (1959).

The Complaint indicates that Respondents failed to provide Ms. Apt with information sufficient to inform her of the true extent of misconduct in their offices. In any event, given the pervasive wrongdoing at the branch office where Respondents managed and supervised Ms. Apt's account, ordinary trade confirmations plainly could not put Ms. Apt on notice of the full extent of the wrongdoing. As this Court has declared, in such situations it would be "almost impossible to state in detail the circumstances constituting a fraud where those

circumstances are peculiarly within the knowledge" of the Respondent firm. *Jeret Contracting Corp v. New York City Transit Auth.*, 22 N.Y.2d 187, 194 (1968).

Appellants should be allowed to proceed on their claims because it would be unreasonable to expect the Appellants to fully have knowledge of and otherwise fully demonstrate the alleged fraudulent misrepresentations or concealments in detail without permitting the Appellants discovery. See *Banner Indus., Inc. v. Schwartz,* 181 A.D.2d 479, 480 (1st Dept. 1992).

Similarly, when evaluating a motion to dismiss in *Simcuski*, the Court refused to decide whether or not the plaintiff there met her contractual obligation of due diligence as a matter of law without discovery, affording the plaintiff the opportunity to develop a factual record. *Simcuski v. Salei,* supra, *at 451.*[4] As a result, at a minimum, Appellants should be afforded the right to conduct discovery on the fraudulent concealment portion of their case prior to dismissal.

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[4] The Appellants' expert/consulting witness, Louis J. Straney, closes his Affidavit by noting at ¶12, R156:

> Upon completion of discovery herein and review of all of the account documents (including, but not limited to, internal documentation, advisor compensation reports, and activity data that would have been made available to Morgan Stanley supervisors), it is likely that I will be able to elaborate upon the limited conclusions I have reached herein and quantify the precise amount of commissions – both disclosed and undisclosed – charged in the Apt accounts. Therefore, I respectfully reserve the right to advise and supplement the conclusions offered herein at an appropriate time.

CONCLUSION

The securities industry has changed dramatically since the Depression Era. Now, financial firms increasingly portray themselves as trusted financial advisers. Given this reality, "brokers" are often acting as "financial advisors" that seek and are often given considerable reliance in financial decisions for investors. The Court should reverse the Appellate Division to permit discovery into whether the Respondents owed Appellants a fiduciary duty.

To the extent the Court has statute of limitations concerns about the claim, the doctrine of equitable estoppel applies to toll the statute of limitations. Because information about the true nature and extent of the wrongdoing resided in the Respondents' hands alone, Appellants should not be barred from litigating their claims because the Respondents succeeded at hiding their wrongdoing. Barring these claims would encourage defendants to run out the clock and cover up their misdeeds, denying Appellants and other similarly situated investors any opportunity to seek justice.

It is further submitted that the procedural underpinnings addressing the equitable estoppel raised in Point II clearly militate in favor of equitably estopping the Respondent from arguing the applicability of statutes of limitations to the

Appellant's claims. The ruling of the lower court dismissing the Appellant's Complaint should be reversed in its entirety.

Respectfully Submitted,

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) ss.:
COUNTY OF NEW YORK)

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I, , being duly sworn, depose and say that deponent is not a party to the action, is over 18 years of age and resides at the address shown above or at

On NOV 18 2014

deponent served the within: ***Amicus Curiae* Brief of the Public Investors Arbitration Bar Association in support of Plaintiffs-Appellants**

Upon:

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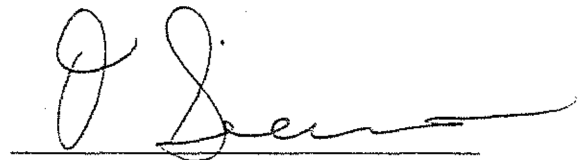
the address(es) designated by said attorney(s) for that purpose by depositing **1** true copy(ies) of same, enclosed in a properly addressed wrapper in an Overnight Next Day Air Federal Express Official Depository, under the exclusive custody and care of Federal Express, within the State of New York.

Sworn to before me on NOV 18 2014



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