IN THE SUPREME COURT OF THE STATE OF OREGON

ROBERT J. BOYER, Plaintiff-Appellant, v. SALOMON SMITH BARNEY, a Delaware corporation; DEAN MICHAEL HOWELL; and DEAN K. MORRELL, Defendants-Respondents.	TC No.: 0212-12721 CA: A123799 SC No.: S055192

BRIEF OF AMICUS CURIAE
PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

Robert S. Banks, Jr. OSB No. 82186
BANKS LAW OFFICE, P.C.
209 S.W. Oak Street, Suite 400
Portland, Oregon 97204
Telephone: (503) 222-7475
Facsimile: (503) 467-7689

Attorney for *Amicus Curiae* Public Investors Arbitration Bar Association

George W. Kelly, OSB No. 82298
303 W. 10th
Eugene, OR 97401
Telephone: (541) 343-1884

Attorneys for Plaintiff-Appellant-Petitioner

Bruce L. Campbell, OSB No. 92537
Miller Nash LLP
111 S.W. 5th Ave., Suite 3400
Portland, OR 97204
Telephone: (503) 205-2419

Attorneys for Defendants-Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

I. THE BOYER DECISION WILL HAVE WIDE RANGING IMPLICATIONS FOR OREGON INVESTORS BECAUSE OF THE NATURE OF THE DISPUTE RESOLUTION PROCESS 1

II. THE CONCURRING OPINION IN *BOYER* WAS MADE WITHOUT REGARD TO CONDUCT RULES THAT ESTABLISH STOCKBROKER STANDARDS OF CARE 3

A. The Boyer Concurrence Would Virtually Eliminate Negligence Claims Against Stockbrokers Except Where The Stockbroker Exercises Discretion Over An Account 3

B. Stockbrokers Owe Duties To Investors In All Cases Regardless of the Contract Terms or Control Over The Account 4

1. The Suitability Rule 5

2. The Brokerage Firm's Duty of Supervision 8

III. OTHER AUTHORITIES HAVE RECOGNIZED THAT THE NASD RULES FORM THE BASIS FOR NEGLIGENCE CLAIMS 10

IV. THE STOCKBROKER CONDUCT RULES ESTABLISH STANDARDS OF CARE AND FORM THE BASIS OF A CLAIM FOR NEGLIGENCE UNDER OREGON LAW 13

V. THE RELATIONSHIP BETWEEN STOCKBROKERS AND CLIENTS IS A SPECIAL RELATIONSHIP AS A MATTER OF OREGON LAW 15

VI. CONCLUSION 16

TABLE OF AUTHORITIES

Federal Cases:

Bateman Eichler, Hill Richards, Inc. v. Berner, 472 U.S. 299 (1985). 16

David v. Merrill Lynch, 440 N.W.2d 269 (N.D. 1989) 2

Dunmire v. Schneider, 481 F.3d 465 (7th Cir. 2007) 2

Mercury Investment Company v. A. G. Edwards & Sons, 295 F. Supp. 1160 (S.D.Tex. 1969) . 12

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng, 697 F.Supp. 1224 (D.D.C.) 11

Mihara v. Dean Witter & Co., 619 F.2d 814 (9th Cir. 1980) 5, 10, 11

Milani v. Conticommodity Serv., Inc., 462 F.Supp. 405 (N.D.Cal. 1976) 2

Piper, Jaffray and Hopwood v. Ladin, 399 F. Supp. 292 (S.D. Iowa 1975) 11

Scott v. Dime Sav. Bank of New York, FSB, 886 F.Supp. 1073 (S.D.N.Y. 1995) 12

Shearson/American Express, Inc. v. McMahon, 482 U.S. 220 (1987) 1, 3

Siedman v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 465 F.Supp. 1233 (S.D.N.Y. 1979) . . 11

Vucinich v. Paine Webber Jackson & Curtis, 803 F.2d 454 (9th Cir. 1987) 11, 12

State Cases:

Bellikka v. Green, 306 Or. 630, 762 P.2d 997 (1988) 13

Bennett v. Farmers Ins. Co., 332 Or. 138, 26 P.3d 785 (2001) 15

Boyer v. Salomon Smith Barney, 213 Or. App. 560, 162 P.3d 1016 (2007) 1, 3, 4, 7, 8, 14

Conway v. Pacific University, 324 Or. 231, 924 P.2d 818 (1996) 15

Georgetown Realty, Inc. v. The Home Insurance Company, 313 Or. 97, 831 P.2d 7 (1992) ... 15

Hagan v. Gemstate Mfg., Inc., 328 Or. 535, 982 P.2d 1108 (Or. 1999) 13

In Hampton Tree Farms v. Jewett, 320 Or. 599, 892 P.2d 683 (1995) 15

Hansen v. Abrasive Engineering & Mfg., 317 Or. 378, 856 P.2d 625 (1993) 13

Kim v. Multnomah County by & Through its Multnomah County Community Dep't of Community Corrections, 328 Or. 140, 970 P.2d 631 (1998) 13

Shahtout v. Emco Garbage Co., 298 Or. 598, 695 P.2d 897 (1985) 14

Shin v. Sunriver Preparatory School, Inc., 199 Or. App. 352, 111 P.3d 762 (2005) 15

Wallace v. Hinckle Northwest, 79 Or. App. 177, 717 P.2d 1280 (1986) 4, 10, 14

SEC Cases:

Application of Michael H. Hume, Exchange Act Rel. No. 35608, 1995 SEC LEXIS 983 (April 17, 1995) 7

Federal Statutes:

7 U.S.C. § 7a(11) 2

Oregon Administrative Rules:

OAR 441-205-0140 7

OAR 441-205-0210 9

Other Authorities:

FINRA Code of Arbitration Procedure, Rule 12100(p) 2

FINRA Code of Arbitration Procedure, Rule 12401(c) 2

FINRA Code of Arbitration Procedure, Rule 12402(b) 2

FINRA Code of Arbitration Procedure, Rule 12904(b) 2

FINRA Code of Arbitration Procedure, Rule 12904(f) 2

FINRA Statistics, *http://www.finra.org /ArbitrationMediation /FINRADisputeResolution/ Statistics/index.htm* 2, 12

NASD Notice to Members 95-15 8

NASD Notice to Members 96-60 7

NASD Rule 0115 5

NASD Rule 2200 5

NASD Rule 2310 . . . . 5, 7

NASD Rule 3010 . . . . 8, 9

NYSE Rule 405 6

D. Robbins, 1 *Securities Arbitration Procedure Manual* (5th Ed. Lexis Nexis 2006) 10, 13

The Public Investors Arbitration Bar Association ("PIABA") seeks permission to appear as a friend of the court to provide information about the established standards of care governing stockbroker-client relationships. The parties did not apprise the court of appeals of those duties, and PIABA believes that the information below will assist the Court in its decision and opinion in this case.

I. THE BOYER DECISION WILL HAVE WIDE RANGING IMPLICATIONS FOR OREGON INVESTORS BECAUSE OF THE NATURE OF THE DISPUTE RESOLUTION PROCESS.

PIABA is a voice for public investors in all types of investments, but it generally limits its amicus petitions to cases which involve securities transactions, where most investments are made. PIABA understands that *Boyer* involves a commodities account, and that it could be distinguished from cases involving securities transactions on that basis. Yet the *Boyer* concurrence analogizes to and directly opines on the duties of stockbrokers. *See, e.g.*, 213 Or. App. at 568. In the arbitration context where these claims are actually resolved, the language in *Boyer will* affect the rights of aggrieved Oregon investors seeking to bring negligence claims against stockbrokers[1] for investment advice and services that fall beneath the industry established standards of care.

Investor cases are resolved through arbitration fora sponsored by the securities and commodities industries. As PIABA's Application to Appear As Amicus Curiae points out, since the Supreme Court's landmark decision in *Shearson/American Express, Inc. v.*

---

[1]The term "stockbroker" is used throughout to include those financial services professionals who are regulated by the Financial Industry Regulatory Authority ("FINRA"), which was known as the National Association of Securities Dealers ("NASD") until July, 2007. All 5,000+ brokers and dealers of securities in the United States, and their registered representatives who are licensed to sell securities, are required to be FINRA members and are subject to FINRA rules.

McMahon, 482 U.S. 220 (1987), virtually all disputes between members of the financial services industry and their clients are resolved in arbitrations conducted by self-regulatory organizations such as the Financial Industry Regulatory Authority ("FINRA") and the National Futures Association ("NFA") arbitration programs. That is because all major brokerage firms today include an arbitration provision in their customer agreements.[2] More than 18,800 customer-brokerage disputes were filed with FINRA alone for the years 2004-2006.[3] *See*: FINRA Statistics, at *http://www.finra.org /ArbitrationMediation /FINRADisputeResolution/ Statistics/index.htm* ("FINRA Statistics")

In securities arbitrations conducted by FINRA, arbitrators frequently are not lawyers. In customer cases of over $50,000, which are decided by a panel of three arbitrators,[4] one arbitrator is *required* to be a member of or associated with the securities industry.[5] The awards are final, not subject to appeal, and need not include any reasoning explaining the

---

[2]The plaintiff's agreement here includes an unsigned arbitration provision. It stated that "YOU NEED NOT SIGN THIS ARBITRATION AGREEMENT TO OPEN AN ACCOUNT WITH SB." That account agreement may have been a vestige of an earlier time when there was a question as to whether the former version of 7 U.S.C. § 7a(11) the Commodities Futures Trading Act prohibited the mandatory arbitration of disputes over $15,000. *See, e.g., Milani v. Conticommodity Serv., Inc.,* 462 F.Supp. 405, 407 (N.D.Cal. 1976); *David v. Merrill Lynch*, 440 N.W.2d 269 (ND 1989). However, authorities today agree that commodities firms may require arbitration as a condition of opening an account. *See. e.g., Dunmire v. Schneider*, 481 F.3d 465 (7th Cir. 2007)(arbitration provision in commodities account covers claims against representative of broker as well as brokerage).

[3]In 2004, 2005 and 2006, respectively, 8,201, 6,074 and 4,614 customer cases were filed. FINRA Statistics.

[4]FINRA Code of Arbitration Procedure, Rule 12401(c) ("FINRA Code"). The FINRA Code is available online at *www.finra.org/web/groups/rules_regs/documents/rule_filing/p018365.pdf.*

[5]FINRA Code, Rules 12402(b), 12100(p).

decision.[6] And, since the cases are not filed in court, there is a dearth of case law nationally addressing client claims against the brokerage industry since *McMahon*. What little law comes from the courts is frequently misapplied in arbitration. Parties cite inapposite cases to arbitrators unfamiliar with the principles of legal reasoning, *stare decisis*, or the significance of factual or legal distinctions between authorities. For those reasons, the *Boyer* decision will be cited as controlling authority in many if not most negligence claims against stockbrokers, both in Oregon and elsewhere. And, for those reasons, PIABA believes that this is a very significant case that could adversely affect many investors.

II. THE CONCURRING OPINION IN *BOYER* WAS MADE WITHOUT REGARD TO CONDUCT RULES THAT ESTABLISH STOCKBROKER STANDARDS OF CARE.

The concurring opinion in *Boyer v. Salomon Smith Barney,* 213 Ore. App. 560, 162 P.3d 1016 (2007), makes a number of statements about stockbrokers' duties that are diametrically opposed to the standards that the brokerage industry itself has established.

A. <u>The Boyer Concurrence Would Virtually Eliminate Negligence Claims Against Stockbrokers Except Where The Stockbroker Exercises Discretion Over An Account</u>.

The *Boyer* concurring opinion states that, in order to plead and prove a negligence case against a stockbroker, an investor would have to plead and prove "that the defendant had entered into a relationship with the plaintiff in which the defendant would exercise judgment *on the plaintiff's behalf* or would assume an obligation to achieve a particular result *on the plaintiff's behalf*." *Id.* at 565 (emphasis in original). The concurrence states that to establish a special relationship that would support a negligence claim against a financial advisor, the contract must have "imposed on defendants the obligation to act to secure or protect

---

[6]FINRA Code, Rules 12904(b), (f).

plaintiff's economic interests rather than their own." *Id.* Further, the *Boyer* concurrence implies that a brokerage firm owes no duties to the investor other than those enumerated in the firm's own new account agreement unless "the stockbroker took responsibility for the clients' financial affairs by making *their* trading decisions *for them*." *Boyer*, 213 Or. App. at 568. (emphasis in original).

In the course of reaching its conclusion that the plaintiff did not plead a claim for negligence, the concurrence misreads *Wallace v. Hinckle Northwest,* 79 Ore. App. 177, *181-182,* 717 P.2d 1280 (1986). That was a fiduciary duty case in which the court held that, where an investor entrusts management of her account to a stockbroker, and the broker accepts that responsibility and exercises substantial control over the account, a fiduciary relationship exists. *Wallace* was not a negligence case, and the court there never considered what duties, if breached, would support a claim for negligence. The *Boyer* concurrence, however, equates negligence and breach of fiduciary duty claims in its reading of *Wallace. Boyer* interprets *Wallace* to mean that there can be no special relationship, and therefore no claim for negligence, unless the broker exercises control and discretion over the account for the benefit of the clients. *Boyer*, 213 Or. App. at 568. In other words, according to *Boyer*, unless there is a fiduciary relationship in which the broker controls the account to benefit the clients, brokers owe no duties other than those that they choose to include in their own customer account agreements.

B. Stockbrokers Owe Duties To Investors In All Cases Regardless of the Contract Terms or Control Over The Account.

In looking only to the contract and the control over the plaintiff's account, the concurrence in *Boyer* ignores well established duties that stockbrokers owe to customers in all cases. To be sure, a stockbroker's exercise of judgment and control over an account is

relevant to certain *types* of claims against stockbrokers, such as churning,[7] unauthorized trading, or breach of fiduciary duty. However, some of the most fundamental duties that brokers owe to their clients exist independently of the written contract the investor is required to sign. Those duties apply whether or not the broker or firm exercises judgment or control over the account. A breach of those duties ought to state a claim for negligence in Oregon, just as it does elsewhere.

The NASD has adopted a detailed series of rules establishing standards of conduct for its members. The rules are published in the NASD Manual and are available online at *http://finra.complinet.com/finra/display/display.html?rbid=1189&element_id=1159000466* (*"NASD Rules"*). They "apply to all members [brokerage firms] and persons associated with a member." NASD Rule 0115. The NASD Rules have been reviewed and approved by the Securities and Exchange Commission, which has jurisdiction over FINRA.

1. The Suitability Rule.

The NASD Rules establish standards for communications and transactions with the investing public. *See* NASD Rules 2200 - 2300, known as the Conduct Rules. Those rules were designed for investor protection. One rule in particular, the suitability rule, illustrates the point that stockbrokers owe duties to their clients regardless of whether they control, exercise judgment over, or promise a result in a client account.

The suitability rule is found in NASD Rule 2310, which provides:

> 2310. Recommendations to Customers. (Suitability)
>
> (a) In recommending to a customer the purchase, sale or

---

[7]Churning refers to excessive trading of a customer account. The elements are (1) broker exercised control over the account; (2) excessive trading in the account; (3) scienter. *Mihara v. Dean Witter & Co.*, 619 F.2d 814 (9th Cir. 1980).

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 situation and needs.

(b) Prior to the execution of a transaction recommended to a non-institutional customer, other than transactions with customers where investments are limited to money market mutual funds, a member shall make reasonable efforts to obtain information concerning:

(1) the customer's financial status;

(2) the customer's tax status;

(3) the customer's investment objectives; and

(4) such other information used or considered to be reasonable by such member or registered representative in making recommendations to the customer.

Similarly, the New York Stock Exchange ("NYSE") has adopted for its members the "Know Your Customer Rule" in NYSE Rule 405, which can be found at *http://rules.nyse.com/nysetools/Exchangeviewer.asp?SelectedNode=chp_1_5&manual=/nyse/nyse_rules/nyse-rules*. It applies to *all* customers and *all* orders, and provides:

Rule 405. Diligence as to Accounts

Every member organization is required through a general partner, a principal executive officer or a person or persons designated under the provisions of Rule 342(b)(1) to

(1) Use due diligence to learn the essential facts relative to ***every*** customer, ***every*** order, ***every*** cash or margin account accepted or carried by such organization and ***every person holding power of attorney*** over any account accepted or carried by such organization (emphasis added).

The suitability standard has been specifically incorporated into Oregon law. The Oregon Department of Consumer and Business Services ("DCBS") had promulgated its own

suitability rule. Oregon Administrative Rule 441-205-0140 provides:

> Suitability of Recommendations
>
> It shall constitute a "Fraudulent, Deceptive, or Manipulative Act or Practice," as used in these rules, for any broker-dealer or associated person to recommend to a customer the purchase, sale, or exchange of any security, unless such broker-dealer or associated person shall have reasonable grounds to believe that the recommendation is suitable for such customer on the basis of information furnished by such customer after reasonable inquiry concerning the customer's investment objectives, financial situation and needs and any other information known by such broker-dealer or associated person.

The suitability and know-your-customer rules are the cornerstones of stockbroker-investor relations. The suitability duty applies whenever a broker "recommends" a trade, and "a broad range of circumstances may cause a transaction to be recommended." NASD Notice to Members 96-60 (explaining the suitability rule).[8] Transactions are recommended whenever the broker or representative "brings a specific security to the attention of the customer through any means." *Id.* Recommended transactions usually occur in non-discretionary accounts, where the stockbroker needs permission to make a trade. An email to a client suggesting the client *consider* the purchase of a security is a recommendation subject to Rule 2310. NASD Notice to Members 96-60. The rule applies equally to speculative and conservative investors. *Application of Michael H. Hume*, Exchange Act Rel. No. 35608, 1995 SEC LEXIS 983 (April 17, 1995) (NASD regards excessive trading in a speculative account to be a violation of the suitability rule).

The *Boyer* concurrence ignores the basic suitability standard of care in stating that a broker owes no duties outside the contract unless he exercises control or judgment over the

---

[8]NASD Notices to Members, which clarify NASD rules, are available online at *www.finra.org/RulesRegulation/NoticestoMembers/2007NoticestoMembers/index.htm.*

account, or unless he has a duty to place the investors' interests over his own. 213 Or. App. 565, 568. Perhaps because it was never so advised, the *Boyer* court did not appreciate that the industry itself has established standards of care for the brokerage industry that apply regardless of whether a stockbroker exercises judgment or control over an account.

The *Boyer* concurrence also erred when it focused on the terms of the customer agreement to identify a brokerage firm's duties to its clients. *See, e.g., Boyer*, 213 Or. App. at 563("[t]he contract defines the parties' rights and obligations in connection with the trading account.") Firms do not identify their suitability obligations in their standard customer agreements, but they exist nonetheless. In fact, NASD Notice to Members 95-15 makes clear that "Section 21(f)(4) of the NASD Rules of Fair Practice [now known as the Conduct Rules], as amended, prohibits the use in any customer agreement of any language that (a) limits or contradicts the rules of the NASD or any other self-regulatory organization." If the law were otherwise, firms could escape their state and federally imposed obligations simply by voiding them in their account agreements.[9] The *Boyer* concurrence's reliance on the language of the new account agreement to determine standards of care, 213 Or. App. at 568, ignores the fact that the industry has established standards that govern the conduct of stockbrokers irrespective of any language in a customer agreement.

2. **The Brokerage Firm's Duty of Supervision**.

Brokerage firms are heavily regulated, but much of the regulation comes from within because they are largely a self-regulated industry. The foundation of the self-regulatory scheme is the duty to supervise. NASD Rule 3010 imposes on every broker-dealer a duty to

---

[9]The written contracts between stockbrokers and their clients are nothing more than the new account applications that each person signs when they open a brokerage account. They are created by and for the benefit of the brokerage firm.

closely monitor and supervise each stockbroker representative, and each and every trade made under the supervisor's jurisdiction. Rule 3010(a) provides detailed supervisory requirements, including the duty to maintain written supervisory procedures, and the assignment of a supervisor to each registered representative. Rule 3010(d) requires a review of all transactions and correspondence at the firm. The NASD supervision rule is found at *http://finra.complinet.com/finra/display/display.html?rbid=1189&element_id=1159000466* .

Recognizing the importance of supervision to investor protection the Oregon DCBS has promulgated specific rules on supervision:

> OAR 441-205-0210 Supervision of Associated Persons
>
> (1) Every broker-dealer shall exercise diligent supervision over the securities activities of all of his associated persons.
>
> (2) Every associated person of the broker-dealer shall be subject to the supervision of a supervisor designated by such broker-dealer
>
> (3) As part of his responsibility under this rule, every broker-dealer shall establish, maintain, and enforce written procedures, a copy of which shall be kept in each business office, which shall set forth the procedures adopted by the broker-dealer to comply with the following duties imposed by this rule, and shall state at which business office or offices the broker-dealer keeps and maintains the records required by OAR 441-195-0010:
>
> > (a) The review and written approval by the designated supervisor of the opening of each new customer account;
> >
> > (b) The frequent examination of all customer accounts to detect and prevent irregularities or abuses, including a review for churning and switching of securities in customers' accounts, as well as unsuitable recommendations and sales of unregistered securities;
> >
> > (c) The prompt review and written approval by

> the designated supervisor of all securities transactions by associated persons and all correspondence pertaining to the solicitation or execution of all securities transactions by associated persons (Emphasis added).

The purpose of the supervision rules is investor protection. They are designed to discover and prevent abusive practices. The rules limit the chance, for example, that a stockbroker will sell a security that is risky, unregistered, and not even approved by his firm to an unsuspecting investor. They help to prevent high pressure sales tactics, and ferret out unsuitable trades before they occur. If a firm fails in its supervisory obligations, and a broker is consequently able to sell an unapproved stock to a customer, the firm can be liable for the trade. Such claims are common, and are known as "selling away" cases. *See,* D. Robbins, 1 *Securities Arbitration Procedure Manual* §5.6i at 5-85 (5th Ed. Lexis Nexis 2006).

Most importantly in the context of *Boyer*, the duties to supervise exist independently of any provisions in a customer contract. Moreover, the duty to design and implement a system of supervision and to review each trade are meant to protect and apply to every securities client and every account, regardless of whether it is discretionary, and regardless of whether the broker is a fiduciary under the *Wallace* standard. The *Boyer* decision must be clarified so that it cannot be used inappropriately to take from Oregon investors the rights to bring negligence claims for damages resulting from a firm's failure to abide by the supervisory rules.

III. OTHER AUTHORITIES HAVE RECOGNIZED THAT THE NASD RULES FORM THE BASIS FOR NEGLIGENCE CLAIMS.

The conduct rules described above serve as a basis for claims based on negligence, and courts have so held. In *Mihara v. Dean Witter & Co., Inc.*, 619 F.2d 814 (9th Cir. 1980), plaintiff had brought claims under both federal securities law and California common law.

He alleged that the defendants engaged in excessive trading, and purchased unsuitable securities which did not conform to his stated investment objectives. One of his expert witnesses testified that the securities were not suitable. Defendants objected that the admission of testimony regarding New York Stock Exchange and NASD rules served to dignify those rules and regulations to some sort of standard. The court rejected that argument, and held that "[t]he admission of testimony relating to those rules was proper precisely because <u>the rules reflect the standard to which all brokers are held</u>." *Id.* at 854 (emphasis added.).

The Ninth Circuit relied on *Mihara* in *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 803 F.2d 454, 461 (9th Cir. 1986). There the court again allowed expert testimony concerning the rules of the New York Stock Exchange and of the National Association of Securities Dealers "because the rules reflect the standard to which all brokers are held." The court concluded, "if expert testimony establishes that the professional standards of brokers were not observed by Moore, both Moore and Paine, Webber may be found liable for professional negligence." *Id.*

In *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng*, 697 F.Supp. 1224, 1227(D.D.C.), the court sustained the investors' common law claim for negligence based on Merrill Lynch's violation of the NASD suitability rule. The court stated, "It is clear from the case law that a stockbroker can be held liable to his client for negligence" for breach of the suitability rules.

Likewise, in *Siedman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 465 F.Supp. 1233, 1236 (S.D.N.Y. 1979) the court determined that when NYSE rules use language commonly associated with misconduct amounting to negligence, brokers' actions taken in

violation them are subject to state common law contract and negligence rules.

In *Piper, Jaffray and Hopwood v. Ladin*, 399 F. Supp. 292, 298 (S.D. Iowa 1975), the court wrote:

> Both Rule 405 of the NYSE and the NASD Suitability Rule are appropriate indicia of the standard of conduct required of a stock broker in the practice of his profession. The imposition of a duty to investigate the financial capability of an investor entering a margin transaction and to inform that investor of the implications of a margin purchase can also be justified as part of a stockbroker's professional responsibility.

Other cases to the same effect include *Mercury Investment Company v. A. G. Edwards & Sons*, 295 F. Supp. 1160, 1163 (S.D.Tex. 1969)(violation of the NASD suitability rule would be admissible as evidence of the broker's negligence); and *Scott v. Dime Sav. Bank of New York, FSB*, 886 F.Supp. 1073, 1081 (S.D.N.Y. 1995), aff'd mem., 101 F.3d 107 1996 WL 98782 (2nd Cir. 1996), *cert. denied*, 520 U.S. 1122 (1997) (jury's finding of negligence supported by evidence that defendant did not conduct suitability inquiry).

In the supervision context, the court in Vucinich v. Paine Webber Jackson & Curtis, 803 F.2d 454, 461 (9th Cir. 1987), affirmed the validity of a claim for negligent supervision of a broker, stating:

> Kite [the supervisor] has testified that he had a duty to supervise Moore [the broker] and a duty to approve short sales. Moore has testified that Kite never discussed Vucinich's investment objectives with him. If these witnesses are believed, Paine Webber may also be found by a jury to have been negligent in its supervision of Moore. *Hecht,* 430 F.2d at 1216.

Finally, it is worthy of note that, of the 18,800 stockbroker-customer disputes filed in 2004-2006, fully 7,272 of them included claims of stockbroker negligence.[10] The leading

---

[10]In 2004, 2005 and 2006, respectively, 3,398, 2,225 and 1,1619 negligence claims were filed. FINRA Statistics. See n. 3, *supra*.

treatise on securities arbitration has correctly observed that a claim for unsuitability "is the most common case brought in securities arbitration because, in the securities industry, a broker is not permitted to recommend or solicit a trade or investment strategy before determining that the recommendation is consistent with the customer's investment objectives, needs, and risk tolerance." D. Robbins, 1 *Securities Arbitration Procedure Manual* §5.5a at 5-11 (5th Ed. Lexis Nexis 2006).

IV. THE STOCKBROKER CONDUCT RULES ESTABLISH STANDARDS OF CARE AND FORM THE BASIS OF A CLAIM FOR NEGLIGENCE UNDER OREGON LAW.

The NASD suitability, supervision and other conduct rules and the Oregon Administrative Rules promulgated by DCBS establish a standard of care to which stockbrokers must adhere. A breach of those duties states a claim for negligence. As this court has held, "A statute can be used to establish the proper standard of care, and to show that the defendant met or failed to meet this standard." *Bellikka v. Green,* 306 Ore. 630, 650-651, 762 P.2d 997 (1988)(*en banc*). The same principle applies to administrative regulations. *Hagan v. Gemstate Mfg., Inc.*, 328 Ore. 535, 542, 982 P.2d 1108 (Or. 1999) ("relevant safety rules are admissible to provide some information about whether the defendant met the applicable standard of care").

In determining whether statutes or rules establish standards of care which give rise to negligence claims, courts first examine whether the standard applies to the defendants. *Kim v. Multnomah County by & Through its Multnomah County Community Dep't of Community Corrections*, 328 Ore. 140, 152, 970 P.2d 631 (1998). In fact, even if the rule does not apply to a particular defendant, it still can be relevant to whether the defendant met the standard of care. *Hansen v. Abrasive Engineering & Mfg.*, 317 Or. 378, 387, 856 P.2d 625 (1993).

Here, each of the rules discussed above was created to apply to stockbrokers.

Next, the courts look to whether the plaintiff is in a class of persons that the rules were designed to protect, and whether the harm suffered is the type that the rule was designed to prevent. *Kim*, 328 Or. at 152. In a similar context, this court stated that rules designed for workplace safety create standards of care that support negligence per se claims: "If the risk is common to workers and other persons, and the government has determined that the risk calls for a mandatory safeguard, it is difficult to argue that this determination has no relevance when someone suffers the kind of injury that the safeguard was meant to prevent." *Shahtout v. Emco Garbage Co.*, 298 Or. 598, 603-604, 695 P.2d 897 (1985).

The NASD rules and Oregon administrative rules discussed above clearly were designed to protect investors. And, they were designed to prevent the sorts of abuse that stockbroker claims are frequently based upon – unsuitable recommendations of high-risk investments, a broker's clandestine sale of securities not on the firm's approved list, the recommendation of excessive or inappropriate margin trading, and the like.

The *Boyer* concurrence was wrong when it opined on pleading and proof requirements for negligence claims against Salomon Smith Barney. It incorrectly stated that, in order to pursue a negligence claim, a plaintiff: (a) must allege a relationship "that imposed on defendants the obligation to pursue plaintiff's interests and not just their own," 213 Or. at 564; (b) must plead and prove that "the defendant would exercise judgment on the plaintiff's behalf or would assume an obligation to achieve a particular result on the plaintiff's behalf," id. at 565; (c) must establish that the relationship allows one party to exercise judgment on the other party's behalf, *id.* at 566; and (d) is bound by the terms of the contract which in the first instance "defines the parties' rights and obligations in connection with the trading

account," *id.* at 563. Additionally, the court was wrong in opining that the decision in *Wallace v. Hickle Northwest,* 79 Ore. App. 177, 717 P.2d 1280 (1986), limits negligence claims against stockbrokers to situations where the broker exercises discretion over the account. There are rules which establish standards of care, and claims for negligence should lie whenever they are breached.

V. THE RELATIONSHIP BETWEEN STOCKBROKERS AND CLIENTS IS A SPECIAL RELATIONSHIP AS A MATTER OF OREGON LAW.

This Court observed in *Georgetown Realty, Inc. v. The Home Insurance Company,* 313 Ore. 97, 831 P.2d 7 (1992), that Oregon law permits negligence claims for economic damages where the contracting parties enjoy a special relationship. To determine whether such a relationship exists, the court looks to the nature of the relationship. If "the other party is subject to a standard of care independent of the terms of the contract" then a negligence claim will lie. *Id.* at 106. *See also: Conway v. Pacific University*, 324 Ore. 231, 237, 924 P.2d 818(1996) ("for tort liability to be imposed, however, a tort duty must exist 'independent of the contract and without reference to the specific terms of the contract'").

The special relationship analysis "begins by examining all aspects of the relationship between the parties to determine whether one had a special responsibility toward the other. If a contract exists, then we may examine that contract to determine the type of relationship between the parties." *Bennett v. Farmers Ins. Co.*, 332 Or. 138, 161, 26 P.3d 785 (2001). "The common thread among special relationships--that is, those warranting a heightened duty of care--is that 'the party who owes the duty has a *special responsibility* toward the other party.'" *Shin v. Sunriver Preparatory School, Inc.*, 199 Or. App. 352, 367,111 P.3d 762 (2005).

In *Georgetown*, the insurer's obligation to defend the insured satisfied the special

relationship test. 313 Or. at 110. The court there observed that special relationships had also been held to exist between the following professionals and their clients: "physicians, lawyers, real estate brokers, architects, engineers, and landlords." *Id.* at 103. Later cases have found special relationships in other places. *In Hampton Tree Farms v. Jewett*, 320 Ore. 599, 618, 892 P.2d 683 (1995), for example, the court found that an agency relationship between a logging operation and a creditor seeking to sell the business was sufficient to create a special relationship and a claim for negligence.

Stockbrokers clearly owe a "special duty of care" to their clients as contemplated by this court in *Shin*. As the United States Supreme Court has held, securities professionals owe a duty of honesty and fair dealing toward their clients. *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 314 (1985). They play a critical role in the retirement and life savings of almost all Americans. Their conduct toward clients, good or bad, can have far-reaching effects on the financial well being of individuals and families, from saving for college educations, to retirement security, to estate planning. They are highly regulated by rules which impose heightened duties of responsibility toward their clients, regardless of the type of account or customer agreement. The consequences of mistakes or errors in judgment by financial advisors can be just as devastating as if it were done by lawyers, real estate brokers, architects, engineers, landlords, creditors, preparatory schools or liability insurers – each of which has been found to be a special relationship. The stockbroker-client relationship should be incorporated into the class of relationships that this court has deemed to be special.

VI. CONCLUSION

Based on the foregoing, and for the protection of Oregon investors, PIABA

respectfully requests that the court issue an opinion that includes the following points:

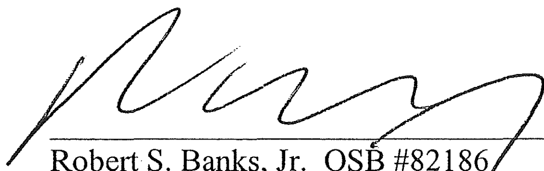
1. Stockbrokers have special relationships with their clients that impose duties outside of the written contract, and that a breach of those duties can support claims for negligence.

2. The supervision and suitability duties imposed by the NASD and NYSE rules, as well as the regulations promulgated by the Oregon Department of Consumer and Business Services, establish a standard of care which exist independently of any contractual duties.

3. Alternatively, that any language in the *Boyer* opinion in the court of appeals is limited to commodities cases, and would not apply to securities accounts or transactions.

Respectfully submitted this 10th day of January, 2008.

BANKS LAW OFFICE, P.C.



Robert S. Banks, Jr. OSB #82186
On Behalf of the Public Investors Arbitration Bar Association

CERTIFICATE OF SERVICE

This shall certify that on January 10, 2008, I caused to be delivered to the persons identified below, at their last known addresses indicated below, true copies of the BRIEF OF *AMICUS CURIAE* PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION by causing the same to be delivered via First Class mail, postage prepaid, and addressed as follows from Portland, Oregon.

George W. Kelly, OSB No. 82298
303 W. 10th
Eugene, OR 97401

Attorney for Robert J. Boyer

Bruce L. Campbell, OSB No. 92537
Miller Nash LLP
111 S.W. 5th Ave., Suite 3400
Portland, OR 97204

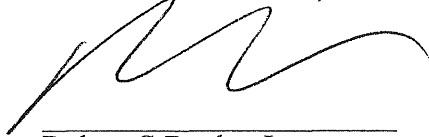
Attorney for Salomon Smith Barney, Dean Michael Howell and Dean K. Morrell

N. Robert Stoll
Gary M. Berne
Timothy J. DeJong
Stoll, Stoll, Berne, Lokting & Shlachter, PC
209 SW Oak Street
Suite 500
Portland, Oregon 97204

Attorneys for Amicus Curiae Oregon Trial Lawyers Association

DATED January 10, 2008

BANKS LAW OFFICE, P.C



Robert S.Banks, Jr.