MOT-2016-00874

State of New York
Court of Appeals

MARC STARR,

Plaintiff-Appellant,

-against-

FUOCO GROUP LLP, LOUIS J. FUOCO, NIXON PEABODY LLP, ALLAN H. COHEN,

Defendants,

EUREKA CAPITAL MARKETS, LLC, MARK HYMAN and LANA SIMKINA,

Defendants-Respondents.

NOTICE OF MOTION OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

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Date Completed: August 30, 2016

Supreme Court, New York County, Index No. 151755/14

STATE OF NEW YORK
COURT OF APPEALS

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MARC STARR,

Plaintiff-Appellant,

File No.
2016-874

-against-

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NOTICE OF MOTION OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION'S MOTION FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF IN SUPPORT OF PLAINTIFF-APPELLANT

PLEASE TAKE NOTICE that, upon the annexed affirmation of Adam M. Nicolazzo, dated August 30, 2016, the undersigned will move this Court, at the courthouse thereof, located at 20 Eagle Street, Albany, New York 12207 on the 12th day of September, 2016, for an order granting leave to the Public Investors Arbitration Bar Association to file a brief the brief attached hereto as *amicus curiae* in the above-referenced matter, and for such other and further relief as the court may deem just and proper under the circumstances.

Dated: New York, New York
August 30, 2016

Respectfully submitted,

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STATE OF NEW YORK
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MARK HYMAN and LANA SIMKINA,

Defendants-Respondents,

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AFFIRMATION OF ADAM M. NICOLAZZO IN SUPPORT OF MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

Adam M. Nicolazzo, an attorney duly admitted to practice before the Courts of the State of New York, hereby affirms under penalty of perjury as follows:

1. I am an associate attorney with Malecki Law and a member of the Bar of the State of New York. I make this affirmation in support of the application of the Public Investors Arbitration Bar Association ("PIABA") for leave to file a brief as *amicus curiae* brief in support of Plaintiff-Appellant's appeal.

2. PIABA is an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA

has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in 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.

3. Attached hereto is a copy of the brief the Proposed *Amicus Curiae* wish to submit to the Court. Proposed *Amicus* have duly authorized me to submit this brief on their behalf.

4. Proposed *Amicus* seeks leave to file this brief because this appeal presents questions of law that are of great importance to them and appear to be issues of first impression in this jurisdiction. Proposed *Amicus* and their members regularly represent public investors in securities arbitration disputes against financial advisors, registered representatives and broker-dealers registered by the Securities and Exchange Commission and the Financial Industry Regulatory Authority ("FINRA"). Without corrective guidance from the Court of Appeals, the conclusions reached First Department may be used to misstate the law in un-appealable securities arbitrations.

5. The First Department's holding that financial advisors cannot be held to answer for extra-contractual causes of action sounding in negligence because

these advisors are not "professionals" is inconsistent and contravenes longstanding and widely-followed precedent from this Court, as well as other courts in the Federal Second Circuit. However, financial advisors and the broker-dealer firms that employ and register them are regularly held liable for negligence-based causes of action in FINRA arbitration proceeds, the exclusive jurisdiction where public investors may bring disputes against these registered persons and entities.

6. For these reasons, and those set forth in the annexed brief, Proposed *Amicus* have a strong interest in the outcome of this appeal.

7. In addition, pursuant to Rule 500.23 of the Rules of Practice of this Court, Proposed *Amicus* are in a position to identify law or arguments that might otherwise escape the Court's consideration or otherwise provide information that would be of assistance to the Court.

8. For all of these reasons, I respectfully request that this Court grant the instant motion in all respects and that Proposed *Amicus* be given leave to file the attached brief in this appeal.

Dated: New York, New York
August 30, 2016

Respectfully submitted,

MALECKI LAW

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ADDENDUM

MOT-2016-00874

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BRIEF OF AMICUS CURIAE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT'S MOTION FOR LEAVE TO APPEAL

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Supreme Court, New York County, Index No. 151755/14

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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*, Public Investors Arbitration Bar Association ("PIABA") states that it has no parents, subsidiaries or affiliates.

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INTRODUCTION

Pursuant to Rule 500.23 of the Rules of this Court, Public Investors Arbitration Bar Association ("PIABA") respectfully submits this, its Brief *amicus curiae,* in support of the Plaintiff-Appellant Marc Starr's Motion for Leave to Appeal from the Order of the Supreme Court, Appellate Division, First Department, entered on March 24, 2016, which affirmed Defendants/Respondents Eureka Capital Markets, LLC's, Mark Hyman's And Lana Simkina's ("Eureka's") Motion to Dismiss pursuant to CPLR Rule 3211(a)(5). The Court of Appeals should accept this appeal to address the First Department's holding that financial advisors do not owe extra-contractual duties because they are not professionals.

STATEMENT OF INTEREST

The Public Investors Arbitration Bar Association ("PIABA") is an international bar association comprised of attorneys who represent investors in securities arbitrations. Since its formation in 1990, PIABA has promoted the interests of the public investor in all securities and commodities arbitration forums, while also advocating for public education regarding investment fraud and industry misconduct. Our members and their clients have a strong interest in 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, because, without corrective guidance from the Court of Appeals, the conclusions reached in the Decision and Order of the Supreme Court, Appellate Division, First Department entered on March 24, 2016 (the "Opinion") may be used to misstate the law in un-appealable securities arbitrations. The challenged decision contravenes longstanding and widely-followed precedent from this Court set forth in *Chase Sci. Research v. NIA Group*, 96 N.Y.2d 20, 29 (2001), as well as the current state of securities law in the State of New York. Moreover, the Order is inconsistent with the Second Circuit's findings regarding the duties and obligations of financial advisors and registered representatives employed (and registered) by Financial Industry Regulatory Authority ("FINRA") member broker-dealer firms. It has long been understood that

such financial advisors and registered representatives often owe considerable duties to their clients. These registered firms and persons operate subject to federal securities laws, regulations, rules and the customs of the securities industry in which they are registered and licensed. These national standards supplement each state's (including New York's) common and statutory law.

SUMMARY OF ARGUMENT

At issue is the First Department's holding that because a financial advisor is not a "professional," any duty owed by the financial advisor must be contained in a contract.

This holding is incorrect for two significant reasons. First, it relies on a case it misstates for support that securities industry participants are not "professionals" and ignores controlling precedent from this Court as well as various courts in other state and federal jurisdictions that have found that securities industry participants are "professionals." Second, a likely consequence of the holding is that broker-dealers and other registered persons may contort the language to avoid liability for generally recognized duties just because they are not contained in a contract. Such a result would be inconsistent with the laws of the State of New York and elsewhere.

The regulatory scheme shapes the duties financial advisors[1] owe to their clients. Importantly the term "financial advisor" and other similar terms are simply

[1] The terms adviser and advisor are generally synonymous. The Investment Advisers Act of 1940 (Advisers Act) spells the term with an e. Persons registered under the Advisers Act are often referred to as registered investment advisers or RIAs.

self-serving titles often used by different securities professionals. A financial advisor may be a "stockbroker, investment advisor, insurance salesperson, accountant, lawyer, or some other financial professional—each of whom may owe different duties to the investor." Christine Lazaro & Benjamin P. Edwards, *The Fragmented Regulation of Investment Advice: A Call for Harmonization*, 4 MICH. BUS. & ENTREPRENEURIAL L. REV. 47, 49 (2014). In many instances, FINRA member firms use the term "financial advisor" to identify associated persons licensed to sell securities to investors. FINRA requires that registered securities brokers pass licensing examinations to demonstrate their competence and receive continuing education about "compliance, regulatory, ethical and sales-practice standards." SEC STAFF, STUDY ON INVESTMENT ADVISERS AND BROKER-DEALERS 77 (2011), available at http:// www.sec.gov/news/studies/2011/913studyfinal.pdf.

FINRA's arbitration forum has essentially become the sole jurisdiction to bring securities disputes against brokers and broker-dealers. In most instances awards issued through FINRA's arbitration forum provide no explanation for the award and do not create precedent. Investor actions, including those brought by New York investors complaining about New York firms and professionals, generally assert claims for breaches of fiduciary duty, fraud, negligence and violation of federal and state (where applicable) securities laws and breaches of contract. The First Department's misstatement of law that was neither raised, nor briefed by, the parties, *i.e.*, its broad declaration that financial advisors do not owe

their clients duties, may create confusion in arbitration hearings and lead to legally incorrect decisions.

For the following reasons, *Amicus* requests that this Court repudiate the First Department's holding that financial advisors are not "professionals" and therefore owe no extra-contractual duties: (i) financial advisors within the securities industry can be, and often are considered professionals; and (ii) the Opinion is inconsistent with decisions from other courts in this State that have found financial advisors in the securities industry may be subject to negligence-based causes of action.

ARGUMENT

POINT I

BROKERS AND BROKER-DEALERS ARE OFTEN DEEMED "PROFESSIONALS"

The First Department relied on *Leather v. United States Trust Co.*, 279 A.D.2d 311, 311 (1st Dep't 2001) to find that Eureka was not a "professional," even though that case involved a specialized "professional malpractice" cause of action not alleged by Mr. Starr and the question of whether defendants were professionals was central to that decision. *See Starr v. Fuoco Group, LLP*, 137 A.D.3d 634, 634 (1st Dep't 2016). In *Leather*, the plaintiff sought relief from a "financial planning company for losses allegedly sustained as a result of defendant's failure to advise plaintiff that his pension plan had become fully funded and needed to be rolled over into an IRA in order to avoid excise taxes." *Leather*, 279 A.D.2d at 311. The *Leather* Court held that the financial planning company could not be held liable for

professional malpractice under CPLR 214 for allegedly failing to provide adequate tax advice. *Id*. at 312 ("[t]he cause of action for 'negligence' and 'gross negligence,' which plaintiff later referred to as a 'malpractice' claim against 'professionals [who] fail[ed] to give proper financial and tax advice'").

The *Leather* decision, however, has no bearing here inasmuch as the *Leather* court relied on the fact that the plaintiff there, unlike here (since the issue was neither raised nor briefed by the parties below), failed to carry the burden of showing that the defendants were engaged in a "profession," defined continuously by the Courts in New York, including the First Department, as "an occupation generally associated with long-term educational requirements leading to an advanced degree, licensure evidencing qualifications met prior to engaging in the occupation, and control of the occupation by adherence to standards of conduct, ethics and malpractice liability." *See, e.g., Santiago v. 1370 Broadway Associates*, 264 A.D.2d 624 (1st Dep't 1999).

Here, the lower court dismissed the causes of action against Eureka on the basis that no negligence cause of action could have been stated because Mr. Starr specifically disclaimed such causes of action in his contract with Eureka (and **not** because Mr. Starr was not a "professional"). *See Starr v Fuoco Group LLP*, 2014 N.Y. Misc. LEXIS 4679, at *13-14 (Sup. Ct. NY County 2014). In a remarkably brief opinion, the First Department mis-applied *Leather* to financial advisors engaged in investment banking and held that Mr. Starr could not assert claims for negligence and gross negligence against Eureka because "a financial advisor such as

Eureka is not a 'professional.'" *Starr*, 137 A.D.3d at 634. This novel holding ignored that the basis of the trial court's holding was that the parties' contract limited Mr. Starr's ability to sue for negligence.

Moreover, the First Department ignored this Court's ruling in *Chase Sci. Research v. NIA Group*, when it gratuitously (and unnecessarily) decided what appears to be an issue of first impression in New York: whether certain financial advisors, including those registered to sell securities to the investment public, qualify as professionals for purposes of a specialized professional malpractice claim.[2]

A. New York Courts Have Considered the Professional Role Brokers and Broker-Dealers Play in the Securities Markets

While the issue of whether a financial advisor registered with the SEC or FINRA is a "professional" for purposes of NY CPLR 214 appears to be one of first impression, at least one New York court has, in *dicta*, accepted that financial advisors are professionals.[3]

In *Torsiello Capital Partners LLC*, the defendant hired the plaintiff firm to perform securities and investment banking services that included finding buyers for defendant's private placement of securities. There, the New York Supreme Court

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[2] In *Chase Sci. Research v. NIA Group*, after reviewing the legislative intent for CPLR 214, this Court set forth the general qualities of "professionals" to which that statute applies as follows:

> [E]xtensive formal learning and training, licensor and regulation indicating a qualification to practice, a code of conduct imposing standards beyond those accepted in the marketplace and a system of discipline for violation of those standards. Additionally, a professional relationship is one of trust and confidence, carrying with it a duty to counsel and advise clients.

Chase Sci. Research v. NIA Group, 96 N.Y.2d 20, 29 (2001) (internal citations omitted).

[3] Other courts around the country have similarly concluded that financial advisors are professionals.

determined that the plaintiff had acted as a securities broker with the meaning of the Securities Exchange Act of 1934, and cited an SEC No Action Letter stating:

> In addition, the SEC has opined in a no-action letter to the text of the note that 'a professional who brings together potential buyers and sellers and advises the parties on questions of value, plays an integral role in negotiating the transaction, or provides other services designed to facilitate the transaction, may be deemed to be a broker' for purposes of the SEA §15 (a) registration requirements (International Bus. Exch. Corp., SEC No-Action Letter, 1986 WL 67535, at *2 [Dec 12, 1986]).

Torsiello Capital Partners LLC v. Sunshine State Holding Corp., 2008 N.Y. Misc. LEXIS 2879 at *12 (Sup. Ct. NY County, 2008) (J. Herman Cahn). Like in *Torsiello Capital Partners LLC*, Mr. Starr similarly sought services from Eureka including a placement of securities.

B. Other Courts Around the Country Have Also Considered Brokers and Broker-Dealers Professionals

Other courts around the country have also found that financial advisors are professionals, in line with the important services they provide and their standing in the securities markets. This view is also in line with that of the SEC.

The District Court for the Southern District of New York has stated in *dicta* that, "[t]here is no reason why financial advisers, unlike lawyers, doctors, and accountants, should be exempt from liability for negligent performance of their professional duties." *Am. Tissue, Inc. v. Donaldson*, 351 F. Supp. 2d 79, n. 21 (S.D.N.Y. 2004) (analyzing New York law).

Additionally, one recent Washington court found

> that 'financial advisor' meant whatever that term means in the field of financial investing. As such, the Court adopted the technical definition for the term 'financial advisor' found in Barron's Finance and Investment Handbook… Under that definition, **financial adviser means a Professional adviser offering financial counsel**. Some financial advisers charge a fee and earn commissions on the products they recommend to implement their advice. Other advisers only charge fees, and do not sell products or accept commissions.

Rockhill v. Jeude, Case No. 11-cv-1308, 2012 U.S. Dist. LEXIS 148091, *17 (W.D. Wash. Oct. 12, 2012) (internal citation omitted; emphasis added); *see also SunAmerica Corp. v. Sun Life Assurance Co. of Can*., 890 F. Supp. 1559, 1571 (N.D. Ga. 1994) ("registered representatives are professional brokers trained in the sale of sophisticated financial products").

These courts acknowledge the important and professional role financial advisors, brokers and broker-dealers play in securities markets. Failing to correct the First Department's gratuitous, unneeded and inapplicable language about financial advisors not being "professionals" could improperly result in the creation of standard for accountability of financial advisors in New York that inadvertently differs from the standard in other jurisdictions. Given the precedent from this Court, along with the holdings of New York Federal Courts and Courts of other States (and the views of the SEC), it cannot be said that financial advisors who are registered to sell securities are not "professionals" or that they never owe extra-contractual duties. *See also* Benjamin P. Edwards, *Fiduciary Duty and Investment Advice: Will A Uniform Fiduciary Duty Make A Material Difference?,* 14 J. BUS. & SEC. L. 105,

112 (2014) ("Brokers already owe continuing fiduciary duties in many circumstances").

POINT II

BROKERS AND BROKER-DEALERS CAN BE HELD LIABLE UNDER NEGLIGENCE-BASED CAUSES OF ACTION

The Opinion is also out of line with prior New York and Second Circuit court holdings regarding whether brokers and broker-dealers (financial advisors by different names) can be held liable for negligence-based causes of action.

Courts in New York have held that brokers and broker-dealers may be sued for various causes of action, including negligence. *See, e.g., Rioseco v. GAMCO Asset Management, Inc.*, 2011 N.Y. Misc. LEXIS 7279 (Sup. Ct. Westchester Cty. 2011) (investor citing securities industry law and rules adequately pled negligence cause of action); *Stern v. Forchheimer*, 37 Misc. 2d 648 (Civ. Ct. Bronx County. 1963) (where defendant broker-dealer had no agreement in place to care for a bond, it could be liable only for gross negligence to customer); *Salwen Paper Co. v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 72 A.D.2d 385 (2d Dep't 1980) (dismissal of complaint reversed, permitting customer's common law claims, including negligence, to move forward against the broker-dealer).

Similarly, the Second Circuit has held that brokers may be liable for the tort of negligence "for a duty owed in respect of advice given." *See, e.g., De Kwiatkowski v. Bear, Stearns & Co.*, 306 F.3d 1293, 1308 (2d Cir. 2002). This holding was in accord with cases from other federal circuits. *See Conway v. Icahn*

& Co., 16 F.3d 504, 510 (2d Cir. 1994) (relationship between stockbroker and its customer is that of principal and agent and is fiduciary in nature, according to New York law… there was ample evidence for the jury to find that Conway's loss was the result of Icahn's negligence …"); *Vucinich v. Paine, Webber, Jackson & Curtis, Inc.*, 803 F.2d 454, 456-460 (9th Cir. 1986) (broker and broker-dealer may be held liable for breach of fiduciary duty, professional negligence and negligent supervision of a broker for failing to carry out duties owed to client); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Cheng*, 697 F. Supp. 1224, 1227 (D.D.C. 1988) (in a case where the investor sued the broker for a common law claim of negligence, "[i]t is clear from the case law that a stockbroker can be held liable to his client for negligence").

New York courts have also confirmed arbitration awards that found liability for negligence by brokers and broker-dealers or that could be supported by the negligence of brokers or broker-dealers. *See, e.g., Sahni v. Prudential Equity Group, Inc.*, 2006 N.Y. Misc. LEXIS 4138 (Sup. Ct. NY County, 2006) (confirming arbitration award in favor of investor against broker-dealer for, in part, negligence); *Morgan Stanley DW Inc. v. Afridi*, 13 A.D.3d 248 (1st Dep't 2004) (reversing lower court's vacatur of arbitration award, noting that the arbitrators could have found the broker-dealer's culpability could have rested on its negligence).

Allowing the First Department's holding to stand uncorrected could foreclose viable lines of liability for investors in this State (and others) on the basis of one

court's misapplication of law on an issue that was neither raised (nor briefed) by the parties. To leave the First Department's gratuitous *dicta* undisturbed could create substantial confusion in non-precedential, and often un-appealable, arbitration proceedings. For these reasons, *Amicus* asks that the Court of Appeals make clear that brokers and broker-dealers may be held liable for tortious conduct like negligence despite the First Department's superfluous statement that a financial advisor is not a "professional." Alternatively, *Amicus* asks that the Court clarify that investors are not limited to causes of action arising out of contract when they sue their financial advisor and investment advisors can be "professionals."

CONCLUSION

Amicus respectfully requests that for the reasons stated above, namely that financial advisors are often considered "professionals" and may be sued for negligence-based causes of action, that the Order be reversed or modified to remove the finding that Eureka is not a professional and therefore may only be held liable for causes of action arising out of a contract.

Dated: New York, New York
August 30, 2016

Respectfully Submitted,

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