UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-16554

In the Matter of

GRAY FINANCIAL GROUP, INC., LAURENCE O. GRAY, and ROBERT C. HUBBARD, IV,

Respondents.

RESPONDENTS' MOTION FOR PARTIAL RECONSIDERATION AND/OR CLARIFICATION OF ORDER GRANTING IN PART MOTION TO QUASH

Respondents Gray Financial Group, Inc., Laurence O. Gray, and Robert C. Hubbard, IV (collectively "Gray"), respectfully request reconsideration and/or clarification of the Order Granting in Part the Motion to Quash (the "Order"). While Respondents agree with the Court's December 9, 2016 Order directing their lawyers, Seward & Kissel, to produce "all client files – including contents thereof – for Gray Financial" as defined in Definition No. 7 of the Subpoena, this Court also unnecessarily limited the documents to be produced. Indeed, by limiting the production (only to Item No. 4 of the Document Subpoena), the Court is leaving it to Seward & Kissel to define the "client file."

This creates at least two problems. First, in the pending malpractice case, Seward & Kissel has already wrongfully taken the position that Respondents Laurence Gray and Robert Hubbard were not clients of the law firm. Contrary to Seward & Kissel's position, the Honorable Leigh Martin May recently issued an order in the malpractice case that Messrs. Gray and Hubbard were in fact clients of the law firm in the sense that they were relying on Seward & Kissel's legal advice. *See* Order on Plaintiffs Motion to Dismiss, *Gray Financial Group, Inc. et*

al. v. Seward & Kissel LLP, Civ. Action No. 1:16-CV-1956-LMM (N.D. Ga. Dec. 1, 2016) (attached as Exhibit 1). Judge May said:

> The Court finds that, as pled, Defendant was actually aware that senior officers in Gray Financial, and specifically [that Mr. Gray and Mr. Hubbard] would rely on its legal advice. [Mr. Gray and Mr. Hubbard] were the ones who actually used the legal advice given to the corporate Plaintiff, and the representation letter did not otherwise limit the scope of S&K's representation to just the corporate Plaintiff [Gray Financial]. In fact, the representation letter never explicitly defines who "You," i.e. the client, is under the agreement. Therefore, the Court finds Gray and Hubbard may bring malpractice claims at this procedural posture.

Exhibit 1, p. 12. Although the Definition No. 7 in the Document Subpoena expressly includes Messrs. Gray and Hubbard as "Gray Financial," Seward & Kissel in this proceeding may well on their own, with no checks and balances in place, conclude that the individuals were not "clients." The reasoning, while at odds with Judge May's December 1 Order, would go that if Messrs. Gray and Hubbard are not clients, then there must not be "client files" and, therefore, nothing for Seward & Kissel to produce. Seward & Kissel could take the position in this case that they are under no obligation to make a production of documents related to them. Such a conclusion would unfairly deprive Messrs. Gray and Hubbard documents to support their reliance on counsel defense.

In a similar vein, again with no checks and balances, Seward & Kissel may conclude that certain documents – including "memoranda, notes, research, billing statements, correspondence, attorney work product, and/or other documents" – are not part of any "client files" and therefore those specific documents need not be produced. Anticipating that Seward & Kissel might take these positions, Respondents included specific categories of discoverable documents in the Document Subpoena that might otherwise exist, but just not be part of the "client file." For purposes of this case, those categories are described in Items 1, 2, 3, 5, 6, 7, 8, 9, 10, 15 and 19 of the Document Subpoena. Indeed, requiring production of these documents should not be a

burden since common sense would suggest that those documents should be part of the client file for Gray and Messrs. Gray and Hubbard, should a client file exist. The Court should modify its Order and direct Seward & Kissel to produce by December 23, 2016 all documents described in Items 1, 2, 3, 5, 6, 7, 8, 9, 10, 15 and 19, to the extent not already produced. Gray is NOT seeking reconsideration of the Court's order granting the motion to quash as to items 11-14, 16-18.

All three Respondents will be making a reliance on counsel defense for one simple reason: they relied on their counsel, as experts in all aspects of developing the investment at issue, and that would include compliance with Georgia law. The cases relied upon by the Court in denying the motion to quash stress that even without asserting the reliance on counsel defense, "a former client is to be accorded access to 'inspect and copy any documents possessed by the lawyer relating to the representation, unless substantial grounds exist to refuse'" (emphasis supplied by court). *Sage Realty Corp. v. Proskauer Rose Goetz & Mendelsohn L.L.P.*, 91 N.Y.2d 30, 37, 689 N.E.2d 879, 881 (1997). But here the reasons are even more acute as Respondents actually need these documents to prove its defense in this case. Accordingly, Gray respectfully requests that the Court reconsider and/or clarify its Order and direct Seward & Kissel, Robert Van Grover and Alexandra Segal to produce items described in Items 1, 2, 3, 5, 6, 7, 8, 9, 10, 15 and 19 as described in the Document Subpoena.

Respectfully submitted this 12th day of December, 2016.

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CERTIFICATE OF SERVICE

The undersigned counsel for Respondents Gray Financial Group, Inc., Laurence O. Gray, and Robert C. Hubbard, IV hereby certifies that he has served a copy of the foregoing **MOTION FOR PARTIAL RECONSIDERATION AND/OR CLARIFICATION OF ORDER GRANTING IN PART MOTION TO QUASH** by electronic mail and by United Parcel Service, addressed as follows:

Secretary Brent J. Fields
Securities and Exchange Commission
100 F Street N.E.
Washington, D.C. 20549-1090

Honorable Cameron Elliot
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This 12th day of December, 2016.

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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

GRAY FINANCIAL GROUP, INC., *et al.*,	:	
Plaintiffs,	:	
v.	:	
SEWARD & KISSEL LLP,	:	CIVIL ACTION NO. 1:16-CV-1956-LMM
Defendant.	:	

ORDER

This case comes before the Court on Defendant's Motion to Dismiss [6]. After a review of the record, a hearing, and due consideration, the Court enters the following Order:

I. Factual Background[1]

Plaintiff Gray Financial Group, Inc. ("Gray Financial") is a registered investment advisory firm. Plaintiffs Laurence O. Gray ("Gray") and Robert C. Hubbard, IV ("Hubbard"), during the relevant time period, have been advisory affiliates of Gray Financial, and Gray was an investment adviser representative of Gray Financial registered with the State of Georgia.

[1] Unless otherwise indicated, all facts are drawn from the Complaint in the light most favorable to Plaintiffs consistent with the Court's task on a Motion to Dismiss.

Defendant Seward & Kissel ("S&K") is a law firm—principally located in New York—which specializes in securities and investment management, including the regulation of investment advisors. S&K represented Gray Financial for years and worked with the individual Plaintiffs directly. S&K partner Robert B. Van Grover—the co-head of S&K's Investment Management Group—was the relationship partner for Gray Financial, and he was responsible for providing or supervising all work for Plaintiffs. Van Grover holds himself out as a private fund specialist and regularly advises clients on compliance and regulatory matters. Alexandra Segal is a S&K Associate who holds herself out as a specialist in investment management, investment advisers, and private funds.

S&K advised Plaintiffs on Georgia law for many years. S&K was aware of Gray and Hubbard's roles at Gray Financial, and it knew its advice would directly and personally impact the individual Plaintiffs' ability to engage in the investment business. S&K knew that Gray Financial and the individual Plaintiffs could be subject to adverse regulatory consequences if it did not ensure its work complied with applicable state and federal laws.

In early 2011, Plaintiffs decided to create a fund of funds which would be marketed to pension funds and other large retirement systems. Plaintiffs employed S&K to handle the legal issues associated with the development of private investment funds and to assist with and advise on important business decisions.

On July 15, 2011, Gray Financial and S&K executed an Engagement Letter covering S&K's role in creating Gray Financial's new funds. The Letter was written to John C. Robinson, Gray Financial's Senior Managing Director, and stated in relevant part:

> 1. Description of Engagement. We will represent **you** in connection with the organization of one or more private investment funds (each a "Fund"). We will prepare a Fund's private offering memorandum, subscription agreement and other organizational documents. We will coordinate initial state blue sky filings for a Fund. We will also provide legal advice in connection with the offering of interests and structuring and business advice in connection with the offering. On an ongoing basis, we will advise you on regulatory and other matters for which you request our assistance.

Dkt. No. [1-1] at 40 (emphasis added). "You" is never defined in the letter, but the signature block states that agreement is to be "accepted and agreed to by: Gray & Company." Id. at 41.

In October 2011, Plaintiffs created a fund of funds known as "GrayCo Alternative Partners I, LP," or "Fund I." S&K drafted the private placement memorandum and other offering documents associated with Fund I.

In April 2012, Georgia changed its law to—for the first time—allow Georgia public pension plans to invest in "alternative investments." O.C.G.A. § 47-20-87. Because its experience with Fund I had been successful, Plaintiffs again turned to S&K for the development of a new alternative-investment fund for Georgia-based pension and large retirement systems—GrayCo Alternative Partners II, LP ("Fund II"). The July 2011 engagement letter between the parties also governed S&K's Fund II work.

In June and July 2012, Hubbard told S&K that Gray Financial wanted Fund II to be similar to Fund I except that Fund II would allow Georgia-based public pension plans to invest in compliance with O.C.G.A. § 47-20-87. On June 8, 2012, Plaintiffs directed S&K to draft the necessary offering documents and evaluate all related legal issues impacting the project. Plaintiffs also requested S&K review the new Georgia law and ensure that Fund II complied with it. S&K Associate Segal informed Plaintiffs that she would have Van Grover review the law and other issues related to Fund II.

Plaintiffs did not hear anything further from Van Grover regarding Fund II's compliance with Georgia law. While Plaintiffs believed Van Grover was supervising the Fund II work, in reality Van Grover devoted little to no time to the Fund II work and left Segal unsupervised.

On June 28 and July 9, 2012, Hubbard followed up with Segal, looking for the Fund II offering materials. Plaintiffs told Segal they needed the offering materials as soon as possible for upcoming marketing meetings with prospective pension fund investors. On July 9, 2012, Segal sent a Confidential Private Offering Memorandum, a Limited Partnership Agreement, and a Subscription Agreement with Instructions and Schedules (collectively, "Offering Documents").[2] Despite knowing that Hubbard intended to market Fund II using the Offering Documents, Segal did not inform Plaintiffs that the documents could

[2] Although not stated in the Complaint, it appears undisputed by the parties that these Offering Documents were marked "draft."

not be relied on as provided. Segal also failed to give any advice as to what marketing Plaintiffs could or could not do with the Offering Documents. Likewise, although being copied on Segal's email to Plaintiffs, Van Grover did not provide any advice regarding Fund II's marketing or adequately review the Offering Documents.

Based on the documents provided, Gray Financial marketed Fund II, believing that S&K would have advised Plaintiffs if their marketing plans were not compliant with state or federal laws. Problems arose based upon Plaintiffs' failure to include certain required notices and disclosures. S&K's failure to include Georgia-specific notices and disclosures left Plaintiffs unprotected in the event the Securities and Exchange Commission ("SEC") deemed Fund II noncompliant with Georgia law.

S&K also continued to advise Plaintiffs on legal issues related to Fund II's development, including the necessary steps to verify Fund II investors for Anti-Laundering purposes and whether Fund II could hold specific investments based on Plaintiffs' existing investments. S&K knew that Gray Financial was using the Offering Documents but failed to advise Plaintiffs regarding what they should do (or not do) to be compliant with all applicable laws.

Plaintiffs ultimately retained a subsequent law firm to handle issues related to Fund II, but they did not direct the new law firm to revisit the opinions and advice previously provided by S&K because Plaintiffs thought they were legally compliant.

In August 2013, the SEC advised Plaintiffs that it was conducting a confidential and non-public investigation into whether Fund II complied with applicable law. On May 21, 2015, the SEC instituted administrative proceedings against Plaintiffs via an Order Instituting Proceedings ("OIP"). The SEC contends that Plaintiffs violated federal securities laws because Fund II did not comply with O.C.G.A. § 47-20-87, the Georgia Public Pension Investment Law. Plaintiffs allege that the SEC's charges caused much of Plaintiffs' business to be destroyed. On February 19, 2015, Plaintiffs filed suit against the SEC, claiming that the SEC administrative proceeding was unconstitutional. Gray Financial Grp., Inc. v. SEC, Civ. A. No. 1:15-cv-0492-LMM (N.D. Ga. 2015).

On June 13, 2016, Plaintiffs filed this lawsuit, bringing claims against Defendant for (1) professional negligence; (2) breach of fiduciary duty; (3) simple negligence; (4) attorney fees; and (5) punitive damages. Defendant has moved to dismiss all the claims against it. Dkt. No. [6].

II. Legal Standard

Federal Rule of Civil Procedure 8(a)(2) requires that a pleading contain a "short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). While this pleading standard does not require "detailed factual allegations," the Supreme Court has held that "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)).

To withstand a Rule 12(b)(6) motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Id. (quoting Twombly, 550 U.S. at 570). A complaint is plausible on its face when the plaintiff pleads factual content necessary for the court to draw the reasonable inference that the defendant is liable for the conduct alleged. Id. (citing Twombly, 550 U.S. at 556).

At the motion to dismiss stage, "all well-pleaded facts are accepted as true, and the reasonable inferences therefrom are construed in the light most favorable to the plaintiff." FindWhat Inv'r Grp. v. FindWhat.com, 658 F.3d 1282, 1296 (11th Cir. 2011) (quoting Garfield v. NDC Health Corp., 466 F.3d 1255, 1261 (11th Cir. 2006)). However, this principle does not apply to legal conclusions set forth in the complaint. Iqbal, 556 U.S. at 678.

III. Discussion

A. Consideration of Matters Outside the Pleadings

Defendant attached three classes of documents to its Motion which it contends this Court should consider: (1) Plaintiffs' Complaint against the SEC in another case before this Court; (2) the SEC's OIP against Plaintiffs; and (3) email communications between Plaintiffs and Defendant during the timeframe of the alleged malpractice. Plaintiffs do not object to this Court considering their allegations in the SEC Complaint or the OIP, but Plaintiffs do object to the Court's consideration of the emails. Pl. Resp., Dkt. No. [9] at 10-12.

When the Court considers matters outside the pleadings in a Rule 12(b)(6) motion, that motion is generally converted into a motion for summary judgment governed by Rule 56. Fed. R. Civ. P. 12(d). However, "[c]ourts may consider evidence extrinsic to the pleadings on a Rule 12(b)(6) motion to dismiss if (1) the documents are referred to in the complaint; (2) the evidence is central to the plaintiff's claim; and (3) the evidence's authenticity is not in question." U.S. ex rel. Saldivar v. Fresenius Med. Care Holdings, Inc., 906 F. Supp. 2d 1264, 1271 (N.D. Ga. 2012) (citing SFM Holdings, Ltd. v. Banc of America Sec., L.L.C., 600 F.3d 1334, 1337 (11th Cir. 2010), Brooks v. Blue Cross & Blue Shield, Inc., 116 F.3d 1364, 1368–69 (11th Cir. 1997)).

The Court finds that it would be inappropriate to consider these emails in this procedural posture. The emails only present a portion of the parties' communications, and it would be unfair and inappropriate to consider a one-sided presentation of evidence at the pleading stage. Therefore, the Court **STRIKES** Ex. B, Dkt. No. [6-3].[3]

B. Defendant's Motion to Dismiss

Defendant has moved to dismiss all of Plaintiffs' claims against it. The Court will consider each claim in turn.

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[3] Should the parties need to include the emails as exhibits to future documents—such as a motion for summary judgment—the Court will decide whether these emails are privileged at that juncture with the benefit of briefing on the subject. The parties should follow the Standing Order's process for sealing documents should either party elect to attach correspondence which Plaintiffs contend is privileged.

1. Legal Malpractice

To state a legal malpractice claim under Georgia law, a plaintiff must prove: "(1) employment of the defendant attorney, (2) failure of the attorney to exercise ordinary care, skill and diligence, and (3) that such negligence was the proximate cause of damage to the plaintiff." Roberts v. Langdale, 363 S.E.2d 591, 592 (Ga. Ct. App. 1987) (quoting Rogers v. Novell, 330 S.E.2d 392, 396 (Ga. Ct. App. 1985)). Defendant moves to dismiss Plaintiffs' legal malpractice claim for three reasons: (1) Plaintiffs have not plausibly pled breach of a duty; (2) Plaintiffs have not plausibly pled causation; and (3) individual Plaintiffs Gray and Hubbard were not clients of S&K and thus cannot bring malpractice claims against them.

a. Plaintiffs have pled Defendant breached a duty.

Defendant first argues that Plaintiffs do not allege Defendant provided them any incorrect legal advice or that Plaintiffs were unaware of the three relevant sales requirements that are at issue. Dkt. No. [22-1] at 12. However, the Court finds that Plaintiffs have pled that Defendant breached a duty. Plaintiffs pled that Defendant was retained to assure Fund II complied with Georgia law, and the SEC contends that it did not. Further, Plaintiffs have pled that despite knowing Plaintiffs would market Fund II with the Offering Documents, Defendant did not advise Plaintiffs that the documents could not be relied upon as provided or give any advice regarding what marketing Plaintiffs *could* do with the documents provided.

The Court also does not find persuasive Defendant's argument that because Plaintiffs knew O.C.G.A. § 47-20-87 existed, Defendant is immunized from all potential malpractice regarding that statute's sales requirements. Plaintiffs are not attorneys; the mere fact they knew a statute existed does not *ipso facto* mean they had an understanding of its legal implications. In fact, that Plaintiffs pointed Defendant to the relevant statute at issue actually cuts in favor of Plaintiffs, as it was clear that Defendant was on notice of the legal advice Plaintiffs sought. Therefore, the Court finds Plaintiffs have plausibly pled that Defendant breached a duty to them.

b. Plaintiffs have pled Defendant's negligence caused some of their harm.

Defendant next argues that Plaintiffs have not pled that S&K's purported negligence caused the SEC to investigate Plaintiffs and thus their resultant damages. Specifically, Defendants argue that Plaintiffs were already aware of O.C.G.A. § 47-20-87's sales requirements notwithstanding S&K's involvement and the OIP's allegation that Gray made a factual misrepresentation cannot be causally related to its representation.

For the reasons stated above, the Court does not find that Plaintiffs' knowledge of the relevant statute relieves Defendant of liability, as knowing a statute exists is different from knowing what the statute means. As well, the Court finds that Plaintiffs have plausibly pled that their marketing efforts are tied to the advice—or lack of advice—Defendant provided them.

However, the Court does not find that Defendant would be liable for Plaintiff Gray making a material misrepresentation of fact, as the OIP alleges Gray falsely stated that other public pensions had already invested in Fund II when they had not. OIP, Dkt. No. [6-4] ¶ 24. This OIP allegation is untethered from any alleged legal advice and solely relates to a then-existing fact which Gray as a lay person would have known. Accordingly, Defendant's Motion is **GRANTED, in part** as to the OIP's allegation that Gray misrepresented facts regarding committed Fund II investors but **DENIED, in part** as to the remaining allegations.

c. Plaintiffs have plausibly pled that individual Plaintiffs Gray and Hubbard were Defendant's clients.

Finally, Defendant argues that Plaintiffs Gray and Hubbard were not its clients and thus cannot bring legal malpractice claims against it. Under Georgia law,

> one who supplies information during the course of his business, profession, employment, or in any transaction in which he has a pecuniary interest has a duty of reasonable care and competence to parties who rely upon the information in circumstances in which the maker was manifestly aware of the use to which the information was to be put and intended that it be so used. But, crucially, such a duty extends only to those persons, or the limited class of persons who the **professional is actually aware will rely upon the information he prepared**, and thus professional liability for negligence of this kind does not extend to an unlimited class of persons whose presence is merely 'foreseeable.' This is true whether the claim is couched in terms of negligent misrepresentation, negligence, professional negligence, or professional malpractice . . . .

Douglas Asphalt Co. v. QORE, Inc., 657 F.3d 1146, 1158 (11th Cir. 2011) (internal citations omitted) (applying Georgia law).

The Court finds that, as pled, Defendant was actually aware that senior officers in Gray Financial, and specifically the individual Plaintiffs, would rely on its legal advice. The individual Plaintiffs were the ones who actually *used* the legal advice given to the corporate Plaintiff, and the representation letter did not otherwise limit the scope of S&K's representation to just the corporate Plaintiff. In fact, the representation letter never explicitly defines who "You," i.e. the client, is under the agreement. Therefore, the Court finds Gray and Hubbard may bring malpractice claims at this procedural posture.

d. Plaintiffs may pursue their special damages.

Defendant next argues that Plaintiffs' reputational claims are barred by the statute of limitations, O.C.G.A. § 9-3-33, and are also otherwise unrecoverable in legal malpractice cases. O.C.G.A. § 9-3-33 provides that "injuries to the reputation" "shall be brought within one year after the right of action accrues." Citing Hamilton v. Powell, Goldstein, Frazer & Murphy, 306 S.E.2d 340 (Ga. Ct. App. 1983), Defendant claims that because Plaintiffs argue their damages flow from the bad publicity caused by the SEC investigation—and the resultant client loss—Plaintiffs' damages are barred by the statute of limitations as this action was filed on May 12, 2016, over one year after the SEC's investigation became public, and general reputational damages are barred in malpractice cases.

Plaintiffs do not dispute that their case was not filed within one year of the investigation's publication, but rather argue that they do not seek general damages for reputational harm, but rather special damages, which they argue are not barred by the one-year statute of limitations. In Hamilton, 306 S.E.2d at 340, the plaintiff—Hamilton—filed a legal malpractice lawsuit against his former law firm after he was indicted for securities fraud and later acquitted. Hamilton sought money damages for "injury to his reputation, for mental and physical strain, for humiliation, for decreased capacity to earn money, for attorney fees incurred in the defense of the criminal case and for other general damages." Id. at 341. At trial, the parties stipulated that Hamilton had incurred $38,206 in special damages—the cost of defending himself in the criminal action—and that any further damages awarded would be general damages. Defendant argued that all general damages should be barred because (1) all reputational damages were barred by a one-year statute of limitations, and (2) any remaining general damages were barred by a two-year statute of limitations. The jury returned a $1,000,000 verdict, and the trial court reduced the award to $38,206—or Hamilton's special damages.

On appeal, Hamilton argued that (1) the statute of limitation did not run on his general damages because it did not commence until he had suffered "actual, recoverable tort damages," and (2) general damages for reputational damage, mental and physical strain, humiliation, and a decreased capacity to earn money should be recoverable legal malpractice damages. The Court of Appeals first

found that O.C.G.A. § 9-3-33 would apply to legal malpractice actions, and thus any action for general reputational damages had to be filed within one year. But, the Court found that regardless of whether the statute of limitations applied,[4] plaintiff "was unable to recover general damages for damage to reputation, mental and physical strain, humiliation, or decreased earning capacity in this case due to the absence of allegations and proof of physical injury or wanton, voluntary or intentional misconduct." Id. at 344. However, Hamilton was able to recover his legal expenses, or his special damages. Id.

Here, Plaintiffs do not seek "general damages"[5] for reputational harm, but rather seek "concrete special damages[6] in the form of financial injury through lost clients, lost business value, and exposure to significant civil monetary liability." Dkt. No. [9] at 23; see also Compl., Dkt. No. [1] at ¶¶ 57-63. Special damages are appropriate even following Hamilton, and thus the Court will not limit Plaintiffs' damages at this time. However, the Court does remain mindful of Hamilton's

[4] The Court of Appeals did not hold when the cause of action would have accrued, but suggested that there was some authority which suggested it accrued when the malpractice itself occurred. Hamilton, 306 S.E.2d at 343.

[5] General damages are "Damages that the law presumes follow from the type of wrong complained of; specif., compensatory damages for harm that so frequently results from the tort for which a party has sued that the harm is reasonably expected and need not be alleged or proved." DAMAGES, Black's Law Dictionary (10th ed. 2014).

[6] Special damages are "Damages that are alleged to have been sustained in the circumstances of a particular wrong" and must be proved. DAMAGES, Black's Law Dictionary (10th ed. 2014).

holding, and thus Plaintiffs are cautioned that general reputational damages will not be allowed.

2. Plaintiffs' Alternative Claims.

Defendant next moves to dismiss Plaintiffs' breach of fiduciary duty and simple negligence claims as duplicative of their legal malpractice claim. Defendant further argues that Plaintiffs' simple negligence claim should be dismissed, as any evaluation of Defendant's conduct would necessary involve the Court to consider professional standards, and thus the simple negligence claim cannot stand.

Plaintiffs respond that their breach of fiduciary duty and simple negligence claims are *bona fide* alternative claims under Rule 8(d)(2). However, Plaintiffs do not respond to Defendant's argument that their simple negligence claim cannot stand because professional standards would dictate whether Defendant was negligent. See LR 7.1B, NDGa.

First, the Court finds that Plaintiffs' fiduciary duty claim is appropriate at this stage of the pleading, especially in light of the fact that it is disputed whether the individual Plaintiffs were Defendant's clients. See Fed. R. Civ. P. 8(d)(2); Both v. Frantz, 629 S.E.2d 427, 431 (Ga. Ct. App. 2006) (fiduciary duty claim not merely duplicative of legal malpractice in the event the jury finds no evidence of attorney-client relationship). However, the Court finds that Plaintiffs cannot bring simple negligence as an alternative claim because any assessment of Defendant's actions will require the Court to determine if Defendant met its

professional standard of care. Grady Gen. Hosp. v. King, 653 S.E.2d 367, 368 (Ga. Ct. App. 2007) ("If the professional's allegedly negligent action requires the actor to exercise professional skill and judgment to comply with a standard of conduct within the professional's area of expertise, the action is for professional negligence."). Defendant's Motion is thus **GRANTED, in part** as to Plaintiffs' simple negligence claim but **DENIED, in part** as to Plaintiffs' breach of fiduciary duty claim.

3. Attorney Fees and Punitive Damages.

Defendant next moves to dismiss Plaintiffs' attorney fees and punitive damages claims, arguing that these claims cannot stand if all other claims have been dismissed, and even if not, there is no evidence that Defendant was willful or wanton. At this stage of the litigation, the Court denies Defendant's request as whether Defendant acted in bad faith or was willful is a factual issue which is better resolved later in the proceeding. Arch Ins. Co. v. Bennett, CIV. A. 2:08-CV0075-RWS, 2009 WL 5175591, at *5 (N.D. Ga. Dec. 21, 2009) ("If Plaintiff is successful on any of the still surviving claims, it may be entitled to attorneys' fees."); Moore v. Federated Retail Holdings, Inc., 6:07-CV-1557-ORL-31GJK, 2008 WL 596109, at *2 (M.D. Fla. Feb. 29, 2008) ("Plaintiff's entitlement to punitive damages is a factual issue that need not be decided at [the motion to dismiss] stage of the litigation."). Accordingly, Defendant's Motion is **DENIED** as to attorney fees and punitive damages.

VI. Conclusion

Based on the foregoing, Defendant's Motion to Dismiss is **GRANTED, in part** and **DENIED, in part**. Plaintiffs' (1) legal malpractice claim based upon the OIP's allegation that Gray misrepresented facts regarding committed Fund II investors; and (2) simple negligence claim are **DISMISSED**. All other claims remain.[7]

IT IS SO ORDERED this 1st day of December, 2016.

LEIGH MARTIN MAY
UNITED STATES DISTRICT JUDGE

[7] Further, the Court **STRIKES** Ex. B, Dkt. No. [6-3], from the Record. Should the parties need to include the emails in future documents—such as a motion for summary judgment—the Court will decide whether these emails are privileged at that juncture with the benefit of briefing on the subject.