12-1053-cv

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Peter Cary, Dayna Smith, Robert Barkin, Christine Spolar and Financial Industry Regulatory Authority, Inc.,

Defendants-Appellants,

Against

Raymond James Financial Services, Inc.,

Plaintiff-Appellee,

Appeal from the United States District Court
for the Eastern District of Virginia (1:2011-cv-00928)

BRIEF OF *AMICUS CURIAE* OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF DEFENDANTS/APPELLANTS, POSITION SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION

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April 2, 2012

DISCLOSURE STATEMENT

Amicus curiae Public Investors Arbitration Bar Association ("PIABA") is a non-profit association. It has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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I.

RULE 29(c)(4) STATEMENT OF IDENTITY, INTEREST, AND SOURCE OF AUTHORITY OF *AMICUS CURIAE*

Pursuant to FEDERAL RULE OF APPELLATE PROCEDURE 29 and this Court's Local Rule 29(c)(4), the Public Investors Arbitration Bar Association ("PIABA") submits the following statement of identity, interest, and source of authority.

Statement of Identity. PIABA was established in 1990 as an international bar association whose members represent public investors in securities industry disputes. An educational and networking organization, PIABA's mission is to protect public investors from abuses in the arbitration process, keep arbitration just and fair, and maintain a level playing field for public investors.

Statement of Interest. PIABA has an interest in this appeal because the district court's analysis of the term, "customer," as set forth in FINRA's Code of Arbitration Procedure ("CAP") Rule 12200[1], conflicts with the decisions of this

[1] 12200. Arbitration Under an Arbitration Agreement or the Rules of FINRA

Parties must arbitrate a dispute under the Code if:

- Arbitration under the Code is either:
  - (1) Required by a written agreement, or
  - (2) Requested by the customer;
- The dispute is between a customer and a member or associated person of a member; and
- The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

Court and other Circuits and district courts, ignores this Circuit's presumption in favor of arbitrability, and is contrary to the plain language of the Rule and past FINRA pronouncements. If allowed to stand, the lower court's decision would significantly undermine the efficacy, timeliness and cost of securities arbitration. A decision rejecting the lower court's ruling will promote efficient arbitration, prevent costly and unnecessary litigation, and protect public investors.

Statement of Source of Authority. PIABA's Board of Directors has authorized the filing of this brief through its *Amicus Curiae* Committee.

Statement of Preparation and Funding. No parties or attorneys in this case assisted in the preparation of or authored any portion of this *amicus curiae* brief. No parties or attorneys in this case contributed money that was intended to fund the preparation or submitting of this amicus curiae brief.

II.

SUMMARY OF ARGUMENT

The issue is whether Appellants are "customers" under FINRA Rule 12200, allowing them to compel FINRA members and associates of members to arbitrate securities disputes. In ruling that they are not, the district court ignored or overlooked critical facts and misconstrued applicable law.

The district court based its oral decision on the absence of any "nexus" or direct link between the investor Appellants and either Raymond James Financial Services ("RJS"), the member organization, or its associate, Keough. In making this decision, the court failed to "follow the money," failed to examine the applicable regulatory scheme, and failed to apply this Circuit's presumption in favor of arbitration. Key facts the court overlooked or ignored included that Keough, RJS's associate, introduced the fraudulent securities to Affeldt, the tax lawyer who sold them to the fraudulent securities, that Keough did so to gain Affeldt's assistance in locating investors, that the two arranged meetings and sold investors together on many occasions, that Keough received commissions on each of the investor Appellants' purchases, and on each of Affeldt's sales except to his own family, that Keough's commissions were twice Affeldt's in amount, that together they were paid approximately $150,000 for sales of $2.6 million of fraudulent securities to 40 purchasers over a period of fourteen (14) months.

In finding no "nexus," the district court also ignored RJS's direct supervisory responsibilities over Keough to the NASD and to the investors under NASD Rules 3010 and 3012, and in addition, ignored Keough's concomitant responsibilities to RJS and the investors under FINRA Rule 3072 and NASD Rule 3040. More specifically, RJS was required to supervise Keough's sales activities and investor relationships in order to prevent harm to the investing public, including supervising all sales to public investors, giving prior permission and approval for all compensation for any sales, and giving prior approval for all outside business relationships, *e.g.*, Keough's business relationships with the issuer and Affeldt. As to Keough, the court his responsibilities to seek and obtain prior written approval before selling the securities in issue, to obtain prior approval before being compensated for each and every sale , and to obtain prior approval before entering into outside business relationships with the issuer or Affeldt. Ther is no evidence in the record that RJS of Keough did anything of the kind. In short, the district court ignored or failed to assess the most important facts and the regulatory defalcations committed both by RJS and Keough related to the sales in issue.

The lower court got it exactly backwards, in ruling that RJS would be irreparably harmed if it did not issue a permanent injunction. As the court recognized, its injunction prevented the investors from being able to pursue a

negligent supervision claim against RJS, since such claim is not available as a private right of action outside FINRA arbitration. Thus, the investors, not RJS or Keough, were irreparably harmed by the Court's decision. The court also failed to apply this Circuit's presumption in favor or arbitration, and finally, it misapplied the cases which it reviewed and upon which it placed ostensible reliance for its decision. Accordingly, in order to preserve the important role played by FINRA in the resolution of securities industry dispute, and to protect the public investors, this Court should reverse the district court's permanent injunction and order RJS and Keough to return to FINRA arbitration.

III.

ARGUMENT

A.

THE DISTRICT COURT IMPROPERLY PLACED THE BURDEN OF PROOF UPON THE INVESTORS.

In *Washington Square Securities, Inc. v. Aune*, the District Court for the Western District of North Carolina held that "[c]ontrary to Defendants' contention that the presumption in favor of arbitrability is relevant to the Court's present inquiry, the presumption that a dispute is subject to arbitration cannot apply if there is no agreement to arbitrate." 253 F. Supp. 2d 839, 842 (W.D.N.C. 2003) *aff'd*, 385 F.3d 432 (4th Cir. 2004). While the District Court ultimately held in favor of arbitration, on appeal this Court disagreed with the reasoning of the lower court.

This Court further explained that "[t]he NASD Code[2] constitutes an 'agreement in writing' under the Federal Arbitration Act, 9 U.S.C. § 2, which binds Washington Square, as an NASD member, to submit an eligible dispute to arbitration upon a customer's demand."[3] *Id.* (*citing Kidder, Peabody & Co., Inc. v. Zinsmeyer Trusts P'ship*, 41 F.3d 861, 863-64 (2d Cir.1994)); *accord with Bank of the Commonwealth v. Hudspeth*, 714 S.E.2d 566, 572 (Va. 2011) (applying the arbitration presumption where the term "customer" is susceptible to multiple interpretations); *Spear, Leeds & Kellogg v. Cent. Life Assur. Co.*, 85 F.3d 21, 26 (2d Cir. 1996) ("the arbitration rules of a securities exchange are themselves 'contractual in nature.'") (*quoting Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis*, 903 F.2d 109, 113 (2d Cir.1990)); *Bensadoun v. Jobe-Riat*, 316 F.3d 171, 176 (2d Cir. 2003) ("interpretation of the NASD arbitration provision is a matter of contract interpretation…[t]he analysis differs from ordinary contract interpretation in that any doubts concerning the scope of arbitrable issues should be

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[2] In 2007, FINRA was formed following the consolidation of the enforcement arm of the New York Stock Exchange and the NASD.

[3] *Cited favorably by Waterford Inv. Services, Inc. v. Bosco*, 2011 WL 3820723 at *9 (E.D. Va. July 29, 2011) *report and recommendation adopted sub nom. Waterford Investor Services, Inc. v. Bosco, ,* 2011 WL 3820496 (E.D. Va. Aug. 26, 2011) ("In *Aune*, the lower court had found that there was no presumption in favor of arbitration, because the investors and the NASD member had never directly entered into an agreement with one another to arbitrate…However, the Fourth Circuit reversed the lower court, ruling that the presumption in favor of arbitration did apply to the interpretation of the terms 'customer' and 'associated member' in the NASD Code.") (Citations omitted).

resolved in favor of arbitration.") (Internal citations and quotations omitted); *Patten Sec. Corp., Inc. v. Diamond Greyhound & Genetics, Inc.*, 819 F.2d 400, 407 (3d Cir. 1987) (holding same).

B.

NO EVIDENCE WAS SUBMITTED SHOWING THAT FINRA INTENDED TO EXCLUDE DISPUTE FROM ARBITRATION.

This Court recognizes that FINRA's "customer" term is both broad and ambiguous, stating that the "it is not clear from the language of the rule what is required before an investor is deemed a customer of a member." *Washington Square*, *supra*, 385 F.3d at 436.

Due to the breadth of FINRA's "customer" term, the district court's failure to examine the regulatory responsibilities imposed by FINRA on RJS, a member organization, and on Kevin Keough ("Keough"), its associated persons, is inexplicable.[4] Further, "the goal of the NASD [now FINRA] is to 'promote and

[4] *Coenen v. R. W. Pressprich & Co.*, 453 F.2d 1209, 1212 (2d Cir. 1972) ("One desiring the benefits of membership in the New York Stock Exchange must be willing to live up to the responsibilities of such membership.") (*quoted by Geldermann, Inc. v. Commodity Futures Trading Comm'n*, 836 F.2d 310, 319 (7th Cir. 1987)); *Pearce v. E.F. Hutton Group, Inc.*, 828 F.2d 826, 830-31 (D.C. Cir. 1987) ("The Exchange's interest in its member firms' business practices surely extends beyond their handling of customer accounts."); *Spear, Leads*, 85 F.3d at 28 ("*Neither a transactional nexus between plaintiff and defendants*, nor identification of these specific defendants as third party beneficiaries, is required to compel Spear, Leeds to arbitrate a dispute in accordance with NYSE procedures") (Emphasis supplied); *Nomura Sec. Int'l, Inc. v. Citibank, N.A.*, 81 N.Y.2d 614, 620, 619 N.E.2d 385, 388 (N.Y. 1993) ("[E]xtend[ing] without justification the

enforce just and equitable principles of trade and business, to maintain high standards of commercial honor and integrity among members of the NASD, to prevent fraudulent and manipulative acts and practices, [and]...*to protect investors and the public interest.' " Washington Square Securities, Inc. v. Aune*, *supra,* 253 F. Supp. 2d 839, 843 (W.D.N.C. 2003) *aff'd*, 385 F.3d 432 (4th Cir. 2004) (citations omitted) (emphasis in original). Accordingly, the district court should not have ignored the presumption in favor of arbitration or failed to apply it on the basis of the absence of a sufficient "nexus" between the investors and RJS or Keough. Instead, the court should haved required RJS and Keough to make a strong showing that no such nexus existed. In other words, the Court placed the burden of proof on the wrong parties, *i.e*., the investors, and also impermissibly lowered the standard of proof that should have been applied to any such evidence offered by RJS or Keough.

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congressional mandate of self-regulation" is not present when a claim asserted by an outsider to the exchange raises questions about a member's business practices.") (Quoting *Paine, Webber, Jackson & Curtis, Inc. v. Chase Manhattan Bank, N.A.*, 728 F.2d 577, 581 (2d Cir. 1984)). .

C.

THE DISTRICT COURT'S IGNORED THE PAYMENT OF COMMISSION TO KEOUGH, KEOUGH'S REGULATORY OBLIGATIONS, AND RJS'S SUPERVISORY OBLIGATIONS.

The court's analysis of the facts is seriously flawed. The pertinent facts are as follows: Appellant investors purchased $2.6 million in fraudulent securities issued by Inofin, Inc. ("Inofin") from David Affeldt ("Affeldt"), a tax attorney who was recruited by Kevin Keough ("Keough") to sell the securities to his clients.[5] Keough compensated Affeldt by allocating to him about 29% of the sales commissions generated with his assistance. Tr. at 45. Keough was paid $97,573.71 and Affeldt $43,097.89 in commissions. *Id.*

The court begins by assuming the very conclusion that it ultimately reaches, *i.e.*, that the investors "did not have… a customer relationship with [RJS] or anyone associated with it…." *Id*., at p. 35. In reaching this conclusion, the court ignores (a) the commissions paid to Keough; (b) the supervisory duties of RJS[6] as

[5] PIABA adopts the Appellants' factual recitations in their entirety. Facts detailing Keough's relationship with Affeldt and his involvement in the sales are set out in Appellants' Brief, Section IV, p. 3, and the commission schedule in J.A. Vol. 1, Affidavit of Thomas Bailey, at p. 420 (herein, "Commission Schedule").

[6] FINRA Rule 3270: Outside Business Activities of Registered Persons, reads in relevant parts:

> No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the

set forth in FINRA Rule 3270; and (c) the regulatory obligations of Keough, as set forth in NASD Rules 3010[7], 3012[8], and 3040[9],[10] none of which were mentioned by the Court.

The court belatedly acknowledges that Keough "may have" received commissions on the sales. Tr., p. 45. The Appellant's Commission Schedule demonstrates that Keough and Affeldt were paid on forty (40) sales totaling $2,678,999.64, transpiring over a fourteen month period and that Keough was paid on every sale made by Affeldt except those to the members of his own family. Keough never disclosed or sought the approval of RJS with respect to these sales or his receipt of compensation.

Each of the sales violated FINRA and NASD regulations applicable to both Keough and RJS.[11] Pursuant to NASD Rule 3040, Keough could not participate in

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> scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member.

See, Addendum No. 1.

[7] *See,* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3717, accessed on April 2, 2012.

[8] *See,* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=3722, accessed on April 2, 2012.

[9] *See,* Addendum No. 2.

[10] *Id.*

[11] Keough's conduct violated FINRA Rules 3270 (Registered Representative's Duty to Disclose Outside Business Activities) and NASD Rule 3040 (Private Securities Transactions by Registered Representatives). RJS's conduct violated

the sales without RJS's prior notice and written approval. Pursuant to FINRA Rule 3270, Keough could not be compensated for the sales without prior notice to RJS. Under NASD Rules 3010 and 3012, RJS was required to supervise every sale by Keough to public customers. The court made no mention of RJS's or Keough's regulatory obligations, except to note that the Cary Parties' negligent supervision claim against RJS could only be asserted in arbitration before FINRA. Tr., p. 46.

The court focused on the investors' lack of knowledge of RJS's involvement and on the nature of Keough's involvement, which the court called "indirect." However, but for Keough's involvement, the sales would not have taken place. Further, Keough was directly compensated for the sales. In addition, whether Keough's involvement was "indirect" is irrelevant. "The absence of direct contact between a broker and the ultimate purchaser is in no sense determinative of his seller status." *Wasson v. SEC*, 558 F.2d 879, 886 (8th Cir. 1977). Arguably, the investors' lack of knowledge of Keough's or RJS's involvement or of their regulatory duties was merely the product of a successful fraud.

In short, the facts were sufficient to establish the investors' "customer" status with respect to RJS and Keough. The dispute arguably arose from RJS's failure to supervise Keough, and Keough's failure to seek or obtain prior approval from RJS for compensation from the Inofin sales and his outside business

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NASD Rule 3010 and NASD Rule 3012 (Broker Dealer's Responsibility to Supervise its Registered Representatives).

relationships with Inofin and Affeldt. The court simply failed to grasp the extent and importance of RJS's and of Keough's regulatory duties with respect to supervision, compensation, third party accounts and outside business activities. The investors were "customers" with direct relationships to RJS and Keough in all of these regards.

The lower court's verbal announcement of its decision demonstrates its failure to recognize the importance of these considerations. Thus, in explaining its ruling, the court listed the following facts: as determinative (1) the investors did not "believe" they had a customer relationship with RJS and had no such relationship,[12] Tr., p. 35; (2) they did not "believe" they were purchasing in or through RJS, *id*. at 36; (3) they purchased from a person with no association with RJS, *id*.; (4) they had no contact with RJS or its representative, *id*.; (5) "Affeldt did not tell the investors he was affiliated with RJS or an RJS associate, *id*. at 36; (6) the investors did not "understand" that they were purchasing from RJS, *id*.; and (7) they did not "understand" they were purchasing from an RJS associate. *Id*. On this flawed analysis, the court held: that "there is no arguably [sic] dispute between the investor [sic] and RJS," *id*. at 40; found "no nexus of association between the investor [sic] sufficient to constitute customers under FINRA Rule

[12] As stated *supra*, the court here assumes the conclusion it is trying to reach. If the dispute arose from federally regulated investment activities of RJS, Keough, or both, then pursuant to FINRA Rule 12200, the Cary Parties were "customers." The court erroneously declares here that no such relationship existed.

12200," *id*. at 43; and concluded that "the law requires that the investor must *in some sense be associated with the FINRA member* in order to constitute a customer sufficient to compel arbitration." *Id*. at 42 (emphasis supplied).

The court acknowledged that Keough "may have" received fees from the sales, but considered this an "insufficient connection to require arbitration." *Id*. at 45-46. The court also held that while "customer" "certainly would include someone that was dealing with the member or person associated with the member," "We don't have that here." *Id*. at 44-45. It is thus clear that the court missed or discounted the critical facts altogether.

D.

THE DISTRICT COURT FAILED TO APPLY THE PRESUMPTION IN FAVOR OF ARBITRABILITY.

In practical effect, the district court ignored this Court's mandate regarding the presumption in favor of arbitrability in *Washington Square Securities, Inc. v. Aune*, 385 F.3d 432, 436 (4th Cir. 2004), stating, "[E]ven if I were to resolve the ambiguity in favor of arbitrability, there would have to be some relationship." Tr., p. 44-45. The court presumed away the existence of a relationship created by RJS's and Keough's regulatory duties and, thus, failed to require RJS and Keough to present "forceful evidence" that the dispute is not covered by the arbitration clause. *Washington Square*, 385 F.3d at 436. *Cf. O.N. Equity Sales Co. v. Gibson*, 514 F. Supp. 2d 857, 862 (S.D.W. Va. 2007) ("This presumption in favor of

arbitrability while interpreting the provisions of the NASD Code is in fact mandated by the Fourth Circuit's holding in *Washington Square*.”). No such “forceful evidence” was presented.

E.

THE DISTRICT COURT’S RELIANCE ON *WATERFORD* AND *MALAK* WAS MISPLACED.

The court also misconstrued *Waterford Investment Services, Inc. v. Bosco*, 2011 WL 3820723 (D.C. E.D. Va. July 29, 2011), holding that this case did not apply because the investor must be “in some sense associated with the FINRA member in order to constitute a customer sufficient to compel arbitration.” Tr., p. 42. *Waterford Investment* ordered arbitration based on an extensive review of the associated person’s indirect control of a third party entity and the third party’s “mere continuation” of the existence of the associated person. *Id.*, at *10-*19. The lower court at bar did not conduct such an analysis. Given the regulatory nexus present in the facts before the court, *Waterford Investment* is inapplicable here. Similarly, the district court erred in finding that “no nexus [was] shown” as required by *Malak v. Bear Stearns & Co., Inc*., Not Reported in F.Supp.2d (2004), 2004 WL 213014 (S.D.N.Y. 2004). In *Malak*, the district court refused to order arbitration because the investors “pool[ed] their funds and relinquish[ed] all investment authority to a third party who deal[t] with an NASD broker,” because the “third party, not the investors,” was the broker’s customer. *Id*. at *5. The flow

of money to Keough and the existence of the associate's and member's regulatory responsibilities in this case were not present in *Malak*.

F.

THE DISTRICT COURT'S DISCUSSION OF *LISK* DEMONSTRATES ITS FLAWED ANALYSIS OF RJS'S AND KOEGH'S INVOLVEMENT.

The court also opined that he "just [didn't] think" that *Lisk* applied, referring to *Walnut Street Securities, Inc. v. Lisk*, 497 F.Supp.2d 714 (M.D.N.C. 2007). In *Lisk*, a member organization appealed post-arbitration and argued that the arbitrator had no jurisdiction because the securities in issue were sold by an associate who set up a corporation involving a relative; therefore the investors were not "customers." The *Lisk* court rejected this argument based on the member's waiver of any jurisdictional argument and its execution of an arbitration submission agreement. 497 F.Supp. 2d at 719, 720-22. In addition, the court held that, where an associated person's "minions or employees" carried out the sales efforts on her behalf, "the sales may be attributed to the associated person so as to establish a customer relationship for the purpose of determining whether the member firm was negligent in supervising the associated person under the NASD Code." *Id*. at 728. The court rejects *Lisk* on the basis that the instant case "is just not the same as *Lisk*." Tr., p. 45. In other words, the court rejects *Lisk*, a case with a very similar set of facts, without explanation.

G.

THE DISTRICT COURT PLACED UNDUE EMPHASIS ON RJS'S LACK OF KNOWLEDGE.

Finally, the lower court rejects "the majority of" the cases brought to its attention on the basis that they "involve investors dealing directly with registered representatives, meaning associated persons [sic] without the knowledge [of] the brokerage firms with which they were associated," including *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48 (2d Cir. 2001). Tr., p. 45. However, *Wilson* merely rejected the argument that investors were required to be customers of the member organization, "not merely of an associated person." 254 F.3d at 59. *Wilson* is not applicable to the facts at bar, and the court's emphasis on the member firm's lack of knowledge is improvident.

The district court acknowledged that FINRA arbitration is required as long as the dispute arose in connection with the business activities of the member or the associated person.[13] As his employer, RJS had a continuing duty to monitor and supervise Keough under FINRA Rule 3270.[14] Rule 3270 also provides that a registered person cannot be "a director or partner of another person, or be compensated… as a result of any business activity" outside of the member firm

[13] Tr. 41.
[14] *See*, footnote 6.

unless prior written authorization is given.[15] The Inofin securities were not a part of RJS's inventory. Thus, Keough's solicitation without authorization by RJS, and his compensation for the sales, violated Rule 3270. That Affeldt solicited the sales does not alter the fact that the dispute arose in connection with the business activities of Keough and RJS. RJS was responsible to supervise Keough's compliance with FINRA Rules as an associated person. Its failure to do so cannot be explained away by lack of knowledge of Keough's wrong doing, or obligation regulatory deficiencies. The Cary Parties were "customers" of RJS and of Keough by reason of Keough's unauthorized compensation and RJS's supervisory duties. To hold otherwise would be to reward Keough's deception of the investors and also reward RJS's improper supervision of Affeldt. Accordingly, such a finding would significantly weaken FINRA's regulatory authority.

H.

KEOUGH'S CONDUCT SUBJECTED HIM TO LIABILITY AS A BROKER AND PROVIDES ANOTHER BASIS TO REQUIRE ARBITRATION.

As is argued by Appellants, "*Transaction-based compensation, or commissions* are one of the hallmarks of being a broker-dealer." *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, Not Reported in F.Supp.2d, 2006 WL 2620985 (D. Neb. 2006); *see also Barry v. Ceres Land Co*., Not Reported in

[15] *Id.*

F.Supp., 1978 WL 960 (D. Minn. 1978) ("Ceres received the *compensation for the sale* of [the investment contracts] to plaintiffs and Haydock and Hallowell brokered the sale. All three would clearly be deemed sellers under Federal … law.") (Emphasis supplied).

As also argued by Appellants, in *In re Kemprowski & the Cambridge Consulting Co.*, Fed. Sec. L. Rep. (CCH) 85,469, Exchange Act Release No. 34-35058, 1994 WL 684628, at *2-3 (Dec. 8, 1994) (attached to Appellants' Addendum at 9), Astro, the issuer, "hired Kemprowski to … raise money through stock sales." *Id*. at *2. Kemprowski then hired independent consultants "to promote sales of Astro stock." *Id*. Kemprowski was compensated for the sales by his agents and sub-agents. "The compensation Astro paid to Kemprowski … depended, in part, on [his] ability to generate sales of Astro stock." *Id*. Based on these facts, the Commission concluded that Kemprowski acted as a broker with respect to the sale of Astro stock. *Id*. at *3. Here, the Commission Schedule and the Affidavits of Appellants and other Inofin investors demonstrate that Keough was hired by Inofin to raise funds through sales of securities, hired Affeldt for that same purpose he and Affeldt together, repeatedly contacted potential investors to make sales pitches, and received commissions from the sales. Accordingly, Keough acted as a broker and Appellants were his customers. *See also, SEC v. Corporate Relations Group, Inc.*, Not Reported in F.Supp.2d, 2003 WL 25570113

*1 M.D. Fla. 2003) (seller of unregistered securities for compensation acted as a broker, *id*. at *18, *citing Kemprowski*); *SEC v. Deyon*, 977 F.Supp. 510, 518 (D.Me. 1997) (finding that defendants acted as brokers where they solicited investors and "actively sought to effect securities transactions"), *aff'd*., 201 F.3d 428 (1st Cir. 1998*); Black Diamond Fund, LP v. Joseph*, 211 P.3d 727, 734 (Colo. App. 2009) (similar; "effecting transactions in securities is shown by actively soliciting clients, selling securities to the clients, and participating in securities transactions 'at key points in the chain of distribution,'" *citing SEC v. Nat'l. Executive Planners, Ltd*., 503 F.Supp. 1066, 1073 (M.D.N.C. 1980) (entity engaged in active solicitation and sales was broker); *SEC v. Margolin*, 1992 WL 279735 (S.D.N.Y. 1992) (unpublished opinion and order) (actor who received transaction-based compensation, advertised for client, and possessed client funds was broker)).

CONCLUSION

In order to preserve the important role played by FINRA in the resolution of disputes between the members of FINRA and their customers and to protect the investing public, this Court should reverse the opinion of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed.R.App.P. 32(a)(7)(B) because this brief contains 3832 words, excluding the parts of the brief exempted by Fed.R.App.P.32(a)(7)(B)(iii). This brief also complies with the typeface requirements of Fed.R.App.P.32(a)(5) and the type style requirements of Fed.R.App.P.32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in Times New Roman 14-point font.

Dated: April 2, 2012.

Dallas, TX **/s/ Braden W. Sparks**

CERTIFICATE OF SERVICE AND CM/ECF FILING

I hereby certify that I caused the forgoing **BRIEF OF *AMICUS CURIAE* OF PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF DEFENDANTS/APPELLANTS' POSITION SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION** to be served on counsel for Plaintiff-Appelle and Defendants-Appellants via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

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I certify that an electronic copy was uploaded by the Court's electronic filing system. Eight hard copies of the foregoing **BRIEF OF *AMICUS CURIAE* OF PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF DEFENDANTS/APPELLANTS' POSITION SEEKING REVERSAL OF THE DISTRICT COURT'S DECISION** was sent to the Clerk's Office by Federal Express to:

Clerk of Court
United States Court of Appeals, Fourth Circuit
Patricia S. Connor, Clerk
1100 East Main Street, Suite 501
Richmond, Virginia 23219-3517

On this 2nd day of April, 2012.

/s/ Braden W. Sparks

Sworn to me this 4th day of April, 2011.

/s/ Deborah K. Beaty
Deborah K. Beaty
Notary Public, State of Texas
NOTARY INFORMATION

ADDENDUM

Add. #	Title of Document
1.	FINRA Rule 3270;
2.	FINRA Rule 3040.

Print

3270. Outside Business Activities of Registered Persons

No registered person may be an employee, independent contractor, sole proprietor, officer, director or partner of another person, or be compensated, or have the reasonable expectation of compensation, from any other person as a result of any business activity outside the scope of the relationship with his or her member firm, unless he or she has provided prior written notice to the member, in such form as specified by the member. Passive investments and activities subject to the requirements of NASD Rule 3040 shall be exempted from this requirement.

• • • Supplementary Material: ----------

.01 Obligations of Member Receiving Notice. Upon receipt of a written notice under Rule 3270, a member shall consider whether the proposed activity will: (1) interfere with or otherwise compromise the registered person's responsibilities to the member and/or the member's customers or (2) be viewed by customers or the public as part of the member's business based upon, among other factors, the nature of the proposed activity and the manner in which it will be offered. Based on the member's review of such factors, the member must evaluate the advisability of imposing specific conditions or limitations on a registered person's outside business activity, including where circumstances warrant, prohibiting the activity. A member also must evaluate the proposed activity to determine whether the activity properly is characterized as an outside business activity or whether it should be treated as an outside securities activity subject to the requirements of NASD Rule 3040. A member must keep a record of its compliance with these obligations with respect to each written notice received and must preserve this record for the period of time and accessibility specified in SEA Rule 17a-4(e)(1).

Amended by SR-FINRA-2009-042 eff. Dec. 15, 2010.
Adopted by SR-NASD-88-34 eff. Oct. 13, 1988.

Selected Notices: 88-5, 88-45, 88-86, 89-39, 90-37, 94-44, 94-93, 96-33, 01-79, 10-49.

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3040. Private Securities Transactions of an Associated Person

(a) Applicability

No person associated with a member shall participate in any manner in a private securities transaction except in accordance with the requirements of this Rule.

(b) Written Notice

Prior to participating in any private securities transaction, an associated person shall provide written notice to the member with which he is associated describing in detail the proposed transaction and the person's proposed role therein and stating whether he has received or may receive selling compensation in connection with the transaction; provided however that, in the case of a series of related transactions in which no selling compensation has been or will be received, an associated person may provide a single written notice.

(c) Transactions for Compensation

(1) In the case of a transaction in which an associated person has received or may receive selling compensation, a member which has received notice pursuant to paragraph (b) shall advise the associated person in writing stating whether the member:

(A) approves the person's participation in the proposed transaction; or

(B) disapproves the person's participation in the proposed transaction.

(2) If the member approves a person's participation in a transaction pursuant to paragraph (c)(1), the transaction shall be recorded on the books and records of the member and the member shall supervise the person's participation in the transaction as if the transaction were executed on behalf of the member.

(3) If the member disapproves a person's participation pursuant to paragraph (c)(1), the person shall not participate in the transaction in any manner, directly or indirectly.

(d) Transactions Not for Compensation

In the case of a transaction or a series of related transactions in which an associated person has not and will not receive any selling compensation, a member which has received notice pursuant to paragraph (b) shall provide the associated person prompt written acknowledgment of said notice and may, at its discretion, require the person to adhere to specified conditions in connection with his participation in the transaction.

(e) Definitions

For purposes of this Rule, the following terms shall have the stated meanings:

(1) "Private securities transaction" shall mean any securities transaction outside the regular course or scope of an associated person's employment with a member, including, though not limited to, new offerings of securities which are not registered with the Commission, provided however that transactions subject to the notification requirements of Rule 3050, transactions among immediate family members (as defined in Rule 2790), for which no associated person receives any selling compensation, and personal transactions in investment company and variable annuity securities, shall be excluded.

(2) "Selling compensation" shall mean any compensation paid directly or indirectly from whatever source in connection with or as a result of the purchase or sale of a security, including, though not limited to, commissions;

finder's fees; securities or rights to acquire securities; rights of participation in profits, tax benefits, or dissolution proceeds, as a general partner or otherwise; or expense reimbursements.

Amended by SR-NASD-99-60 eff. March 23, 2004.
Adopted by SR-NASD-85-28 eff. Nov. 12, 1985.

Selected Notices: 75-34, 80-62, 82-39, 85-21, 85-54, 85-84, 91-32, 94-44, 96-33, 01-79, 03-79.

12-1053-cv

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Peter Cary, Dayna Smith, Robert Barkin, Christine Spolar and Financial Industry Regulatory Authority, Inc.,

Defendants-Appellants,

Against

Raymond James Financial Services, Inc.,

Plaintiff-Appellee,

Appeal from the United States District Court

for the Eastern District of Virginia (1:2011-cv-00928)

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION

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April 2, 2012

CORPORATE DISCLOSURE STATEMENT

Amicus curiae Public Investors Arbitration Bar Association is a non-profit association. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

MOTION FOR LEAVE

Public Investors Arbitration Bar Association ("PIABA") respectfully files this Motion for Leave to File its Amicus Curiae Brief in support of Defendants-Appellants' notice of appeal seeking to reverse the decision of the United States District Court for the Eastern District of Virginia (Lee, G.), entered on December 15, 2011, permanently enjoining Defendants-Appellants from further arbitration proceedings against Raymond James Financial Services, Inc. before the Financial Industry Regulatory Authority ("FINRA").

1. Notice of appeal was filed by Appellants on January 11, 2012. On March 5, 2012 the court extended the deadline to file the opening brief to March 26, 2012, and the responsive brief to April 25, 2012. Therefore, according to the F.R.C.P 29 and Local Rule 29.1, an amicus curiae brief would be due on April 2, 2012.
2. Pursuant to F.R.A.P 29 and this Court's Local Rule 29(c)(4), the Public Investors Arbitration Bar Association ("PIABA") submits the following statements of identity, interest, and source of authority.

3. **Statement of Identity**. PIABA was established in 1990 as an international bar association whose members represent public investors in securities industry disputes. An educational and networking organization, PIABA's mission is to protect public investors from abuses in the arbitration process, keep arbitration just and fair, and maintain a level playing field for public investors.
4. **Statement of Interest**. PIABA has an interest in this appeal because the district court's analysis of the term, "customer," as set forth in FINRA Rule 12200, ignores critical facts, ignores the obligations of member firms firing and associates of members under the securities laws' regulatory framework, conflicts with the decisions of this Court and of other Circuits and district courts, ignores this Circuit's presumption of arbitrability, and is contrary to the plain language of the Rule and past FINRA pronouncements. If allowed to stand, the lower court's decision would significantly undermine the efficacy, timeliness and cost of securities arbitration. A decision rejecting the lower court's ruling will protect promote efficient arbitration, prevent costly and unnecessary litigation, and protect public investors.
5. **Statement of Source of Authority**. PIABA's Board of Directors has authorized the filing of this brief through its *Amicus Curiae* Committee.
6. **Statement of Preparation and Funding**. No parties or attorneys in this case assisted in the preparation of or authored any portion of this *amicus curiae*

brief. No parties or attorneys in this case contributed money that was intended to fund the preparation or submitting of this *amicus curiae* brief.

7. The undersigned counsel has spoken with Stephen Cochran, attorney for appellee regarding the filing of an amicus curiae brief and Mr. Cochran advised he opposes the filing of same. The undersigned has spoken with Alin Rosca, attorney for appellants regarding the filing of an amicus curia brief and Mr. Rosca, is not opposed to the filing of same.

Dated April 2, 2012.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND CM/ECF FILING

I hereby certify that I caused the forgoing Motion for Leave to File Brief of *Amicus Curiae* of Public Investors Arbitration Bar Association in Support of Defendants-Appellants Position Seeking Reversal of the District Court's Decision to be served on counsel for Plaintiff-Appelle and Defendants-Appellants via Electronic Mail generated by the Court's electronic filing system (CM/ECF) with a Notice of Docket Activity pursuant to Local Appellate Rule 25.1:

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