12-0058-cv

United States Court of Appeals
for the
Second Circuit

TWENTY-FIRST SECURITIES CORPORATION,

Plaintiff-Appellant,

-against-

DR. BYRON CRAWFORD,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF AMICUS CURIAE THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF DEFENDANT-APPELLEE IN SUPPORT OF AFFIRMANCE

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Date Completed: June 8, 2012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

TWENTY-FIRST SECURITIES CORPORATION,

Plaintiff-Appellant,

-against-

DR. BYRON CRAWFORD,

Defendant-Appellee.

FED. R. APP.P.26.1 CORPORATE DISCLOSURE STATEMENT

Docket No. 12-58

Pursuant to Fed. R. App. P. 26.1, the undersigned counsel for *Amicus Curiae* Public Investors Arbitration Bar Association, a private, non-governmental party, certifies that the Public Investors Arbitration Bar Association is a non-profit association. It has no parents, subsidiaries or affiliates, has no parent corporation, and no publicly-held corporation owns 10% or more of its stock.

Dated: Albany, New York
June 8, 2012

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INTRODUCTION

Pursuant to the Rules of this Court, the Public Investors Arbitration Bar Association ("PIABA")[1] respectfully submits this, its brief *amicus curiae,* in support of Dr. Byron Crawford's ("Crawford") response to the appeal of Twenty-First Securities Corporation ("Twenty-First Securities") which seeks to reverse the decision of the United States District Court for the Southern District of New York, entered on January 6, 2012, on the grounds that, *inter alia,* the Defendant-Appellee Crawford was not a customer of the Plaintiff-Appellant Twenty-First Securities Corporation.

The Public Investors Arbitration Bar Association (PIABA) submits this brief *amicus curiae* to advance its mission statement of promoting the interests of the public investor in arbitration, protecting public investors from abuses prevalent in the arbitration process. In this regard, it is submitted that the lower court did not abuse its discretion in determining that the Defendant-Appellee Dr. Byron Crawford was a customer of the Plaintiff-Appellant Twenty-First Securities Corporation.

[1] No counsel for a party or party to this proceeding authored this Brief, in whole or in part, and no counsel for a party or party to this proceeding made a monetary contribution intended to fund either the preparation or the submission of this brief. No person other than PIABA, its members, or its counsel made a monetary contribution to the preparation or submission of this Brief.

STATEMENT OF INTEREST

PIABA is a national bar association established in 1990 as an educational and networking organization for attorneys representing the public investor in securities disputes. The mission of PIABA is to promote the interests of the public investor in securities arbitration by 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, given its goal of assuring that victimized investors have recourse to the sole, appropriate venue, the Office of Dispute Resolution of the Financial Industry Regulatory Authority (FINRA) without fear of encountering costly, vexatious, and inappropriate court-venued proceedings in the state and federal courts. The interpretation sought to be imposed by the Plaintiff-Appellant would significantly impede investors from seeking civil redress in the arbitration process by requiring them, in the first instance, to litigate and prove their status as purchasers of securities.

SUMMARY OF ARGUMENT

As indicated in the record below, it is uncontroverted that Robert Gordon, the President of the Plaintiff-Appellant Twenty-First Securities Corporation, both solicited and recommended that Dr. Crawford invest in the subject underlying investment, namely the 1861 Fund, also arranging for the delivery of fund-related information and materials [A.29, 62-64]. It is also uncontroverted that the Plaintiff-Appellant Twenty-First Securities Corporation was the "referring broker" and was paid a referral fee. M oreover, the underlying contractual provisions associated with the purchase of the 1861 Fund, also included the ongoing payment of a management fee to Twenty-First Securities Corporation for these services which it provided [A.58, 66, 69] as one of its "clients" [A.66, 69].[2]

Additionally, it is also uncontroverted that Twenty-First Securities Corporation is a FINRA member firm. The amalgam of these uncontroverted facts is that Dr. Crawford was clearly a "customer" of Twenty-First Securities Corporation, a FINRA member broker-dealer firm, for purposes of requiring it to submit the claims of the Defendant-Appellee Dr. Byron Crawford (Case No. 11-02801) [A.6, 14-24] to arbitration.[3] Therefore, it is submitted that any effort on the

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[2] For purposes of this Amicus Brief, we incorporate by reference, *in haec verba,* the entirety of the "Statement of Facts" portion of the Brief for Defendant-Appellee Dr. Byron Crawford.

[3] FINRA operates the largest and predominant dispute resolution forum in the securities industry to assist in the resolution of monetary and business disputes between and among investors, brokerage firms, and individual brokers (www.finra.org/ArbitrationAndMediation/index.htm).

part of Twenty-First Securities Corporation to avail itself of a separate court-venued remedy to enjoin the underlying arbitration proceeding, initiated in the first instance by Dr. Crawford, was improper and also contrary to the mission statement of the amicus PIABA in assuring a single, convenient, and expeditious arbitral venue and remedy for the resolution of disputes of public investors (and "customers") involved in securities brokerage disputes.[4]

In sum, the District Court correctly determined that Dr. Crawford was a customer of Twenty-First, as he received investment advice from its President, Gordon [A.83], also noting that Twenty-First Securities Corporation received compensation in the form of a referral fee for referring him to the Fund [A.84],[5] (citing *UBS Fin. Servs. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643 [2d Cir. 2011]).

According to the FINRA website, a number of annual cases filed with FINRA includes the following (2009 - 7,137; 2010 – 5,680; 2011 – 4,729) (www.finra.org/ArbitrationAndMediation/FINRADisputeResolution/AdditionalResources/Statistics/index.htm).

[4] The FINRA Rules of Fair Conduct clearly require that upon the request of a customer, FINRA member firms can be compelled to arbitrate any such dispute of said customer if "the dispute arises in connection with the business activities of the member." [A.75]

[5] The Disclosure Statements incorporated as a part of the Limited Partnership Agreement of 1861 Capital Fund, LP states as follows:

> Be advised that Twenty-First Securities Corporation ("TFSC") has entered into an agreement with 1861 Capital Management, LLC ("1861 Capital") whereby TFSC will receive a solicitation fee from 1861 Capital for account TFSC refers to become investors in 1861 Capital Fund, LP (the "Fund"). TFSC will receive such a fee on your account. TFSC's solicitation fee is an amount calculated to be up to 15% of the management fee received by 1861 Capital and 15% of the Incentive Allocation received by 1861 Capital Partners, LLC (the general partner of the Fund) from the Fund relating to your investment. [A.58]

ARGUMENT

I. THE LOWER COURT CORRECTLY IGNORED THE SPECIOUS FORM-OVER-SUBSTANCE ARGUMENT THAT THE DEFENDANT-APPELLEE DR. CRAWFORD WAS NOT A "PURCHASER" OF THE SUBJECT SECURITIES, IN DETERMINING THAT HE WAS A "CUSTOMER" OF TWENTY-FIRST SECURITIES CORPORATION

(i) The Defendant-Appellee Was a Customer of Twenty-First Securities Corporation, as Defined by FINRA Rule 12200

FINRA Rule 12200 requires members of the Financial Industry Regulatory Authority (FINRA) to arbitrate the disputes pursuant to the FINRA Code of Arbitration Procedure if arbitration is "requested" by [a] customer, "[t]he dispute is between a customer and a member or associated person of a member," and "[t]he dispute arises in connection with the business activities of the member," cited in *J.P. Morgan Secs., Inc. v. La. Citizens Prop. Ins. Corp.*, 712 F.Supp.2d 70 at p.77 (S.D.N.Y. 2010); *Citigroup Global Mkts., Inc. v. VCG Special Opportunities,* 598 F.3d 30, 32 N.1 (2d Cir. 2010).[6]

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[6] Additionally, a number of other exchanges have entered into an agreement with FINRA to provide its dispute resolution services to them, including NASDAQ, NASDAQ OMX (including the former Boston Stock Exchange and Philadelphia Stock Exchange), the New York Stock Exchange, NYSE AMEX, the Municipal Securities Rulemaking Board (MSRB), and the International Securities Exchange (ISE) (www.FINRA.org/ArbitrationAndMediation/FINRADisputeResolution/MoreonFINRADisputeResolution/OtherExchangesUsingFINRAsForum/index.htm).

The District Court record below clearly supported its determination that Dr. Crawford was a "customer" of Twenty-First Securities Corporation and that his dispute arises in connection with the business activities of Twenty-First, as required by FINRA Rule 12200.[7] (See also *In Re American Express Financial Advisors Securities Litigation,* 672 F.3d 113, 128 [2d Cir. 2011], citing FINRA Code of Arbitration Procedure §12200; also citing *John Hancock Life Insurance Company v. Wilson*, 254 F.3d 48, 58 [2d Cir. 2001]). Additionally, there is no indication in the record below that the FINRA Office of Dispute Resolution declined to entertain the claims of the Defendant-Appellee Crawford, as it might otherwise have, pursuant to Rule 12203 of the FINRA Code of Arbitration Procedure.

(ii) The Defendant-Appellee Was a Customer of Twenty-First Securities Corporation, as Defined by FINRA Rule 1250(b)(1)

The Plaintiff-Appellant Twenty-First Securities Corporation has sought to confuse the issue of the Defendant-Appellee Dr. Byron Crawford's status as a "customer" by advancing the specious argument that Dr. Crawford's nominee entity, Rahn & Bodmer, and not Dr. Crawford, was the real customer for purposes of determining "customer" status under the FINRA Rules. FINRA Rule 1250(b)(1),

[7] As indicated in an e-mail from Jim Siegel, General Counsel of the Plaintiff-Appellant Twenty-First Securities Corporation, dated March 7, 2008: "I am writing in response to your e-mail below addressed to Bob Gordon yesterday. To answer your first question, the role of Twenty-First *vis á vis* 1861 Capital is that of a referring broker. For that role, we receive a solicitation fee paid on an ongoing basis." [A.67-71]

however, states that the term customer ". . . shall mean any natural person and any organization, other than another broker or dealer, executing securities transactions with or through or receiving investment banking services from a member." [8] In this regard, it is uncontroverted that Dr. Crawford received services from Twenty-First Securities Corporation. [A.29, 58, 62-64, 69 and 83]

(iii) The Defendant-Appellee Was a Customer of Twenty-First Securities Corporation, as Defined by FINRA Rule 4530

The Supplemental Material comments to FINRA Rule 4530 state that the term "customer" includes those ". . . with whom the member has engaged, or sought to engage in securities activities."[9] Even the FINRA Dispute Resolution "Glossary of Arbitration Terms" defines "customer" as a person who ". . . transacts business with any member firm and/or associated person." [10] As submitted above, the Defendant-Appellee was likewise a "customer" by this standard. (See also, *Multi-Financial Securities Corp v. King*, 386 F.3d 1364, 1368 [11th Cir. 2004]).

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[8] FINRA Rule 1205(b)(1).

[9] FINRA Rule 4530, Supplementary Material, Comment .08.

[10] *See* FINRA Dispute Resolution Glossary.

(iv) The Argument of the Plaintiff-Appellant Exalts Form Over Substance With its Repeated Assertions That the Defendant-Appellee Was Not the Purchaser of the Securities at Issue, and Thus Was Not a "Customer" of Twenty-First Securities Corporation

The Plaintiff-Appellant's Brief is laden with repetitive, misleading references to irrelevant facts purporting to evidence Dr. Crawford's "non-purchase" of the securities at issue. Examples of these utterances, which obscure the simple reality that Dr. Crawford was a "customer" of the Plaintiff-Appellant, include the following:

- ". . . Crawford did not purchase the securities at issue?" (p.2, lines 5-6)
- "Crawford's arbitration claim relates to losses allegedly sustained by him as a result of an investment made not by him but by an entity, a Swiss company, by the name of Rahn & Bodmer . . ." (p.3, lines 9-11)
- "Crawford did not purchase the subject securities." (p.5, lines 3-4)
- "Crawford did not purchase the securities at issue, and Twenty-First had no role in Rahn & Bodmer's purchase of the securities from 1861 Capital." (p.10, lines 9-10)
- "As a result, under a summary judgment standard, Twenty-First is entitled to a factual finding that Crawford is not the purchaser or record owner of the investment and, as a result, a legal conclusion that Crawford is not Twenty-First's customer, for purposes of the investment, under FINRA Rule 12200." (p.17, lines 4-8)
- ". . . the fact that Crawford did not purchase the security robs him of the status of customer." (p.19, lines 1-2)

- ". . . Crawford conceded that he did not purchase the securities at issue and failed to establish any connection with Rahn Bodmer, the actual purchaser of the securities." (p.24, lines 11-13)

- "The end result of all of this is that Rahn & Bodmer (not Crawford) bought securities from 1861 Capital, not Twenty-First."

This argument is disingenuous and evidences a profound misunderstanding of the transctional aspect of the securities business.[11]

In unsubstantiated, broad-brush fashion, the Plaintiff-Appellant's Brief argues baselessly that Rahn & Bodmer, the nominee for the securities in question, is the only party with standing to bring a claim as a "customer" of Twenty-First Securities Coroporation, stating:

> The only "customer" was Rahn & Bodmer and the only entity it was a "customer" of was 1861 Capital. Rahn & Bodmer has made no complaint, either of 1861 Capital or of Twenty-First (p.37, lines 10-12).

Seeing through this obvious fallacy, the District Court correctly determined that the Defendant-Appellee Dr. Byron Crawford was the real party in interest, and thusly clearly a customer of Twenty-First Securities Corporation.[12]

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[11] Speaking directly to this issue, the Securities Exchange Commission has noted: "In the case of securities held in street name, generally the securities are held by a securities depository (e.g., the depository trust company), who, as the registered owner, holds the securities on behalf of another securities intermediary (e.g., a broker-dealer or bank), who in turn holds the securities for its customers, the beneficial owners. All the rights and obligations of the securities are passed through the registered owner to the beneficial owners. For more information on the relationship between securities intermediaries and beneficial owners." (Release No. 34-50758A; File No. S7-24-04, Footnote 2). See also, Release No. 34-38406 (Mar. 14, 1997), at n.5.

[12] Again addressing the particulars of securities industry protocol, the Securities Exchange Commission has noted: "To facilitate the clearance and settlement of securities transactions,

(v) The Interpretation Sought by Twenty-First Securities Corporation Would Eviscerate the Long-Standing Precedent Established by the United States Supreme Court in *Shearson/American Express, Inc. v. McMahon*

The flawed argument advanced by the Plaintiff-Appellant would see the many thousands of small investors who file arbitration claims with the Financial Industry Regulatory Authority (FINRA) be subjected to protracted, expensive and vexatious litigation in the federal courts in order to prove their status as purchasers and owners of the underlying securities in their accounts, before they would be permitted to proceed to have their arbitration claims heard before the FINRA Office of Dispute Resolution.[13] This would clog the courts, given the thousands of cases filed annually with the FINRA Office of Dispute Resolution (see Footnote 3), also

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securities held by a securities intermediary on behalf of its customers or another securities intermediary are commonly registered in the name of the securities intermediary or in its nominee name, which makes the securities intermediary the registered owner. This is often referred to as holding a security 'street name.' Holding securities in street name at a securities depository facilitates the transfer of negotiable certificates and obviates manually-processed paperwork and physical delivery of certificates. Registered clearing agencies acting as securities depositories help to centralize and automate the settlement of securities, in part by reducing the physical movement of securities traded in the U.S. market using book-entry movements. On occasion, other types of securities intermediaries, such as broker-dealers or banks, may perform similar functions by holding a certificate registered in its name but held on behalf of its customers." (Release No. 34-50758A; File No. S7-24-04 [December 7, 2004], pp.1-2).

[13] Of the four depositories registered as clearing agents in 1983, DTC Depository Trust Company is the only one still operating. DTC estimates that as of December 31, 2002, approximately 84% of the shares issued by domestic companies listed on the NYSE and 88% of the domestic companies listed on the NASDAQ are deposited at DTC. (These statistics do not include ADRs). E-mail from Joseph Trezza, Sr. Product Manager, DTC, to the Commission staff (November 14, 2003) (Release No. 34-50758A; File No. S7-24-04, Footnote 28 [December 7, 2004]).

defeating the public policy favoring arbitration as an expeditious and convenient forum for resolving these types of disputes.

Carrying the Defendant-Appellant's argument to its absurd conclusion, the nominee, Rahn & Bodmer, would be the only entity allowed to sue for damages, even though the real party in interest, the Defendant-Appellee Crawford was the one who alleges, and actually sustained, damages. Such an interpretation would eviscerate the long-standing precedent favoring securities customer arbitration first established by the Supreme Court of the United States in *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 107 S. Ct. 2232, 96 L.Ed. 185.

CONCLUSION

Inasmuch as the Defendant-Appellee Crawford was a customer of the Plaintiff-Appellant Twenty-First Securities Corporation, the lower court determination in this regard should be affirmed, and the entirety of the underlying dispute should be resolved by way of prior submission to the Office of Dispute Resolution of the Financial Industry Regulatory Authority (FINRA).

Respectfully Submitted,

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FED R. APP. P. 32(a) CERTIFICATE OF COMPLIANCE

Certificate of Compliance With Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) because this brief contains 1,930 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief 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 14 point Times Roman font.

s/Timothy J. O'Connor

Timothy J. O'Connor
Attorney for *Amicus Curiae*
Public Investors Arbitration
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Dated: June 8, 2012

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

TWENTY-FIRST SECURITIES CORPORATION

Plaintiff-Appellant.

-vs-

DR. BYRON CRAWFORD

Defendant-Appellee.

----------X

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

U.S. District Court
Index No. 12-0058-cv

PLEASE TAKE NOTICE, that upon the annexed affirmation of Timothy J. O'Connor, dated the 8th day of June, 2012, and upon a copy of the proposed *Amicus Curiae,* and upon all the pleadings and prior proceedings in the above-styled case, the Public Investors Arbitration Bar Association (PIABA), by its *Amicus Curiae* Committee members and Attorney Timothy J. O'Connor, will move this Court at the Patrick Daniel Moynihan U.S. Courthouse, 500 Broadway, New York, New York 10007, on _____, 2012, at the opening of the Court on that day, or as soon thereafter as counsel may be heard, for an order for *amicus curiae* relief pursuant to 22 N.Y.C.R.R. § 500.23(a).

Dated: June 8, 2012
Albany New York

Respectfully Submitted,

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O'CONNOR AFFIRMATION

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------X

TWENTY-FIRST SECURITIES CORPORATION

Plaintiff-Appellant.

-vs-

DR. BYRON CRAWFORD

Defendant-Appellee.

AFFIRMATION OF TIMOTHY O'CONNOR IN SUPPORT OF MOTION OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION (PIABA) FOR *AMICUS CURIAE* RELIEF ALLOWING THE FILING OF AN *AMICUS CURIAE* BRIEF AND PARTICIPATION IN ORAL ARGUMENT

U.S. District Court
Index No. 12-0058-cv

---------- X

1. **TIMOTHY J. O'CONNOR,** an attorney admitted to practice law in the Courts of the State of New York, affirms the following under penalty of perjury:

2. I am a member of the *Amicus* Committee of the Public Investors Arbitration Bar Association ("PIABA"), a not-for-profit organization headquartered in Norman Oklahoma whose purpose is to advance the interests of public investors in the financial and securities markets.

3. In preparation of the instant motion and accompanying *Amicus Curiae* Brief, I worked closely with Attorney Lisa A. Catalano, Chair of PIABA's Amicus Committee and Director of the Securities Arbitration Clinic at St. John's University School of Law in Jamaica, New York, a not-for profit organization representing underserved investors in securities disputes, as well as Attorneys Braden W. Sparks of Braden W. Sparks, P.C., Dallas, Texas, and Teresa J. Verges, Director of the

Investor Rights Clinic of the University of Miami School of Law, Miami, Florida.

4. PIABA has also appeared as *amicus curiae* in numerous other cases in State and Federal Courts throughout the United States, and it is submitted that the investing public has a significant stake in the outcome of the instant Appeal, particularly as the same relates to the position of the Plaintiff-Appellant Twenty-First Securities Corporation that aggrieved investors in the securities markets, such as the Defendant-Appellee Crawford, are not entitled to pursue civil claims in FINRA-venued arbitration, based upon, *inter alia,* their claims that Dr. Crawford was not a customer of Twenty-First Securities Corporation, notwithstanding the numerous *indicia* of his customer status.

5. PIABA seeks permission to file a brief as *amicus curiae* because it believes that this court's recent decision in ***Twenty-First Securities Corp. v. Dr. Byron Crawford, 11 Civ. 6406, 2011 U.S. Dist. LEXIS 144366*** **handed down on December 15, 2011** should be affirmed.

6. PIABA also seeks permission to file a Brief as *amicus curiae*, as we believe that the public policy established by the United States Supreme Court in *Shearson/American Express, Inc. v. McMahon,* 482 U.S. 220, 107 S.Ct. 2332, 96 L.Ed. 185, favoring the arbitral forum for aggrieved investors, should be continued.

7. PIABA is also desirous of bringing to the Court's attention various rules, provisions and pronouncements of the Financial Industry Regulatory Authority (FINRA), which have long afforded investors an arbitral forum (as opposed to the

courts) for the pursuit of civil claims relating to their victimization in the financial markets.

8. It is also submitted that the persuasive authority and pronouncements of the Securities Exchange Commission cited in the accompanying amicus brief likewise serves to expose the glaring weaknesses of the Appellant's various arguments that the Appellee was not its customer.

9. Finally, PIABA submits that long-established *stare decisis* of this court affording victimized investors access to the courts for civil redress, and further, the public policy, favors resolving disputes of this nature in arbitration, as opposed to submission of the same to protracted, vexatious and costly litigation in the courts.

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

Dated: Albany, New York
June 8, 2012

s/Timothy J. O'Connor
TIMOTHY J. O'CONNOR

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