IN THE SUPREME COURT OF OHIO

CYNTHIA BOYD, *et al*.,	)	Case No. 2017-1336
	)	
Petitioners,	)	On Order of Certification of Question of
	)	State Law from the Sixth Circuit Court of
v.	)	Appeals
	)	
KINGDOM TRUST, *et al*.,	)	
	)	
Respondents.	)	

AMICUS BRIEF OF THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF NEITHER PARTY

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STATEMENT OF AMICUS INTEREST

Public Investors Arbitration Bar Association ("PIABA") is a national, not-for-profit, voluntary, public bar association established in 1990, with a membership of approximately 450 attorneys located in 44 states and Puerto Rico. In order to qualify for membership, attorneys must devote a significant portion of their practice to representing investors in disputes with the securities industry. PIABA's mission is to promote the interest of the public investor in securities and commodities arbitration and litigation. Collectively, PIABA members have represented tens of thousands of investors in securities cases around the country.

PIABA publishes books and reports on securities arbitration and litigation, conducts regular CLE programs for its members, and communicates directly with the governmental and quasi-governmental agencies, such as the Securities and Exchange Commission (SEC), the North American Securities Administrators' Association (NASAA), and the Financial Industry Regulatory Authority (FINRA) on issues of interest to PIABA members and public investors.

PIABA has appeared as an *amicus curiae* in cases before the United States Supreme Court, federal Circuit Courts of Appeal, and state supreme courts involving issues of importance to public investors' claims against the securities industry. PIABA's interest in the present case stems from its commitment to protecting the public from schemes to defraud investors.

SUPREME COURT RULE OF PRACTICE 16.06

PIABA files this amicus brief pursuant to Supreme Court Rule of Practice 16.06. As this brief does not expressly support the position of either party, pursuant to Rule 16.06(B)(3), this brief is being filed within the time for filing allowed for the appellees/respondents' merit brief.

ARGUMENT

CERTIFIED QUESTION: Does Ohio Rev. Code § 1707.43 impose joint and several liability on a person who, acting as the custodian of a self-directed IRA, purchased – on behalf and at the direction of the owner of the self-directed IRA – illegal securities?

In its certification order, the Sixth Circuit appears to be asking this Court to make a universal determination as to whether, under R.C. 1707.43, a self-directed IRA custodian acting at the behest of a purchaser falls within scope of the statute's prohibitions where the purchased securities are illegal.

Petitioners ask this Court to answer the certified question in the affirmative – yes, R.C. 1707.43 always imposes liability on a self-directed IRA custodian who purchases illegal securities on behalf of and at the direction of the owner because such activities necessarily constitute participation in or aiding the seller in the sale.

On the other hand, Respondents, amicus presumes, will ask this Court to answer the certified question in the negative – R.C. 1707.43 never imposes such liability because a self-directed IRA custodian acting at the behest of a purchaser by definition is not participating in the sale or aiding the seller in the sale.

As amicus curiae, PIABA takes no position on whether there is blanket liability on a self-directed IRA custodian under the statute, as advanced by Petitioners.[1] On the other hand, PIABA explicitly asks the Court to reject the interpretation of the statute offered by Respondents, as that interpretation goes far beyond what appears to be the intent of the

[1] While on the one hand, the text of the statute is incredibly broad in its use of the phrase "participating or aiding the seller 'in any way,'" on the other hand, it appears unlikely that the legislature intended innocent commercial actors engaged in normal commercial activities who have no knowledge of the sale's illegality to be within the class of persons who are liable under the statute. *Wells Fargo Bank v. Smith*, No. CA2012-04-006, 2013-Ohio-855 at ¶ 29 (Ohio Ct. App. Mar. 11, 2013).

legislature in enacting the statute, *i.e.*, to impose liability on persons participating in or aiding the seller in the sale of illegal securities. Instead, PIABA believes at a minimum that the statute is clear that a self-directed IRA custodian can be held liable if its conduct goes beyond the traditional role of passive custodian. Whether a self-directed IRA custodian can be liable for "participat[ing] or aid[ing] the seller in any way" under R.C. 1707.43 depends entirely on whether the custodian actually "participated or aided the seller." Stated differently, even if a self-directed IRA custodian is not liable under the statute simply by virtue of having executed a purchase at the direction of the customer, a self-directed IRA custodian nevertheless can be liable where its conduct goes beyond the "normal commercial activity" of a custodian. *Wells Fargo Bank v. Smith*, No. CA2012-04-006, 2013-Ohio-855 at ¶ 29 (Ohio Ct. App. Mar. 11, 2013).

Thus, it is PIABA's position that, at a minimum, the certified question should be answered: "Yes, provided that the self-directed IRA custodian engages in conduct going beyond the 'normal commercial activity' of a custodian."

Here's why. Suppose Bernie Madoff approaches a self-directed IRA company and states, "I am running a massive Ponzi scheme but in order to make it work, I need to scam investors into funneling money into my Ponzi scheme through their self-directed IRA accounts. I'm going to be referring a bunch of business to you from investors that I am defrauding into dumping money into my Ponzi scheme – so when those investors call to instruct you to invest their money in my scheme, please just execute their transactions as quickly as possible and do not warn them. And please also pass along to all of your customers these materials that make my Ponzi scheme look like a legitimate investment." If the IRA custodian goes along with the Madoff's plan, there can be no valid basis for absolving it from liability for participating or aiding the seller in the illegal

sales under the Ohio Securities Act. To hold otherwise would be essentially to grant self-directed IRA custodians blanket immunity under the Act, irrespective of their actual aid or participating with the seller in the unlawful sale.

Holding that IRA custodians have blanket immunity would be particularly invidious because of the significant role played by self-directed IRA custodians in the marketplace. Self-directed IRA companies, by their very nature, are members of the security industry that are most susceptible to involvement in schemes to defraud investors. Self-directed IRA companies specialize in unconventional investment vehicles – the very type of investment vehicles most often utilized by fraudsters and scam artists.[2] Again, PIABA takes no position on whether, when those self-directed IRA companies restrict their conduct to the traditional role of passive investment custodian, they should be held liable under the Ohio Securities Act. But when they actively participate in or aid a seller in a scheme that defrauds investors, their illegal conduct undoubtedly constitutes exactly what the Ohio Securities Act was designed to prevent, and there is no basis in law or logic to exempt self-directed IRA custodians from liability where the facts establish that their conduct has exceeded the ministerial role of a passive custodian and instead participate or aid the seller in a fraudulent scheme.

Put another way, answering "no" to the certified question would improperly presume that self-directed IRA custodians **always** limit their conduct to passive execution of customer requests. Just as it is improper to presume that police officers never use excessive force simply by virtue of the fact that they are police officers, or that doctors never breach the standard of care

[2] *See, e.g.*, SEC Investor Alert: Self-Directed IRAs and the Risk of Fraud, available at https://www.sec.gov/investor/alerts/sdira.pdf ("In particular, fraud promoters who want to engage in Ponzi schemes or other fraudulent conduct may exploit self-directed IRAs because they permit investors to hold unregistered securities and the custodians or trustees of these accounts likely have not investigated the securities or the background of the promoter. There are a number of ways that fraud promoters may use these weaknesses and misperceptions to perpetrate a fraud on unsuspecting investors.").

simply by virtue of the fact that they are doctors, it is improper to presume that self-directed IRA custodians never participate or aid in the sale of unlawful securities simply because they are self-directed IRA custodians.

Further, granting self-directed IRA custodians blanket immunity would be directly contrary to the plain language of the statute. If the General Assembly wanted to exempt self-directed IRA custodians from liability under the Ohio Securities Act, they surely could have done so. But they did not.[3] And this court should not rewrite the statute to provide an exemption where none was written. Rather, the General Assembly enacted a statute that holds jointly and severally liable "*every person* that has participated in or aided the seller in any way" in the sale of the illegal security. R.C. 1707.43. It would be the height of judicial activism for this Court to write into the statute an exception that the General Assembly did not see fit to enact.

Indeed, Ohio courts have long recognized the expansive breadth of the "participate or aid in any way" language found in R.C. 1707.43. For instance, in *Hild v. Woodcrest*, 59 Ohio Misc. 13 (Montgomery County Common Pleas 1977), the accounting firm retained by the developed financial and investment information and prepared a memorandum for the purpose of attracting potential investors. The accounting firm also contacted its own clients, including the plaintiff, who were interested in making this type of investment. The court, relying on case law from other states where "participating" and "aiding" had been interpreted as implying some activity in inducing the purchaser to invest, found that the accounting firm had participated in the sales to the plaintiff to an extent well within the liberal language of R.C. 1707.43.

[3] Indeed, the Ohio Securities Act contains a series of carve-outs, such as for attorneys, accountants, or engineers whose involvement was incidental to their profession. R.C. 1707.431(A). The General Assembly did not carve out self-directed IRA custodians.

Corporate Partners, L.P. v. Natl. Westminster Bank PLC (7th Dist. 1998), 126 Ohio App. 3d 516, involved the illegal sale of PharMor stock. Defendant NatWest prepared the private placement memorandum for PharMor. The Court of Appeals held that preparing a private placement memorandum, which was distributed to prospective investors, may subject NatWest to liability under R.C. 1707.43. *Id*. at 524. *See also Federated Mgmt. Co. v. Coopers & Lybrand*, 137 Ohio App.3d 366,393 (10th Dist. 2000) (conceiving, organizing and directly participating in the underwriting of the offering could be considered aiding the seller in any way); *Boland v. Hammond*, 144 Ohio App. 3d 89 (4th Dist. 2001) (relaying the proposed terms of the sales, arranging and attending meetings between plaintiffs and the seller, and collecting money for the investments, constituted participating in and aiding in the sales of the illegal securities); *Johnson v. Church of the Open Door*, 179 Ohio App. 3d 532, 541 (9th Dist. 2008) (telling Plaintiffs about the investment program and arranging a meeting with the sellers could constitute participating or aiding in the sale).

Federal courts in Ohio have likewise held that "participating or aiding in any way" under the Ohio Securities Act includes a broad swath of behavior. *See, e.g.*, *Riedel v. Acutote of Colorado*, 773 F. Supp. 1055, 1067-68 (S.D. Ohio 1991) (providing financial projections and marketing activities constituted "participating or aiding" in the sale of unregistered securities); *McNamara v. Hurtz Maj. Fin. Servs. Corp.*, 2006 U.S. Dist. LEXIS 49592, 10 (S.D. Ohio July 20, 2006) (signing joint venture agreement constituted participating or aiding in the sale, as did making representations regarding the value of the investment and the mechanism for repayment); *In re Nat'l Century Fin. Enters.*, 580 F. Supp. 2d 630, 649-650 (S.D. Ohio 2008) (holding that Moody's, the ratings agency, could be liable under R.C. 1707.43 by virtue of the fact that its ratings of the securities at issue helped induce the plaintiff's purchase); *Escue v. Sequent, Inc.*,

2010 U.S. Dist. LEXIS 87043, *41 (S.D. Ohio August 24, 2010) (the allegation that the defendants approved merger agreement, which was a precondition for merger going forward, was sufficient to allege that the defendants "participated in or aided the seller in any way" for purposes of liability under §1707.43(A)); *Pullins v. Klimley*, 2008 U.S. Dist. LEXIS 3467, 112-114 (S.D. Ohio Jan. 7, 2008) (making misstatements and/or material omissions regarding the financial health of company which induced plaintiffs to continue to hold securities was sufficient to constitute "participating or aiding in any way").

In sum, whatever the Court's view may be on the "strict liability" question of whether a self-directed IRA custodian is always liable for executing the purchase of an illegal security, its decision must make clear that where the facts of a given case demonstrate that a self-directed IRA custodian's conduct goes beyond the role of a passive custodian, the custodian may be held liable for "participating or aiding in any way" under the Ohio Securities Act.

CONCLUSION

In answering the certified question, this Court should be wary not to announce too broad a principle. Regardless of whether a self-directed IRA custodian is *necessarily* liable under R.C. 1707.43, this Court should make clear that a self-directed IRA custodian *may be* liable under R.C. 1707.43, at least when its conduct extends beyond the role of passive custodian.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *amicus* brief was served on the following counsel, by ordinary U.S. mail, postage prepaid, this 27th day of March, 2018:

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