02-56016, 02-56052

UNITED STATES COURT OF APPEALS
FOR THE
NINTH CIRCUIT

HERBERT COUTEE and LORINE COUTEE,
Appellees, Cross Appellants and Petitioners Below

vs.

BARINGTON CAPITAL GROUP, L.P., MORTON GERALD GROPPER, BRUCE ADAM GROPPER, JAMES ANTHONY MITAROTONDA, JEROME SNYDER and JOHN TELFER,
Appellants, Cross Appellees and Respondents Below.

On Appeal From The United States District Court
For The Central District of California, Case No. 02-09953 GHK

MOTION BY THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION ("PIABA") FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES; AND BRIEF FOR AMICUS CURIAE IN SUPPORT OF APPELLEES FOR REVERSAL IN PART AND AFFIRMANCE IN PART

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, amicus curiae Public Investors Arbitration Bar Association is a not-for-profit corporation and does not have any parent entities and there are no publicly held companies that own ten percent or more of its stock.

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES AND CROSS-APPELLANTS HERBERT AND LORINE COUTEE; AND STATEMENT OF INTEREST

The Public Investors Arbitration Bar Association, Inc., through its undersigned counsel, hereby respectfully files this Motion for Leave to File Amicus Curiae Brief In Support of Appellees and Cross-Appellants Herbert and Lorine Coutee, pursuant to Federal Rules of Appellate Procedure 29, and as grounds states as follows:

The Public Investors Arbitration Bar Association, Inc. ("PIABA") is a not-for-profit corporation, with more than 500 members from forty states and Puerto Rico, all of who devote a significant portion of their practice to the arbitration of securities disputes, and all of whom represent public investors in contractual arbitration proceedings. Collectively, PIABA members have represented tens of thousands of public investors in securities arbitrations around the country.

PIABA's official mission is to promote the interests of public investors 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 public investors in securities arbitration.

PIABA seeks to advance the rights of public investors through a variety of activities, including the submission of briefs as amicus curiae. The United States Supreme Court and federal Circuit Courts of Appeal have permitted

PIABA to appear as amicus curiae in cases relating to the interpretation of the arbitration rules of the National Association of Securities Dealers, Inc. ("NASD"), as well as cases involving issues of importance to the arbitration of public investors' claims against stockbrokers.

In addition, PIABA publishes books and reports on securities arbitrations, conducts annual CLE programs for its members, and communicates with governmental and quasi-governmental agencies, such as the Securities and Exchange Commission and the NASD, on issues of interest to PIABA members and public investors.

The present case involves the issue, among others, of whether a securities broker dealer can impose a choice of law clause on its customers in which the law of a distant state is selected and which, if applied to a public investor, would deprive that public investor of rights and remedies afforded them by their home state. In the present case, the NASD arbitrators awarded punitive damages and attorneys' fees to California public investors pursuant to California law in an arbitration claim heard in California. Appellant stockbrokers argue that the public investors had agreed to a contractual choice of law clause specifying that New York law in connection with opening their account with appellants.

The issue of whether stockbrokers can require their public customers to waive rights and remedies that their home state law provides them has been raised in hundreds of securities arbitration cases in which PIABA members represent public customers. This Court's decision on this issue will thus

have an impact on numerous arbitrations. This Court should therefore permit PIABA to appear on behalf of its members and their public customer clients who presently do not have any direct representation in this matter.

Counsel for appellees Herbert and Lorine Coutee has ably presented the case for affirming the district court's decision insofar as it confirmed the underlying arbitration award, and reversing the district court's judgment insofar as it vacated the underlying arbitration award, from their client's perspective. PIABA asks for leave to provide an additional perspective from a broader viewpoint of public investors and consumers. PIABA has reviewed the briefs of the parties and believes that other authorities and arguments support appellees' position. PIABA therefore asks for leave to file an amicus brief pursuant to FRAP 29 to present the points and authorities as set forth in the accompanying amicus brief, on behalf of public investors.

WHEREFORE, PIABA respectfully requests this Court to grant this motion.

Dated: December 16, 2002

Timothy A. Canning
Attorney for Amicus Curiae PIABA

AMICUS CURIAE'S BRIEF

ARGUMENT

Public investors, as well as other consumers, are entitled to the rights and remedies afforded them by the laws of their home state. The availability of punitive damages, attorneys' fees, and other remedies reflect fundamental policy decisions by the state to protect its citizens. Securities brokers should not and indeed are not permitted to deprive public investors of the protections of their state's investor protection and consumer protection laws by imposing choice of law clauses on their customers.

I

IN CLAIMS AGAINST STOCKBROKERS, CALIFORNIA PUBLIC INVESTORS ARE ENTITLED TO THE RIGHTS AND REMEDIES PROVIDED BY CALIFORNIA LAW

State law plays a crucial role in regulating securities transactions and providing remedies to its citizens when they are abused or taken advantage of by securities brokers, sellers or purchasers, just as the states protect their citizens from other consumer fraud. *See, e.g., Hall v. Superior Court (Imperial Petroleum)* 150 Cal.App.3d 411, 197 Cal.Rptr. 757 (1983) (observing that California's Corporations Code is the cornerstone reflecting "California's policy is to protect the public from fraud and deception in securities transactions . . . ."); and *see generally, Yu v. Signet Bank,* 69 Cal.App.4th 1377, 82 Cal.Rptr. 2d 304 (1999) (California has the right to protect its consumers from conduct it deems unlawful,

even though that conduct may be lawful in other states). The importance of state involvement in securities transactions is reflected, for example, in the ongoing investigations into analyst conflict of interest cases that were instituted by state regulators, and not federal regulators. Congress has often recognized the importance of state law in securities regulation, as reflected, for example, in the way Congress carefully limited any preemptive effect of the federal securities laws.

California has expressed an important policy interest in protecting its senior citizens from financial abuse. California Elder Abuse and Dependent Adult Civil Protection Act ("Elder Abuse Act"), Welfare & Inst. Code §§ 15600 et seq. Financial abuse occurs when a "person ... who stands in a position of trust to, an elder ... takes, secretes, or appropriates their money or property, to any wrongful use, or with the intent to defraud." §15610.30(a)(1). The California legislature found a pressing need for the Act's protections: "Annually, 225,000 incidents of adult abuse occur in California.... Twenty-three percent of the incidents involve physical abuse, **32 percent involve fiduciary abuse**, 22 percent involve mental suffering, and 3.8 percent involve sexual abuse." Stats. 1998, c.946 (S.B.2199), §1(a) (emphasis added). The Legislature found a need for providing attorney fees to plaintiffs because "infirm elderly persons ... are a disadvantaged class, ... few civil cases are brought in connection with this abuse", and added § 15657 expressly "to enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults." § 15600(h) & (j), Stats. 1991, ch.

774, § 2.

The case now before this Court implicates two important rights and protections that California provides its citizens: first, the availability of punitive damages, designed to punish and deter others from engaging in similar misconduct against other California residents; and second, the availability of attorneys' fees to elder victims of financial abuse, designed to encourage attorneys to take up their cause as well as ensure that the elder victims receive full compensation for the harm they suffered.

Stockbrokers should not be able to escape the investor protection laws or consumer protection laws of their customer's home state by imposing choice of law clauses. If choice of law clauses are enforced against public investors, the laws in those states which choose to offer more protection to their citizens will be rendered meaningless – for the stockbrokers will, of course, utilize a choice of law clause that imposes the law of the state which offers the least protection to the public investor. Cary S. Lapidus, *Should Arbitrators Apply New York Law In Face Of A New York Choice-of-Law Provision, in* 1 SECURITIES ARBITRATION 1996 77, 80 (Practising Law Institute 1996).

> It would be a substantial blow to the protection of members of the California investing public if a defrauding [stockbroker] defendant were allowed to eliminate rights and protections and remedies available under California law, merely by including a New York choice-of-law clause in a customer agreement.

Id. at 85.

In the present case, a panel of NASD arbitrators awarded California

public customers (appellees Herbert and Lorine Coutee) punitive damages and attorneys' fees under California law, as well as compensatory damages, arising out of securities fraud committed by appellants. Appellants contend, among other things, that in doing so the arbitrators manifestly disregarded the law because a purported "choice of law" clause (entered into between another brokerage firm and appellees) specified that New York law would apply, and (according to appellees) New York law would not permit the imposition of punitive damages or an award of attorneys' fees.

As a matter of policy, such clauses should not be enforced where they deprive public investors of the protection of their state's securities laws or consumer protection laws, as appellants attempt to do here.

II

AS MEMBERS OF THE NASD, APPELLANTS WERE PROHIBITED FROM USING THE CHOICE OF LAW CLAUSE TO DEPRIVE APPELLEES OF THEIR STATE LAW REMEDIES

The Securities and Exchange Commission and the National Association of Securities Dealers have recognized the fundamental unfairness of choice of law clauses imposed by stockbrokers against their public customers. Appellants are members or persons associated with members of the NASD. The NASD (with the SEC's approval) enacted rules that prohibited NASD member firms – such as appellants -- from seeking to enforce choice of law provisions that limit the remedies available to public customers in NASD arbitrations. NASD

Conduct Rule 3110(f)(4) provides:

> No agreement shall include any condition that limits or contradicts the rules of any self-regulatory organization or limits the ability of a party to file any claim in arbitration **or limits the ability of the arbitrators to make any award.**

NASD Manual, Rule 3110(f)(4) (emphasis added). As the NASD itself explained in its Notice to Members 95-16 (1995):

> Some customer agreements attempt to directly limit the ability of a customer to file a claim or to limit the authority of the arbitrators to make an award, including an award of punitive damages. Others attempt to do so indirectly by the use of a so-called "governing law clause." For example, **certain customer agreements simply state that New York law will govern any dispute in arbitration, but do not disclose that New York law prohibits an award of punitive damages in arbitration.** Where the governing law clause is used to limit an award, it violates Section 21(f) of the NASD Rules of Fair Practice [now NASD rule 3110(f)].

NASD Notice to Members 95-16 (1995) (emphasis added).

The NASD rule prohibiting NASD members from using choice of law clauses in the manner proposed by appellants is binding on appellants in the underlying arbitration. The Uniform Submission Agreement signed by appellants and appellees when the underlying arbitration was commenced incorporated all the NASD rules, and required appellants and appellees to be bound by those rules.

The binding effect of the NASD rules in arbitrations was recently acknowledged by the United States Supreme Court in *Howsam v. Dean Witter*, 537 U.S. ___, ___S.Ct. ___, 2002 WL 31746742 (12/10/02). The Court there stated:

> Howsam's execution of a Uniform Submission Agreement

> with the NASD in 1997 effectively incorporated the NASD Code into the parties [arbitration] agreement.

Id. at __, 2002 WL 317467 at p. 5 (holding that the interpretation of a time-bar rule in the NASD Code of Arbitration Procedure was for the arbitrators to decide, not the courts).

The NASD considers this principle to be of such importance that it sanctioned securities broker Bear Stearns for asserting a choice of law clause against a public customer in NASD arbitration, where that choice of law clause would restrict the customers' right to a particular remedy. See, e.g., NASD Disciplinary Actions Reported for December 1998, (http://www. nasdr.com/ 3050_9812.htm) in which Bear Stearns was fined because it had asserted in an NASD arbitration that the customer could not be awarded punitive damages because of a New York choice of law clause in the customer agreement.

In light of the NASD's express prohibition on its members from using choice of law clause in the manner in which appellees here attempt to use it, the arbitrators did not manifestly disregarded the law in refusing to apply the choice of law clause in awarding appellees the remedies of punitive damages and attorneys' fees.

III

THE NEW YORK CHOICE OF LAW CLAUSE IS CONTRARY TO CALIFORNIA'S FUNDAMENTAL PUBLIC POLICIES

California has a strong fundamental policy to protect its citizens from oppressive, fraudulent or malicious acts, and to protect its elderly citizens

from financial abuse. The former fundamental policy finds its expression in California Civil Code section 3294, which permits the imposition of punitive damages. The latter fundamental policy is expressed in California Welfare & Institutions Code section 15657, which permits an award of attorneys' fees to an elderly person or a disabled adult who was a victim of financial or physical abuse.

California's fundamental policy protecting elders is expressed in Welfare & Inst. Code § 15657, which requires an award of attorneys' fees to an elderly person or a disabled adult who was a victim of financial or physical abuse. The fundamental policy favoring punitive damages is expressed in Civil Code § 3294 and Welfare & Inst. Code § 15657.

The Elder Abuse Act protections in this case were enacted for the public welfare. They cannot be waived by a private contract. Cal. Civil Code § 3513 ("...a law established for a public reason cannot be contravened by a private agreement"). To the extent that a contractual choice of law could extinguish those protections, it is void. *See County of Riverside v. Superior Court*, 27 Cal.4th 793, 804, 42 P.3d 1034, 1042, 118 Cal.Rptr.2d 167, 176 (2002) (quoting Civil Code § 3513). Otherwise, a broker-dealer's adhesionary contract could disenfranchise the legislatures of 49 states by referring to the law of a 50th, and render a nullity each state's important laws enacted for the protection of its citizens.

A choice of law clause will not be enforced where it conflicts with fundamental policies of the forum state, and where the forum state' interests would be more seriously impaired. See, e.g., *Haisten v. Grass Valley Medical*

Reimbursement Fund, Ltd., 784 F.2d 1392, 1402-03 (9th Cir. 1986) (refusing to enforce a choice of law provision in an insurance contract because strong public policy required the application of California law); *Nedlloyd Lines B.V. v. Superior Court*, 3 Cal.4th 459, 466, 11 Cal.Rptr. 330 (1992) (applying a similar test under Restatement (Second) Conflicts of Law §187, but holding that a choice of law clause in a contract between two sophisticated commercial entities should be enforced); and see *Restatement (Second) Conflicts of Law*, § 187 cmt. B (1971) (in a contract of adhesion, the forum state should refuse to apply a choice of law provision if to apply it would result in substantial injustice).

The purpose behind punitive damages is to punish the defendant and deter future misconduct by others through making an example of the defendant. Cal. Civ. Code § 3294; see *PPG Industries v. Transamerica Ins. Co.*, 20 Cal.4th 310, 317, 84 Cal.Rptr.2d 455 (1999); and *Yu v. Signet Bank*, 69 Cal.App.4th 1377, 82 Cal.Rptr. 2d 304 (1999) (holding in part that California may protect its own consumers and punish the conduct of an out-of-state defendant by imposing punitive damages if the conduct has an impact on California consumers regardless of whether the conduct might be lawful elsewhere, relying on *BMW of North America, Inc. v. Gore* (1996) 517 U.S. 559, 116 S.Ct. 1589).

Under California's Elder Abuse Act, attorneys' fees are recoverable where a defendant has been found liable for, among other things, acting with recklessness, oppression, fraud or malice in the commission of fiduciary abuse of an elder. Cal. Welfare & Inst. Code § 15657. As stated by the California

legislature, the purpose behind such an award is to "enable interested persons to engage attorneys to take up the cause of abused elderly persons and dependent adults." Cal. Welfare & Inst. Code §15600(j). The purpose of this Act is to protect a particularly vulnerable portion of the population from gross mistreatment in the form of abuse. *Delaney v. Baker,* 20 Cal.4th 23, 82 Cal.Rptr. 610 (1999).

California has a fundamental public policy interest in making punitive damages and attorneys' fees available to elders who suffer financial abuse at the hands of another. As one commentator has observed:

> For non-residents of New York with claims against brokers, it is often the case that the laws of their own states provide more favorable protection to them under a variety of legal theories. . . . Many of these Blue Sky laws and other related statutes, such as consumer protection or elder abuse acts, are also more advantageous to the investor in the remedies provided, such as by allowing attorneys' fees, punitive damages, rescission or realistic prejudgment interest rates as part of the recoverable damages.

Cary S. Lapidus, *supra,* at 80.

Here, the arbitrators found that appellees were entitled to the remedies provided by California law to California residents, regardless of the presence of a choice of law clause specifying New York law. Their award should be confirmed.

IV

ENFORCING THE NEW YORK CHOICE OF LAW CLAUSE AGAINST CALIFORNIA PUBLIC CUSTOMERS WOULD RESULT IN SUBSTANTIAL INJUSTICE BY DEPRIVING THEM OF REMEDIES OTHERWISE AVAILABLE TO CALIFORNIA CITIZENS

A choice of law clause will not be enforced where it is a contract of adhesion and if its application would result in substantial injustice to the party as to whom the contract was one of adhesion. Restatement (Second), Conflicts of Law § 187 cmt (b). Here, the panel of arbitrators could have found that the contract containing the choice of law clause was one of adhesion to appellees. For example, the statement of claim alleges that the Coutees' brokers would help them fill out the brokerage account forms; that the Coutees had virtually no investment experience and did not understand the account statements; and that there was a fiduciary relationship between the Coutees and appellants. Respondents' Excerpts of the Record ("RER"), pp. 9 –12. The contract on which appellants rely in asserting New York choice of law is itself a standardized form agreement, drafted by appellants' clearing firm. RER p. 18.

A contract of adhesion is one that is a "standardized contract, which, imposed and drafted by the party of superior bargaining strength, relegates to the subscribing party only the opportunity to adhere to the contract or reject it." *Graham v. Scissor-Tail, Inc.* 28 Cal.3d 807, 817, 171 Cal.Rptr. 604 (1981) (citations and internal quotation marks omitted). A contract of adhesion will not

be enforced where it does not fall within the expectations of the weaker or adhering party, or where it is unduly oppressive or unconscionable. *Id.* at 820.

The arbitrators could well have concluded that the choice of law clause was part of a contract of adhesion. As interpreted by appellants, the choice of law clause would cause a substantial injustice, as it would have interfered with the Coutees' ability to recover punitive damages and their right to recover attorneys' fees under California's Elder Abuse Act. See also, *Brenner v. Oppenheimer*, 44 P.3d 364 (Kan. 2001) (refusing to enforce a New York choice of law clause in a securities arbitration where doing so would be contrary to the forum state's settled public policy).

Barnes v. Logan, 122 F.3d 820 (9th Cir. 1997) does not stand for a contrary proposition. In that case, this Court held only that any error committed by an NASD arbitration panel in awarding punitive damages to an investor "pursuant to Section 3294 of the California Civil Code and pursuant to *Mastrobuono [v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S.Ct. 1212 (1995)]" was harmless even though a choice of law clause specified Minnesota law. *Id.* at 823-24. This Court did not address whether the choice of law clause at issue there was enforceable in the first place; *i.e.*, whether the law of the forum state (i.e., California) reflected a fundamental public policy that should govern over the choice of law clause between the parties.

Here, in contrast, the choice of law clause on which appellees rely is contrary to two fundamental policies of California law, which California has a

significant interest in enforcing: the imposition of punitive damages, to protect its investors from similar misconduct in the future, and the award of attorneys' fees to encourage the protection of California residents. Where New York choice of law clauses conflict with fundamental California policy, even courts sitting in New York have refused to vacate an arbitration award where the arbitrators disregarded a New York choice of law clause. *SG Cowan Securities Corp. v. Messih,* 224 F.3d 79, 81 (2nd Cir. 2000) (affirming the district court's opinion, as reported at 2000 WL 633434 (S.D.N.Y. 2000); see generally *Sanders v. Gardner*, 7 F.Supp.2d 151 (S.D.N.Y. 1998), *Shamah v. Schweiger,* 21 F.Supp.2d 208, 216 (E.D.N.Y. 1998), and *Porush v. Lemire,* 6 F.Supp.2d 178 (E.D.N.Y. 1998), and cases cited therein.

As a result, the arbitrators in this case did not manifestly disregard the law in refusing to apply the New York choice of law clause to deprive the Coutees of an award of punitive damages and attorneys' fees. The award should therefore have been confirmed in its entirety.

CONCLUSION

State laws designed to protect investors and consumers which reflect a fundamental policy of that state should not and cannot be trumped by a contractual choice of law clause, particularly where the parties to such a clause are not in an equal bargaining position. Here, the arbitrators correctly ruled that the New York choice of law clause did not deprive the Coutees of their statutory and tort remedies as provided for by California law. The district court's judgment should be affirmed to the extent it confirmed the award, and should be reversed to

the extent it vacated the arbitrators' award.

Respectfully submitted,

Dated: December 16, 2002

Timothy A. Canning
Attorney for Amicus Curiae
Public Investors Arbitration Bar Association

CERTIFICATION OF WORD COUNT

I, Timothy A. Canning, certify that the foregoing Brief of Amicus Curiae contains 3,918 words, and therefore within the word limitation prescribed by Rule 32(a)(7)(B) and Rule 29(d) of the Federal Rules of Appellate Procedure.

I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 16, 2002

Timothy A. Canning

PROOF OF SERVICE

I declare as follows:

I am over the age of 18 years and not a party to this action. My business address in the county where the service described below took place is 350 E Street, Suite 201, Eureka, California 95501.

On December 16, 2002, I served two copies of the foregoing document entitled, MOTION BY THE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION ("PIABA") FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF APPELLEES; AND BRIEF FOR AMICUS CURIAE IN SUPPORT OF APPELLEES FOR REVERSAL IN PART AND AFFIRMANCE IN PART on counsel for appellants and counsel for appellees, by depositing said copies in the mail at Eureka, California, in sealed envelopes, with first class postage prepaid, addressed to:

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I declare under the penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Dated: December 16, 2002

_____

Timothy A. Canning