IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DELUTHA H. KING et al.,

Plaintiffs-Appellants,

Case No. 21-13737-JJ

v.

KOVACK SECURITIES, INC. and BRIAN KOVACK

Defendants-Appellees

MOTION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF URGING REVERSAL

The Public Investors Advocate Bar Association ("PIABA") respectfully moves for leave to file a Brief as *Amicus Curiae* in support of Appellants Urging Reversal. PIABA submits its proposed Brief with this Motion.

I. IDENTITY AND INTEREST OF PIABA

PIABA is an international organization of attorneys who advocate on behalf of savers, investors, and retirees in disputes with their financial professionals. PIABA works to protect public investors from abuses in the arbitration process and to create a level playing field for public investors in securities and commodities arbitration and litigation. PIABA has appeared as an amicus curiae before the United States Supreme Court, Federal Circuit Courts of Appeal, and state supreme

courts throughout the nation in cases involving issues important to public investors.

II. CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that the following persons have an interest in the outcome of this case and were not included in the Certificates of Interested Persons of the previously filed briefs or motions.

1. Public Investors Advocate Bar Association ("PIABA").

Public Investors Advocate Bar Association is a non-profit. It has no parent corporation. No publicly held corporation owns 10% or more of its stock.

III. PIABA'S FAMILIARITY WITH ISSUES AND SCOPE OF PARTIES' ARGUMENTS

PIABA and its counsel are familiar with the District Court's dismissal of Appellants' claims and the arguments of the parties.

IV. ISSUES TO WHICH *AMICUS* BRIEF WILL BE DIRECTED

PIABA's *amicus* brief will demonstrate that the trial court committed reversible error by ruling that a brokerage firm's customers, customer lists, and anticipated commissions from those customers are not assets owned by the firm that can be the subject of a fraudulent transfer action. PIABA's brief explains why this conclusion is contrary to the holdings of courts in Georgia and nationwide, as well as to financial industry standards and practices.

V. ALL PARTIES DID NOT CONSENT

Under Federal Rule of Appellate Procedure 29(a), an *amicus curiae* other than the government may file a brief only with leave of court or when all parties consent. PIABA requests leave of court because all parties have not consented to PIABA filing an *amicus* brief. Specifically, Defendants-Appellees have not consented to PIABA's filing of an amicus brief in this case.

VI. REASONS FOR AND RELEVANCE OF PIABA'S AMICUS CURIAE BRIEF

To fulfill its role as a voice for public investors and customers of broker-dealers, PIABA frequently files amicus briefs in cases that may impact the rights and protections afforded to those persons. PIABA has an interest in this matter because brokerage firms frequently try to evade arbitration awards by transferring their customers to other brokerage firms for no or inadequate consideration, which is what the appellants have alleged occurred in this case. PIABA is concerned that the ruling of the District Court in this matter, if left undisturbed, will permit and, in fact, endorse a road-map of sorts to other broker-dealers facing arbitration awards due to injured investors that will allow them to evade liability for their misconduct. The proposed amicus curiae brief explains that allowing member firms to avoid their liabilities to its own customers in this manner will deprive many public customers of the ability to receive their due compensation when there has

already been an affirmative finding that the member firm has violated the law and damaged its customer.

CONCLUSION

For the foregoing reasons, the Public Investors Advocate Bar Association hereby respectfully requests the Court to grant leave for PIABA to file an amicus curiae brief in support of Plaintiffs-Appellants Urging Reversal.

Dated: June 7, 2022.

Respectfully submitted,

PAGE PERRY
1493 LaVista Road NE
Atlanta, Georgia 30324
(404) 567-4400 Telephone
(404) 334-7213 Facsimile
aperry@pageperry.com

By: */s/ Alan R. Perry, Jr.*
ALAN R. PERRY, JR.
State Bar No. 572508

Counsel for Public Investors Advocate Bar Association

CERTIFICATE OF COMPLIANCE

This Motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2). This Motion contains 586 words.

This motion complies with requirements of Federal Rule of Appellate Procedure 32(a)(5) & (6). This motion was prepared in a proportionally spaced typeface using Microsoft Word in fourteen (14) point Times New Roman font.

Signed on June 7, 2022.

/s/ Alan R. Perry, Jr.
ALAN R. PERRY, JR.

(6 of 32)

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2022, a true and correct copy of the above and foregoing has been served by ☒**CM/ECF;** ☐**overnight delivery;** ☐**United States first class mail;** ☐**facsimile transmission;** and/or ☐**hand delivery** on the following:

David J. Hungeling
Adam S. Rubenfield
HUNGELING RUBENFIELD LAW
1718 Peachtree Street, Ste. 599
Atlanta, Georgia 30309
COUNSEL FOR APPELLANTS

G. Wayne Hillis, Jr., Esq.
Justin Gunter, Esq.
PARKER, HUDSON, RANIER & DOBBS, LLP
303 Peachtree Street NE, Ste. 3600
Atlanta, Georgia 30308
COUNSEL FOR APPELLEES

/s/ Alan R. Perry, Jr.
ALAN R. PERRY, JR.

No. 21-13737-JJ

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DELUTHA H. KING, as the Executor of the Estate of Cecil C. Keck, RONALD H. LOVING, individually and as Executor of the Estates of Delutha H. King and Lois W. King and as Successor Administrator of the Estate of Mabel W. Keck, and KRISTIE L. TAYLOR,

Appellants/Plaintiffs,

vs.

KOVACK SECURITIES, INC. and BRIAN KOVACK,

Appellees/Defendants.

Appeal from the United States District Court for the Northern District of Georgia
Case No. 1:18-cv-04079-SCJ - The Honorable Steve C. Jones

BRIEF OF *AMICUS CURIAE* PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION SUPPORTING APPELLANTS URGING REVERSAL

Alan R. Perry, Jr.
State Bar No. 572508
aperry@pageperry.com
PAGE PERRY
1493 LaVista Road NE
Atlanta GA 30324
Telephone: (404) 567-4400

Counsel for Public Investors Advocate Bar Association

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

The undersigned counsel certifies that the following persons have an interest in the outcome of this case and were not included in the Certificates of Interested Persons of the previously filed briefs.

1. Public Investors Advocate Bar Association ("PIABA").

Public Investors Advocate Bar Association is a non-profit. It has no parent corporation. No publicly held corporation owns 10% or more of its stock.

Signed on June 7, 2022.

/s/ Alan R. Perry, Jr.
ALAN R. PERRY, JR.

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS iii

TABLE OF AUTHORITIES iv

STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE AND ITS INTEREST IN THE CASE 1

STATEMENT OF ISSUES 4

SUMMARY OF ARGUMENT 4

LEGAL DISCUSSION 6

A. Purpose of Securities Laws and Regulations 6

B. FINRA's Role in the Regulatory Framework 7

C. The Unpaid Arbitration Award Problem 8

D. The Law Supports Appellants' Fraudulent Transfer Claims 11

CONCLUSION 19

TABLE OF AUTHORITIES

Cases

Ariz. Premium Fin. Co. v. Keystone Surplus Lines, 2007 U.S. Dist. LEXIS 111158 (E.D. Penn. Sept. 6, 2007) 17
Charles Schwab & Co. Inc. v. Fin. Indus. Regulatory Auth. Inc., 861 F. Supp. 2d 1063 (N.D. Cal. 2012) 2-3
Deutsche Bank Sec. v. Pruitt, No. 1:11-cv-04434-SCJ, 2012 U.S. Dist. LEXIS 203105 (N.D. Ga. Jan. 4, 2012).................... 13-14
Ernst & Ernst v. Hochfelder, 425 U.S. 185 (1976) 6
In re Williams, 354 B.R. 604 (Bankr. N.D.N.Y. 2006) 15-16
Jevne v. Superior Court, 35 Cal.4th 935 (Cal. 2005) 2
Jones v. Tauber & Balser, P.C., 503 B.R. 162 (N.D. Ga. 2013)....................15
King v. Kovack Sec., No. 1:18-CV-04079-SCJ, 2021 U.S. Dist. LEXIS 212142 (N.D. Ga. Sep. 28, 2021) 3
Marriage of Finby, 222 Cal. App.4th 977 (2013) 11
Mitchell v. Lyons Prof'l Servs., 109 F. Supp. 3d 555 (E.D.N.Y. 2015) 15,16
Moll v. Moll, 187 Misc.2d 770 (N.Y. Sup. Ct. 2001) 11
Morgan Keegan & Co. v. McPoland, 829 F. Supp. 2d 1031 (W.D. Wash. 2011)....7
Morgan Stanley DW, Inc. v. Frisby, 163 F. Supp. 2d 1371(N.D. Ga. 2001) 14-15
Odyssey Reinsurance Co. v. Nagby, 2019 U.S. Dist. LEXIS 111794 (S.D. Cal. Jul. 2, 2019) 16
Niroo v. Niroo, 313 Md. 226 (1988)) 11
Pangburn v. Pangburn, 152 Ariz. 227 (1986) 11
Paul F. Newton & Co. v. Tex. Commerce Bank, 630 F.2d 1111 (5th Cir. 1980)......7
Reiss v. Reiss, 654 So.2d 268 (Fla. Dist. Ct. App. 1995) 11
S.P. Richards Co. v. Hyde Park Paper CO., 2015 U.S. Dist. LEXIS 98321 (M.D. Fla. Jul. 28, 2015) 15
Schwartz v. Concordia Int'l Corp., 255 F. Supp. 3d 380 (E.D.N.Y. 2017)...............6
SEC v. W. J. Howey Co., 328 U.S. 293, 66 S. Ct. 1100 (1946)....................8
United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975) 7
United States v. Wittig, 575 F.3d 1085 (10th Cir. 2009) 7
West v. Hsu (In re Advanced Modular Power Sys.), 413 B.R. 643 (Bankr. S.D. Tex. 2009) 16

Statutes

15 U.S.C. § 78d 6
15 U.S.C. § 78o(b)(8)..8
O.C.G.A. § 18-2-70..11

Other Authorities

FINRA, *Discussion Paper- FINRA Perspectives on Customer Recovery* (Feb. 8, 2018) 9, 10, 12
FINRA, *Statistics on Unpaid Customer Awards in FINRA Arbitration Report*......10
NASAA Press Release, May 20, 2022 10
PIABA, *REPORT: Unpaid Arbitration Awards A Problem The Industry Created – A Problem The Industry Must Fix* (Feb. 25, 2016)..9
PIABA, Unpaid Arbitration Awards, The Case For An Investor Recovery Pool (March 7, 2018) 9
Press Release, FINRA, NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority (July 30, 2007) 8
Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission, 115 Cong. (2019), https://www.congress.gov/115/chrg/CHRG-115shrg28854/CHRG-115shrg28854.pdf 6
Why Buy a Book of Business?, SPRINGTREE GROUP (May 18, 2017), https://www.springtreegroup.biz/buy-book-business/..12

Rules

Fed. R. App. P. 29(a)(4)(E)...1

STATEMENT OF THE IDENTITY OF THE AMICUS CURIAE AND ITS INTEREST IN THE CASE

Public Investors Advocate Bar Association ("PIABA") submits this Brief as an Amicus in support of the Appellants.

PIABA is an international organization of attorneys who advocate on behalf of savers, investors, and retirees in disputes with their financial professionals. PIABA works to protect public investors from abuses in the arbitration process and to create a level playing field for public investors in securities and commodities arbitration. PIABA has appeared as an amicus curiae before the United States Supreme Court, Federal Circuit Courts of Appeal, and state supreme courts throughout the nation in cases involving issues important to public investors.

Pursuant to Fed. R. App. P. 29(a)(4)(E), PIABA states that (i) neither party's counsel authored this Brief in whole or in part; (ii) neither a party nor a party's counsel contributed money that was intended to fund preparing or submitting this Brief; and (iii) no person—other than the Amicus Curiae, its members, or its counsel—contributed money that was intended to fund preparing or submitting this Brief.

The District Court in this case ruled that a brokerage firm's customers, customer lists, and anticipated commissions from those customers are not assets owned by the firm which can be the subject of a fraudulent transfer action. PIABA

is filing this Amicus brief because the order of the District Court, if left to stand, will aid bad actors in the securities industry by codifying an improper escape route from paying injured customers who have obtained a monetary award against a firm. Specifically, it would allow a firm, which was held to be liable to customers for violating investor protection rules and laws, to continue to avoid responsibility for the damages it caused by transferring its customers and books of business to another firm for no or inadequate consideration. After doing so, it would then continue to do business under the name of the new firm to which it had transferred its assets, out of reach of the harmed customers seeking to enforce their monetary award.

The Financial Industry Regulatory Authority ("FINRA")[1] is charged with regulating brokerage firms and, in that capacity, has promulgated numerous rules that govern the securities industry. Those rules exist for customer and investor protection. Broker-dealers, such as Appellee, are required by the Exchange Act (as defined below) to be members of FINRA, which in turn requires that such broker-dealers abide by FINRA rules. Since the SEC approves FINRA rules and makes those rules binding on broker-dealers, FINRA rules have the force of federal regulations. *Jevne v. Superior Court,* 35 Cal.4th 935, 953 (Cal. 2005); *Charles Schwab & Co. Inc. v. Fin. Indus. Regulatory Auth. Inc.*, 861 F. Supp. 2d 1063,

[1] FINRA is a self-regulatory organization that governs broker-dealers and their associated persons.

1065 (N.D. Cal. 2012). One such rule is FINRA Rule 12200, allowing customers of a broker-dealer to elect to file claims through FINRA Dispute Resolution Services and arbitrate any and all disputes that arise in connection with the business activities of the FINRA member.

Here, Appellants did precisely that; they filed an arbitration action against Resources Horizons Group, LLC ("RHG") in 2013. *See* Order, *King v. Kovack Sec.,* No. 1:18-CV-04079-SCJ, 2021 U.S. Dist. LEXIS 212142, at *5 (N.D. Ga. Sep. 28, 2021) (hereafter the "Order"). After over a year of litigation, including the time and monetary investment that entails, Appellants obtained an arbitration award in their favor against RHG. *Id.* at *6. RHG did not pay the arbitration award rendered against it, in whole or in part. *See* Amended Complaint for Damages, *King v. Kovack Sec.,* No. 1:18-CV-04079-SCJ at ¶ 25 (N.D. Ga. Aug. 28, 2018).

Unpaid arbitration awards are a pervasive problem that PIABA has been monitoring, reporting on, and trying to improve for many years. The drafters of the Securities Exchange Acts anticipated this problem as far back as 1934. As laws and regulations are updated to attempt to avoid this outcome, bad actors in the securities industry such as RHG continue to try to invent new ways to avoid these liabilities to harmed customers. The law should not permit this type of liability

avoidance because it contravenes the purpose of the entire securities regulatory system: protecting investors and safeguarding market integrity.

PIABA maintains that if the Order stands, it will provide legal precedent and authority for broker-dealers around the country to circumvent the purpose of the regulatory systems and FINRA's arbitration process, or otherwise violate regulatory rules designed for the protection of public investors and customers of broker-dealers.

STATEMENT OF ISSUES

Whether the trial court erred in concluding that the customer accounts transferred from RHG to Appellees were not assets of RHG that could be fraudulently transferred.

SUMMARY OF ARGUMENT

This case presents a recurring problem in the securities industry. The securities laws and regulatory system were created for the purpose of protecting public consumers and clients of brokerage firms. Yet violations of these protectionary measures continue to occur, and bad actors continue to avoid responsibility for the damages they cause in various ways. A common avoidance technique is that firms with a history of regulatory problems and customer awards will simply shut themselves down rather than pay the awards. The same personnel will then pop back up under the name of a new firm, transfer all the clients of the

old firm to the new firm, and then continue to do business with no repercussions or liability for the previously unpaid awards of the former firm that was operated by the same control people. The net result is that injured consumers end up with empty rights and no practical remedies, the wrongdoers avoid any meaningful consequences for their actions, and the acquiring firm receives a windfall of new assets to manage and the fees and commissions which those assets generate.

This contravention of the protectionary purposes of the securities laws can and must be corrected through the appropriate application of the fraudulent transfer laws, which exist to avoid this type of chicanery.

As discussed herein, courts nationwide have consistently found that brokerage firms' books of business, including their customers, their customer lists, and their good will, are all assets with tangible value. Indeed, this is why there is a market in which financial advisors' books of business are regularly bought and sold between firms.

Consequently, when an insolvent firm with outstanding creditors shuts down and transfers its entire customer base to a new company for little or no compensation, those assets are properly subject to being clawed back as a fraudulent transfer. There is simply no valid reason why the assets of brokerage firms, including customer lists, customers, and good will, should be treated any

differently than any other situation where a debtor has fraudulently transferred its assets to another entity.

LEGAL DISCUSSION

A. Purpose of Securities Laws and Regulations

The Securities Act of 1933 and the Securities and Exchange Act of 1934 (the "Exchange Act") were passed "[i]n response to the sudden and disastrous collapse in prices of listed stocks in 1929, and the Great Depression that followed." *Schwartz v. Concordia Int'l Corp.*, 255 F. Supp. 3d 380, 389 (E.D.N.Y. 2017). Among other things, Congress intended to "promote ethical standards of honesty and fair dealing" that had been missing from the markets prior to and during the Great Depression. *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 195 (1976). The Exchange Act also created the Securities and Exchange Commission. *See* 15 U.S.C. § 78d.

The SEC has summarized a major problem in the industry as "[w]hat dollars do you actually collect when somebody has done you harm? Because you can have a really strong standard, but if there are no dollars there, that's a problem." *Virtual Currencies: The Oversight Role of the U.S. Securities and Exchange Commission and the U.S. Commodity Futures Trading Commission*, 115 Cong. (2019), CHRG-115shrg28854.pdf (congress.gov) (testimony of SEC Chair Jay Clayton). This is not a new problem. The original drafters of the Exchange Act foresaw bad actors

using corporate fictions as a way to circumvent the protections (and consequences) of the legislation. Specifically, the legislative history of the Exchange Act shows that Congress was concerned about "the specific evil of persons seeking to evade liability under the [securities laws] by organizing 'dummies,' that, acting under their control, would commit the prohibited acts." *Paul F. Newton & Co. v. Tex. Commerce Bank*, 630 F.2d 1111, 1118 (5th Cir. 1980).

B. <u>FINRA's Role in the Regulatory Framework</u>

The Exchange Act empowers the SEC with "broad authority over all aspects of the securities industry, including the power to register, regulate, and oversee brokerage firms, transfer agents, and clearing agencies, as well as the nation's securities self-regulatory organizations (SROs)." *United States v. Wittig*, 575 F.3d 1085, 1105 (10th Cir. 2009). In 1938, Congress imposed a regulatory framework for the off-exchange market through the *Maloney Act*, which added Section 15A to the Exchange Act. *See United States v. Nat'l Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694, 700 n.6 (1975). It provided for the creation of national securities associations of broker-dealers with powers to adopt and enforce rules to regulate the off-exchange market. *Id.* Only one such Association was ever created – the National Association of Securities Dealers (the "NASD"), which is now known as FINRA. *See Morgan Keegan & Co. v. McPoland*, 829 F. Supp. 2d 1031, 1033 n.1 (W.D. Wash. 2011). Under the Exchange Act, every broker-dealer, including Appellee

Kovack Securities, Inc., is now required to be a registered member of FINRA. *See* 15 U.S.C. § 78o(b)(8).[2]

FINRA is a self-regulatory organization born out of a merger between the National Association of Securities Dealers ("NASD") and the regulatory arm of the New York Stock Exchange ("NYSE"). *See* Press Release, FINRA, NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority (July 30, 2007), *available at* NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority - FINRA | FINRA.org. FINRA is the largest independent regulator for all securities firms doing business in the United States, handling virtually every aspect of the securities business including registrations, rulemaking, enforcement, and dispute resolution. *See id.*

C. The Unpaid Arbitration Award Problem

Unfortunately, there are "countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." *SEC v. W. J. Howey Co.*, 328 U.S. 293, 299, 66 S. Ct. 1100, 1103 (1946). In 2016, PIABA

[2] "It shall be unlawful for any registered broker or dealer to effect any transaction in, or induce or attempt to induce the purchase or sale of, any security (other than commercial paper, bankers' acceptances, or commercial bills), unless such broker or dealer is a member of a securities association registered pursuant to section 78o–3 of this title or effects transactions in securities solely on a national securities exchange of which it is a member." 15 U.S.C. § 78o(b)(8).

published the results of research into the practical outcomes of customer arbitration claims through FINRA.[3] In sum, PIABA research found that:

> $62.1 million of customer awards issued in 2013 were unpaid. The Public Investors Arbitration Bar Association's ("PIABA's") analysis of the 2013 awards reveals that more than 1 out of 3 cases investors take through to an arbitration hearing and win an award assessing liability and damages goes unpaid. Viewed differently, nearly $1 of every $4 awarded to investors in arbitration hearings goes unpaid.[4]

In response, FINRA published a Discussion Paper in 2018 that included some of its own updated statistics on the problem.[5] FINRA's updated statistics showed that in the five years from 2012 through 2016, a total of 268 awards (27% of the cases where investors were successful) totaling $199 million in awards (29% of total damages awarded to investors) went unpaid.[6] PIABA subsequently studied the 2017 award data, and found that the trend continued: 36% of the investors who won their cases collected nothing, and 28 cents of each dollar awarded went unpaid.[7]

---

[3] *See* PIABA, REPORT: Unpaid Arbitration Awards: A Problem The Industry Created - A Problem The Industry Must Fix (February 25, 2016) | PIABA.

[4] *Id.* at 2.

[5] *See* FINRA, *Discussion Paper- FINRA Perspectives on Customer Recovery* (Feb. 8, 2018), *available at* finra_perspectives_on_customer_recovery.pdf.

[6] *See* PIABA, Unpaid Arbitration Awards, The Case For An Investor Recovery Pool (March 7, 2018), *available at* KM_554e-20180305165240 (piaba.org).

[7] *Id.*

The problem persists: for the year 2020, the percentage of cases with damage awards that are unpaid was 37% and the percentage of unpaid award dollars was 24%--$5 million that should be returned to damaged customers.[8]

State securities regulators have also recognized the problem. On May 20, 2022, the North American Securities Administrators Association adopted a model rule for states to use as a guide in amending state securities laws to address the problem of "the failure of regulated firms and persons to pay final awards and judgments to customers…."[9]

FINRA specifically recognizes that one of the pervasive issues causing this ongoing and massive problem is that "a member firm with substantial arbitration claims seeks to avoid payment of the claims should they go to award or result in a settlement by shifting its assets, which are typically ***customer accounts***, or its managers and owners, to another firm and closing down."[10]

This is precisely what RHD did in this case.

---

[8] *See* Statistics on Unpaid Customer Awards in FINRA Arbitration, Statistics on Unpaid Customer Awards in FINRA Arbitration | FINRA.org.

[9] NASAA NASAA Members Adopt Model Rule Addressing Unpaid Customer Arbitration Awards and Judgments -, May 20, 2022 press release. The model rule's amendments would make failure to pay customer final judgments, awards, or regulatory fines and penalties an express example of dishonest or unethical practices, empowering state regulators to suspend or revoke licenses of state-registered firms and associated persons. Whether or not states adopt the model rule or some version of it remains to be seen.

[10] Discussion Paper, FINRA Perspectives on Customer Recovery, pg. 15 (emphasis added), finra_perspectives_on_customer_recovery.pdf.

D. The Law Supports Appellants' Fraudulent Transfer Claims

RHG's flouting of the purported consumer protections of the securities laws and their related regulatory system should be remedied by application of the Uniform Fraudulent Transfer Act ("UFTA"). O.C.G.A. § 18-2-70.

The District Court concluded that RHG's customer accounts were not an asset, and therefore could not be the subject of a UFTA claim. Doc 118 – Pg 14-22. This conclusion is contrary to the decisions of courts nationwide, which have consistently held that a financial advisor's book of business, customer lists, and good will are all tangible assets. *See e.g. Marriage of Finby,* 222 Cal. App.4th 977, 985-87 (2013) (holding that a financial advisor's book of business, customer lists, and transition bonus are divisible community property assets); *Moll v. Moll,* 187 Misc.2d 770, 775 (N.Y. Sup. Ct. 2001) (holding that the clients serviced by a stockbroker are a marital asset); *Reiss v. Reiss,* 654 So.2d 268, 268-69 (Fla. Dist. Ct. App. 1995) (holding that a stockbroker's signing bonus for clients he brought over to his new firm is a divisible marital asset); *Niroo v. Niroo,* 313 Md. 226, 234-35 (1988) (holding that an insurance agent's anticipated renewal commissions on policies he had sold are a property interest); *Pangburn v. Pangburn,* 152 Ariz. 227, 230 (1986) (holding that an insurance agent's contractual right to renewal commissions is a marital asset).

Further, FINRA itself has recognized that a broker-dealer's customer accounts, *i.e.* book of business, are both: (1) an asset of the firm; and, (2) susceptible to being fraudulently transferred to other broker-dealers in attempts to avoid paying adverse awards to customers like the Appellants.[11] This conclusion is in line with authorities across the country, as discussed herein, and recognizes the practical realities of the business itself.

The brokerage industry is a service industry whose entire revenue stream is based on acquiring and maintaining customer accounts. Firms profit from the fees and commissions generated from customer account maintenance, special services, and trading activity. They can also make money from customer accounts in other ways, such as margin account loans to customers. Unsurprisingly, an entire industry has developed to support individual advisors and brokerage firms that want to buy or sell their books of business.[12] In this industry, selling the clients is effectively selling the business, and therefore a broker's or a firm's book of business can have tremendous value. It is universally accepted within the industry that a book of business (customer accounts) has value that is based on a number of factors, including an estimation of future cash flows, potential for additional sales, and the estimated longevity of those accounts. The practical reality is that a

---

[11] *Id.*

[12] *See* Why Buy a Book of Business?, SPRINGTREE GROUP (May 18, 2017), Why Buy a Book of Business? - Springtree Group.

broker-dealer's single most valuable asset is usually its customer list/book of business.

As a result of that value in a customer list, broker-dealers are typically very consistent in their belief that their customers are ***theirs***. Their contracts with their registered representatives include terms claiming that customers and prospective customers are the property of ***the company.*** When such an employee moves firms and tries to bring clients with him, those same broker-dealers routinely claim a legally enforceable contract and property interest in those clients and seek damages and injunctive relief to prevent further takings.

While broker-dealers do not own the assets in their customer's accounts, well-established case law recognize that broker-dealers' relationships with their customers are valuable assets, just like their brokers' relationships. For example, in *Deutsche Bank Sec. v. Pruitt,* Deutsche Bank Securities, Inc. sought to enjoin a former broker from soliciting clients after he left the firm. No. 1:11-cv-04434-SCJ, 2012 U.S. Dist. LEXIS 203105 (N.D. Ga. Jan. 4, 2012). Deutsche Bank Securities, Inc. is a FINRA registered broker-dealer. *Id.* at *1. After its advisor left and moved to a competitor, he contacted his former clients through the mail to solicit their business. *Id.* at *2. Deutsche Bank argued, and the court accepted, that:

> Deutsche Bank's customer list represents an economically valuable resource. Indeed, 'customer lists and customer information which

> have been compiled by firms represent a material investment of employers' time and money.' *Durham v. Stand-By Labor of Ga., Inc.*, 230 Ga. 558, 198 S.E.2d 145, 150 (Ga. 1973). Information in Deutsche Bank's customer list is protected by Deutsche Bank and is not readily obtainable by its competitors who stand to gain economically from the use of that information to solicit its clients. Additionally, Deutsche Bank indicates that the security of customer information is maintained by, among other methods, limiting access to computer data and hard copies, restricting access to only those individuals who have a need to know, and by instituting a confidentiality policy and requiring financial advisors and their office staff to abide by its requirements. These efforts to maintain secrecy are reasonable under the circumstances. Thus, the Court concludes that there is a likelihood that Deutsche Bank can prevail in establishing that its list of clients is a trade secret.

Id. at *12-13.

Similarly, in *Morgan Stanley DW, Inc. v. Frisby*, Morgan Stanley, another FINRA registered broker-dealer, brought a suit against two of its former brokers. 163 F. Supp. 2d 1371, 1373 (N.D. Ga. 2001). Morgan Stanley specifically complained that:

> immediately after leaving Morgan Stanley, the Defendants began a swift and methodical effort to solicit, by overnight mailings, the customers with whom they did business while at Morgan Stanley; … over 30 Morgan Stanley customers with whom Defendants had dealings while employed by Morgan Stanley have contacted Morgan Stanley to terminate their brokerage relationship and transfer their accounts to the Defendants at PaineWebber; and … Defendants' efforts at solicitation have included financial incentives to Morgan Stanley clients such as Paine Webber's agreement to pay all costs of transfer and/or reduced commissions. Morgan Stanley viewed these actions as unlawful efforts to solicit clients in violation of a binding and legally enforceable non-solicitation agreement signed by Defendants.

Id. at 1374. Morgan Stanley based its suit on allegations that these solicitations were in violation of a non-solicitation employment agreement and a misappropriation of its trade secrets, including customer lists, account summaries, and related information. *Id.* at 1377.

As a result, it should not be surprising that courts have found that these types of non-tangible assets are equally capable of being fraudulently transferred. "[C]ourts have held that a transfer of enterprise goodwill, if done fraudulently, would violate the UFTA" and have "recognized that although an intangible, goodwill is an integral part of the business, same as the physical assets…. [T]he drafters of the UFTA intended the definition of property to include real and personal property whether tangible or intangible." *Jones v. Tauber & Balser, P.C.*, 503 B.R. 162, 182 (N.D. Ga. 2013) (collecting cases) (internal citations and quotation marks omitted); *see also S.P. Richards Co. v. Hyde Park Paper CO.*, 2015 U.S. Dist. LEXIS 98321, *10 (M.D. Fla. Jul. 28, 2015), (stating that the "customer list is an asset of [the defendant] under the UFTA").

Numerous other courts have similarly held that customer lists/customer goodwill are business assets. *See e.g. Mitchell v. Lyons Prof'l Servs.*, 109 F. Supp. 3d 555, 560-562 (E.D.N.Y. 2015) (holding that customer lists and customer accounts are property interests that can be the subject of a fraudulent conveyance action); *In re Williams*, 354 B.R. 604, 609 (Bankr. N.D.N.Y. 2006) (holding that

anticipated commissions from insurance renewals of an insurance agent are a transferable property interest); *Odyssey Reinsurance Co. v. Nagby*, 2019 U.S. Dist. LEXIS 111794, *28 (S.D. Cal. Jul. 2, 2019) (collecting cases that hold "that intangible assets can be subject of a fraudulent transfer, including a 'book of business,' corporate goodwill, or ongoing business concern."); *West v. Hsu (In re Advanced Modular Power Sys.)*, 413 B.R. 643, 673 (Bankr. S.D. Tex. 2009) (holding that the transfer of assets, including "customer information…, vendor information, and competitive advantages in the forms of goodwill and specialized knowledge were the Debtor's property" and were fraudulently transferred).

The circumstances of RHG's transfer of its clients to Appellee make this property interest *more valuable*, not less. Numerous courts have recognized that there is special value in obtaining a list of people who need the transferee's services due to the winding down of the transferor's business. *See e.g.*, *Mitchell*, 109 F. Supp. 3d at 566-67 (stating that, in receiving the transferor's list of customers "that obviously needed security services," the transferee received "the opportunity… to continue servicing those same customers."); *In re Williams*, 354 B.R. at 608-09 (finding that a transferee insurance agency receiving information about the transferor's customers' insurance expirations and renewals "enables the [transferee] agent to contact the insured before the existing contract expires and

arms him with the information essential to secure another policy and to present to the insured a solution for his insurance requirement.”).

In *Ariz. Premium Fin. Co. v. Keystone Surplus Lines*, 2007 U.S. Dist. LEXIS 111158 (E.D. Penn. Sept. 6, 2007), the Court relied on the following facts to determine that the transfer of customer lists from a business that had folded to a new entity violated Pennsylvania’s UFTA:

> [Transferee] obtained [Transferor]'s paper and electronic files which identified previous [Transferor] customers. Because [Transferee] provides the same services previously supplied by [Transferor], these files enabled [Transferee] to focus its marketing efforts upon those producers most likely in need of [Transferee]'s services. Ultimately, approximately 80% of [Transferor]'s producers transferred their contracts to [Transferee]. [Transferee] was therefore able to avoid the expense and inherent inefficiency of soliciting the greater universe of insurance agents in order to develop a viable customer base. The transferred client database also included information about the exact nature of policies previously purchased by the producers and the expiration dates of those policies. This information enabled [Transferee] to solicit specific producers as their policies approached their expiration dates. [Transferee] could therefore easily and efficiently execute what [Transferee’s owner] described as "renewal" contracts.

Id. at *26-27.

Here, RHG’s customers and agents needed a new broker-dealer in order to engage in any investment transactions. As part of its winding down, RHG arranged for Appellee to take RHG’s representatives and their customers. Doc 118 – Pg 9-10. As a result of the communication between RHG and Appellee (and the subsequent facilitation of the “mass transfer” of representatives and customers),

180 of the 210 representatives (nearly 86%) transferred to Appellee. *Id.* at 10. RHG previously had 3,341 customers and assets under management of more than $1.1 billion. *See* Amended Complaint for Damages, Doc 30 – ¶ 18. ***All but 230 of those 3,341 customers (over 93%)*** transferred to Appellee. Doc 118 – Pg 10-11. Most significantly, the management of those customers' assets ***and the resulting revenue to the firm*** became Appellee's as a result of this arrangement. As the authorities above hold, when an asset received (in this case, the opportunity to facilitate the transfer of a huge number of RHG's representatives and customers to its own business) produces an income stream, it is a valuable asset that should be subject to the Uniform Fraudulent Transfer Act.

In short, the weight of authority from numerous courts supports a conclusion that a broker-dealer's book of business is an asset of the firm to which a fraudulent conveyance claim can apply. The SEC, FINRA, and state regulators recognize the problem of unpaid arbitration awards and judgments, and the licensing games that firms can play to avoid regulatory enforcement. Aggrieved customers such as Appellants, with enforceable money awards, should have the full benefit of the UFTA. For these reasons, the District Court's Order should be reversed, and the Appellants should be given the opportunity to prove their fraudulent transfer claims.

CONCLUSION

Permitting brokerage firms to transfer their most valuable asset – their book of business, potentially valued in the millions or billions - to a new firm for no or inadequate consideration in order to avoid paying for the consequences of their unlawful actions undermines the intended protections of the securities laws and regulations. It leaves thousands of injured consumers who have enforceable rights to redress with no actual remedy. For these reasons, PIABA respectfully requests that the Court reverse the District Court's ruling and find that Appellants may pursue their fraudulent transfer claims against Appellee.

Dated: June 7, 2022.

Respectfully submitted,

PAGE PERRY
1493 LaVista Road NE
Atlanta, Georgia 30324
(404) 567-4400 Telephone
(404) 334-7213 Facsimile
aperry@pageperry.com

By: */s/ Alan R. Perry, Jr.*
ALAN R. PERRY, JR.
State Bar No. 572508

Counsel for Public Investors Advocate Bar Association

(31 of 32)

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of FED. R. APP. P. 29 and 32 because:

☒ this brief contains 4,358 words, excluding the parts of the brief exempted by FED. R. APP. P. 32(f), *or*

☐ this brief uses a monospaced typeface and contains _______ lines of text, excluding the parts of the brief exempted by FED. R. APP. P. 32(f).

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 in font 14, Times New Roman, *or*

☐ this brief has been prepared in a monospaced typeface using ____________________ with ______________________.

Signed on June 7, 2022.

/s/ Alan R. Perry, Jr.
ALAN R. PERRY, JR.

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of June, 2022, a true and correct copy of the above and foregoing has been served by ☒**CM/ECF;** ☐**overnight delivery;** ☐**United States first class mail;** ☐**facsimile transmission;** and/or ☐**hand delivery** on the following:

David J. Hungeling
Adam S. Rubenfield
HUNGELING RUBENFIELD LAW
1718 Peachtree Street, Ste. 599
Atlanta, Georgia 30309
COUNSEL FOR APPELLANTS

G. Wayne Hillis, Jr., Esq.
Justin Gunter, Esq.
PARKER, HUDSON, RANIER & DOBBS, LLP
303 Peachtree Street NE, Ste. 3600
Atlanta, Georgia 30308
COUNSEL FOR APPELLEES

/s/ Alan R. Perry, Jr.
ALAN R. PERRY, JR.