SJC Docket No. 12662

IN THE

Supreme Judicial Court for the Commonwealth of Massachusetts

DONNA A. ALIBERTI,

Appellant (Defendant / Plaintiff-in-Counterclaim),

– v. –

UBS FINANCIAL SERVICES INC.,

Appellee (Plaintiff / Defendant-in-Counterclaim).

On Appeal From the Appeals Court for the Commonwealth of Massachusetts

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BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AS *AMICUS CURIAE* SUPPORTING APPELLEE AND REVERSAL OF THE DECISION OF THE APPEALS COURT

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CORPORATE DISCLOSURE STATEMENT

Amicus curiae, the Securities Industry and Financial Markets Association, states that it has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

RULE 17(C)(5) DECLARATION

No party's counsel in this case authored this brief in whole or in part, and no party, no party's counsel, nor any other person or entity, other than the Securities Industry and Financial Markets Association (SIFMA), its members, or its counsel, contributed money intended to fund the preparation or submission of this brief. Further, neither the *amicus curiae* nor its counsel represents or has represented one of the parties to the present appeal in another proceeding involving similar issues, or was a party or represented a party in a proceeding or legal transaction that is at issue in the present appeal.[*]

[*] UBS Financial Services Inc. is a member of SIFMA, but it has not authored this brief in whole or in part, and it has not contributed money to SIFMA specifically for the purpose of preparing this *amicus curiae* brief.

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STATEMENT OF IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Securities Industry and Financial Markets Association (SIFMA) is the leading trade association for broker-dealers, investment banks, and asset managers operating in the United States and global capital markets. On behalf of the industry's nearly one million employees, SIFMA advocates on legislation, regulation, and business policy, affecting retail and institutional investors, equity and fixed income markets, and related products and services. SIFMA serves as an industry-coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. With offices in New York and Washington, D.C., SIFMA is the United States regional member of the Global Financial Markets Association (GFMA). An important function of SIFMA is to represent the interests of its members in cases addressing issues of widespread concern in the securities and financial markets.[*]

The outcome of this case will affect SIFMA and its members because the Appeals Court's decision affects the rights and obligations of broker-dealers and other financial services firms doing business in Massachusetts. SIFMA and its members are concerned that the novel fiduciary duty created by the Appeals Court's unprecedented decision is legally unsound and contrary to fundamental legal principles for establishing new fiduciary relationships. Further, the financial services industry is not well-equipped

[*] For more information, see http://www.sifma.org.

to honor fiduciary duties to account beneficiaries, and such a fiduciary duty presents significant, unnecessary investment advisory problems. Thus, SIFMA and its members believe that the Appeals Court's decision will have significant market consequences and is bad policy.

SUMMARY OF THE ARGUMENT

The financial services industry has long operated with the understanding that account beneficiaries are not owed fiduciary duties under State law (Massachusetts and New York included).[1] *See infra* at 13-17. Indeed, it is well-established that, with some limited exceptions, even *accountholders* are not owed fiduciary duties for nondiscretionary accounts. *See infra* at 16. This foundational principle pervades the financial services industry's approach to administering custodial Individual Revenue Accounts (IRAs). It is reflected in account agreements, account pricing, procedures for interfacing with account beneficiaries, and mechanisms commonly relied upon to resolve beneficiary disputes. *See infra* at 26-31.

[1] There is some question in this case as to which State's law applies—Massachusetts or New York. The acts or omissions giving rise to the claims at issue occurred primarily in Massachusetts, but the Appeals Court applied New York law based on a contractual choice-of-law provision. *See* RA 117-28; ADD 9. SIFMA takes no position as to whether New York or Massachusetts law applies.

"RA" refers to the Record Appendix filed in the Appeals Court by Appellant Donna Aliberti. "ADD" refers to the Addendum attached to the Brief of the Appellee, filed in this Court on February 22, 2019.

Account agreements specifically set forth the relationships and obligations among nondiscretionary IRA accountholders, financial services firms that act as custodians for such accounts, and account beneficiaries. For example, the account agreements of UBS Financial Services Inc. (UBS), which are typical of those in the industry, define UBS as the custodian for its clients' nondiscretionary IRAs. *See UBS Client Relationship Agreement* at 3, *available at* https://www.ubs.com/us/en/wealth-management/misc/account-disclosures.html ("According to the UBS IRA Custodial Agreements, UBS Financial Services Inc. is named as the custodian of your IRA when we accept the Account.").[2]

Under UBS's agreements, the client retains complete control over the IRA, and any discretion or fiduciary obligation by UBS with respect to the IRA is clearly disavowed. *See UBS Agreements & Disclosures*, at 49, 54, *available at* https://www.ubs.com/us/en/wealth-management/misc/account-disclosures.html (providing that "the Client shall direct the investments in the IRA," and "[t]he Custodian shall not have any discretionary authority or control or otherwise assume any fiduciary duties with respect to the IRA"). Account beneficiaries are bound by the account agreements, and UBS's role with respect to account beneficiaries is similarly

[2] Because UBS's agreements are publicly available, this Court may consider them. *Schaer v. Brandeis Univ.*, 432 Mass. 474, 477 (2000) (holding that matters of public record may be considered in analyzing a motion to dismiss). The agreement provisions discussed herein are similar to provisions that would have been included in Appellant Donna Aliberti's agreements with UBS.

limited: UBS must effect its clients' written instructions and, in the event of a beneficiary dispute, may hold the IRA assets until the dispute is resolved or interplead the competing beneficiaries to achieve court-resolution of the dispute. *Id.* at 53-54.

Against this backdrop, the Appeals Court created a novel fiduciary duty to account beneficiaries without legal support. *See infra* at 13-17. Specifically, the Appeals Court's decision cites no case law supporting the creation of a fiduciary relationship between IRA custodians and account beneficiaries. The two cases relied upon by the Appeals Court involve completely different circumstances than those of this case. *See infra* at 13-15. Moreover, a fiduciary duty owed to account beneficiaries—who may not be customers of, or have any sort of relationship with, the IRA custodian—is inconsistent with fundamental principles for establishing new fiduciary relationships. *See infra* at 18-20. Finally, nothing in the U.S. Internal Revenue Code supports the Appeals Court's decision. *See infra* at 20-25.

Not only is the creation of fiduciary obligations to account beneficiaries legally unsound, but it would also set bad policy. *See infra* at 26-31. The relationships among IRA custodians, accountholders, and account beneficiaries are created and defined by contract. These bargained-for contractual relationships do not contemplate fiduciary duties to beneficiaries. Such fiduciary duties would be enormously expensive, and account contracts do not reflect such expense. *See infra* at 26-29. In addition, the Appeals Court's decision will create significant practical problems. *See infra* at 29-31. A fiduciary duty to account beneficiaries will place custodians in the impossible position

of having to navigate conflicts between competing beneficiaries, or possibly between accountholders and beneficiaries. This will lead to uncertainty and invite more litigation, further increasing the cost of the new fiduciary obligation. Finally, a fiduciary duty to account beneficiaries is unnecessary, as account beneficiaries may be entitled to contract remedies. *See infra* at 31-32.

ARGUMENT

I. IMPOSING A FIDUCIARY DUTY TO IRA BENEFICIARIES IS UNPRECEDENTED, IRRECONCILABLE WITH FIDUCIARY PRINCIPLES, AND UNSUPPORTED BY STATE OR FEDERAL LAW.

A. No New York or Massachusetts Court Has Established a Fiduciary Duty Owed to IRA Beneficiaries.

The Appeals Court held that Appellee UBS Financial Services Inc. (UBS) owed a fiduciary duty to Appellant Donna Aliberti, the purported beneficiary of three custodial IRAs held by UBS. ADD 2, 12-17. The court reached this conclusion even though Ms. Aliberti was not UBS's customer and had no other relationship with UBS. *See id.* at 2-3.

The Appeals Court's holding is unprecedented. The court cited no case law addressing fiduciary relationships in the context of account beneficiaries. And indeed, no other New York or Massachusetts court has ever held that a broker-dealer or other financial institution owes a fiduciary duty to the beneficiary of an IRA or other account—a fact that Ms. Aliberti effectively concedes. *See* Appellant's Br. 15 ("No reported decision has been found addressing the specific question asked by this Court,

viz., 'whether, under New York law, the custodian of a non-discretionary, or self-directed, individual retirement account (IRA) owes a fiduciary duty to a beneficiary of the IRA.'").

Citing two cases from New York courts, the Appeals Court concluded that UBS owed a fiduciary obligation to Ms. Aliberti because UBS exercised "complete control" over the IRAs following the accountholder's death, and Ms. Aliberti was "entirely reliant" on UBS for access to the funds. ADD 14-15 (citing *People v. Coventry First LLC*, 13 N.Y.3d 108 (2009), and *Shurka v. Shurka*, 955 N.Y.S.2d 12 (N.Y. App. 2012)). The Appeals Court's analysis is flawed for three reasons.

First, IRA custodians such as UBS do not have unfettered control over an IRA following a client's death. Rather, the custodian's conduct is circumscribed by the terms of the account agreement between the custodian and the client. *See, e.g.*, *UBS Agreements & Disclosures* at 53-54. Such agreements are enforceable by the beneficiary upon the accountholder's death and often expressly disclaim any fiduciary obligations owed by the custodian. *See id.* at 49, 54.

Second, the cases relied upon by the Appeals Court do not support the creation of fiduciary obligations owed to account beneficiaries. *Shurka* was a matrimonial action, where the wife joined as a party the holder of her husband's assets in seeking payment of funds owed to her. *Shurka*, 955 N.Y.S.2d at 13. The extent of the parties' relationships is unclear from the court's opinion, and contrary to the Appeals Court's

suggestion, the court did not hold that mere control of assets is sufficient to create a fiduciary duty. *Id.*

Coventry is likewise misplaced. There, the court held that clients of life insurance brokers had adequately pleaded that they were owed a fiduciary duty. *Coventry First LLC*, 13 N.Y.3d at 115-16. The complaint alleged that the brokers had advertised themselves as "highly-skilled experts" who would "obtain the best possible price" for their clients' life insurance policies. *Id.* The court therefore found that the brokers were "on notice that their advice is specially relied on by their clients . . . . in a new and largely unregulated industry." *Id.* Thus, the brokers' alleged conduct "comport[ed] with the legal theory of fiduciary duty." *Id.* *Coventry* did not address fiduciary duties owed to third parties, and the representations and reliance dispositive in *Coventry* are not present in UBS's relationships with its clients, let alone with beneficiaries named by the clients. In fact, standard account agreements make clear that the custodian will *not* "make investment decisions for you or manage your accounts on a discretionary basis," and that "the [c]ustodian shall not have any discretionary authority or control or otherwise assume any fiduciary duties" with respect to the IRA. *UBS Agreements & Disclosures* at 49, 54. Thus, the realities of the IRA services provided by financial services firms are far afield from the facts in *Coventry*.

In her briefing to the Appeals Court, Ms. Aliberti cited two cases for the proposition that the custodian of a financial account may owe a fiduciary duty to the account beneficiary, but neither case so holds. *See Manson v. Hubbard*, 87 Mass. App.

Ct. 1137, at *1 (July 27, 2015) (table), *reprinted at* 2015 WL 4508365 (non-precedential) (analyzing whether a "trustee/custodian" was court-appointed and therefore entitled to quasi-judicial immunity); *Robbins v. Tucker Anthony Inc.*, 233 A.D.2d 854, 854 (N.Y. App. 1996) (involving an IRA *owner* who brought a claim against the IRA custodian); *see also* Appellant's Br. 19 (acknowledging that *Robbins* involved a claim by "the owner of an IRA").

Third, the creation of fiduciary obligations to account beneficiaries is inconsistent with the relationship between financial services firms and their clients. Under both New York and Massachusetts law, broker-dealers for nondiscretionary IRAs do not owe a fiduciary duty to their clients related to investments held by the IRAs. *See* ADD 12 ("In both New York and Massachusetts, 'brokers for nondiscretionary accounts do not owe clients a fiduciary duty.'" (quoting *Celle v. Barclays Bank P.L.C.*, 48 A.D.3d 301, 302 (N.Y. 2008))); *see also, e.g.*, *Barrett v. Grenda*, 154 A.D.3d 1275, 1278 (N.Y. App. 2017) (holding that brokerage firm owed no fiduciary duty to plaintiff, who had a self-directed IRA with the firm); *Patsos v. First Albany Corp.*, 433 Mass. 323, 333 (2001) ("Where the account is 'non-discretionary' . . . the relationship generally does not give rise to fiduciary duties.").[3]

[3] Broker-dealers may owe clients a fiduciary duty in some circumstances, such as when they act as an investment advisor. This exception does not apply in this case, because the IRAs at issue were nondiscretionary. In any event, even if an exception did apply, imposing a fiduciary obligation to account *beneficiaries* is unprecedented, irreconcilable

The IRAs in this case were nondiscretionary, and as stated above, standard UBS client agreements and disclosures expressly disclaim discretionary authority and fiduciary duties with respect to IRA administration. *UBS Agreements & Disclosures* at 49, 54. Such waivers of fiduciary duties are enforceable. *See BNP Paribas v. BAML*, 866 F. Supp. 2d 257, 269 (S.D.N.Y. 2012) (enforcing contractual waivers of fiduciary duties); *Barrett*, 154 A.D.3d at 1278 (finding no fiduciary duty where the Client Agreement made clear that plaintiff's IRA accounts with brokerage firm were self-directed); *Ne. Gen. Corp. v. Wellington Adv., Inc.*, 82 N.Y. 2d 158, 164 (1993) (holding that if the plaintiff "wanted fiduciary-like relationships or responsibilities, it could have bargained for and specified for them in the contract").

Thus, imposing a fiduciary duty to Ms. Aliberti would improperly provide her with greater rights than those held by nondiscretionary IRA clients. *Cf. Saska v. Metro. Museum of Art*, 975 N.Y.S.2d 605, 615 (N.Y. Sup. Ct. 2013) ("[A] third-party beneficiary 'has no greater rights or remedies than the direct parties to [a contract].'" (alteration in original)). And as explained in Part II below, doing so is unwarranted and would be unwise.

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with fiduciary principles, and would raise the practical problems identified in Part II below.

B. Imposing A Fiduciary Duty Owed to Account Beneficiaries is Fundamentally Inconsistent with Fiduciary Relationships.

The Appeals Court's creation of fiduciary duties owed to account beneficiaries is unprecedented for good reason—such fiduciary duties are contrary to the common-law understanding of fiduciary relationships and, ultimately, impossible to satisfy. A fiduciary relationship is "known to the common law as a special relationship of trust between the fiduciary and his client." *Chamber of Commerce of U.S. v. U.S. Dep't of Labor*, 885 F.3d 360, 385 (5th Cir. 2018). It is "the punctilio of an honor most sensitive." *Meinhard v. Salmon*, 249 N.Y. 458, 464 (1928) (Cardozo, C.J.). Accordingly, Courts should not elevate ordinary contractual relationships to the level of a fiduciary relationship. *See Ne. Gen. Corp.*, 82 N.Y. 2d at 165; *see also EBC I, Inc. v. Goldman, Sachs & Co.*, 5 N.Y.3d 11, 22 (2005) (holding that a fiduciary relationship between contracting parties requires "a relationship of higher trust" "beyond that which arises from the [contract]").

This case involves an ordinary business transaction in which the disputing parties are at double arm's length: UBS entered into an arm's length contractual relationship with the accountholder, and Ms. Aliberti is once removed from that relationship. *See EBC I*, 5 N.Y.3d at 19 (stating that a fiduciary relationship is "grounded in a higher level of trust than normally present in the marketplace between those involved in arm's

length business transactions"). Thus, UBS and Ms. Aliberti did not have the special relationship of trust required for fiduciary obligations to attach.

Moreover, imposing fiduciary obligations to account beneficiaries poses practical problems that will prove unavoidable. Fiduciaries owe "a duty of undivided and undiluted loyalty to those whose interests the fiduciary is to protect," meaning that a fiduciary cannot act for two or more parties with conflicting interests. *Birnbaum v. Birnbaum*, 73 N.Y. 2d 461, 466 (1989). But imposing a fiduciary duty to beneficiaries would create conflicts of interest that would be impossible to navigate, because those beneficiaries might have competing claims to the assets of the IRA.

The facts of this case provide one example. Here, UBS customer Patrick Kenney owned three non-discretionary IRAs. RA 220, ¶ 3. When he died unexpectedly, a dispute arose as to whom Mr. Kenney intended as the primary beneficiary of his IRAs. RA 221-23, ¶¶ 7-19. Ms. Aliberti and another individual listed on two of Mr. Kenney's beneficiary forms, Craig Gillespie, made competing claims as to the largest IRA. RA 222 ¶ 14. UBS filed an interpleader action to determine the proper beneficiary or beneficiaries for that account, and the dispute was ultimately settled. RA 225, ¶¶ 33-34. Yet, under the Appeals Court's view, UBS owed duties of undivided loyalty to both Ms. Aliberti and Mr. Gillespie until their dispute was resolved. The court never considered the impossibility of complying with such competing duties.

Disputes among purported beneficiaries are not uncommon. The Appeals Court's ruling places account custodians in the impossible position of having to choose

which potential fiduciary obligation to honor. Complicating matters, the new fiduciary duty created by the Appeals Court deprives account custodians of the mechanisms used to resolve beneficiary disputes, because any delay in distributing IRA assets, or the filing an interpleader action, is arguably harmful to the proper beneficiary.

The upshot is uncertainty and increased litigation risk for account custodians. When faced with competing beneficiaries, a wrong decision—or even an attempt to determine the proper beneficiary—could subject account custodians to liability for breach of fiduciary obligations.

And lawsuits by *potential* beneficiaries will not be far behind. It takes little imagination to anticipate that beneficiaries may begin to file lawsuits even before the accountholder dies—particularly because under the Appeal Court's ruling, account custodians owe fiduciary duties to account beneficiaries but not to accountholders. Thus, beneficiaries could claim that account custodians must, for example, override an accountholder's poor investment decisions that would reduce the assets available to the beneficiary.

In short, a fiduciary duty owed to account beneficiaries is contrary to well-established fiduciary obligations and would lead to unworkable results.

C. 26 U.S.C. § 408(a) Does Not Support the Imposition of a Fiduciary Relationship Between IRA Custodians and Beneficiaries.

Relying on 26 U.S.C. § 408(a), the Appeals Court held that a fiduciary relationship existed between UBS and Ms. Aliberti because "[t]he accounts at issue were IRAs,

which by definition are 'trust[s] created or organized in the United States for the exclusive benefit of an individual or his beneficiaries.'" ADD 13. But there are two fundamental problems with the Appeals Court's analysis.

First, the federal Internal Revenue Code does not define what fiduciary relationships might exist under *State* law. Rather, Section 408 sets forth the requirements for an IRA to receive favorable tax treatment under the Internal Revenue Code, and defines an IRA as a "trust" solely for "purposes of this section." 26 U.S.C. § 408(a), (d), (e), (h). Thus, numerous courts have recognized that "the language of I.R.C. § 408(a) is not, in any way, dispositive of the issue of whether IRAs are trusts under relevant state law." *Pineo v. Fulton*, 240 B.R. 854, 865 (Bankr. W.D. Pa. 1999); *accord Estate of Davis*, 171 Cal. App. 854, 857 (Cal. Ct. App. 1985) ("A custodial IRA is not an express trust [under State law] because there is no intent to establish a trust," and "the [lower] court's finding that the IRAs be treated as trusts is limited to Internal Revenue Code section 408's purpose of tax deferment.").

Second, Section 408 recognizes the existence of two types of IRAs: trusteed IRAs, 26 U.S.C. § 408(a), and custodial IRAs, which the Internal Revenue Code merely "treat[s] as a trust" for tax purposes, even though such an IRA is "*not a trust*" under

State law, *id.* § 408(h) (emphasis added). The Appeals Court ignored this critical distinction.[4]

With a custodial IRA, the type of IRA at issue in this case, the financial institution simply holds the IRA assets in custody. The accountholder retains control over the assets, and the financial institution effects transactions only at the accountholder's direction. This type of custodial arrangement is described in UBS's account agreements. *See UBS Agreements & Disclosures*, at 49, 54 (providing that "the Client shall direct the investments in the IRA," and "[t]he Custodian shall not have any discretionary authority or control or otherwise assume any fiduciary duties with respect to the IRA"). If the accountholder dies, the custodian does not have authority to effect transactions or make investments decisions, and the prevailing practice is to effectively freeze the account until the beneficiaries come forward. At that time, control of the IRA assets transfers to the beneficiaries.

In contrast, a trusteed IRA is operated as a trust, with the financial institution serving as trustee. If the accountholder becomes incapacitated or dies, the assets will be managed or distributed in accordance with the terms of the trust.

[4] Because this case involves a custodial IRA, this brief focuses on Section 408's implications for custodial, and not trusteed, IRAs. But imposing a fiduciary obligation for beneficiaries even for trusteed IRAs raises the same practical problems identified herein, and reads too much into Section 408.

Nothing in 26 U.S.C. § 408 compels the conclusion that account beneficiaries are owed a fiduciary duty. As explained above, although Section 408(a) addresses the tax treatment of IRAs that are structured as trust accounts, Section 408(h) acknowledges that IRAs can be custodial, and provides that a custodial IRA may be "treated as a trust" *for purposes of receiving the special tax treatment* afforded by Section 408—even though the Internal Revenue Code recognizes that such a custodial IRA "is *not* a trust" under State law. 26 U.S.C. § 408(h) ("*For purposes of this section*, a custodial account shall be treated as a trust if the assets of such account are held by a bank (as defined in subsection (n)) or another person who demonstrates, to the satisfaction of the Secretary, that the manner in which he will administer the account will be consistent with the requirements of this section, and if the custodial account would, *except for the fact that it is not a trust*, constitute an individual retirement account described in subsection (a)."") (emphasis added); *id.* § 408(a) & (e) (providing that an individual retirement account, defined as a trust that meets certain requirements, is generally exempt from taxation). And with respect to UBS specifically, the Internal Revenue Service has explicitly recognized UBS as a passive or non-passive nonbank custodian for IRAs established under Section 408. The letter providing such recognition is included in the standard package of UBS account disclosures and agreements provided to IRA clients. *See UBS Agreements & Disclosures* at 73.[5]

[5] In addition, the Internal Revenue Code uses the word "fiduciary" without conferring the type of common-law fiduciary obligations claimed by Ms. Aliberti. *See Chamber of*

Ms. Aliberti's argument that a custodial IRA is a trust as a matter of State law is wholly unpersuasive. Ms. Aliberti cites irrelevant case law that offers little to no analysis of Section 408 or fiduciary duties. For example, she claims that one case—*JPMorgan Chase Bank, N.A. v. Maurer*, No. 13-cv-3302, 2015 WL 539494 (S.D.N.Y. Feb. 10, 2015)—is "very analogous," Appellant Br. 19. But *Maurer* considered whether federal jurisdiction exists over interpleader. 2015 WL 539494, at *13. To be sure, the court noted that, "[o]utside the interpleader context," the beneficiaries could bring their claims for breach of contract, or potentially for breach of fiduciary duties, in a separate action, but it did not decide the viability of those claims. *Id.*

The vast majority of Ms. Aliberti's remaining cases simply repeat the language of Section 408(a), which governs *trusteed* IRAs. *See* Appellant's Br. 29-31 nn.29-41.[6] And

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Commerce, 885 F.3d at 367 (explaining that IRA service providers deemed "fiduciaries" under the Internal Revenue Code are "not statutorily required to abide by duties of loyalty and prudence").

[6] *See Blankenship v. Liberty Life Assurance Co. of Boston*, 486 F.3d 620, 626 (9th Cir. 2007) (considering whether an accountholder took possession of retirement funds that were directly rolled over into an IRA and simply quoting 26 U.S.C. § 408(a)); *In re Meehan*, 102 F.3d 1209, 1212 (11th Cir. 1997) (analyzing whether an IRA was property of the bankruptcy estate under the federal Bankruptcy Code and simply quoting 26 U.S.C. § 408(a)); *Inv. Co. Inst. v. Clarke*, 630 F. Supp. 593, 595-96 (D. Conn. 1986) (discussing fiduciary obligations under the federal Employee Retirement Income Security Act of 1974 (ERISA) and simply quoting 26 U.S.C. § 408(a)); *In re Jolly*, 567 B.R. 480, 485 (Bankr. M.D.N.C. 2017) (distinguishing IRAs from retirement annuities); *In re Thomas*, 477 B.R. 778, 784 (Bankr. D. Idaho 2012) (quoting 26 U.S.C. § 408(a) and analyzing treatment of IRAs under bankruptcy law); *In re Swenson*, 130 B.R. 99, 101 (D. Utah 1991) (same); *In re Staniforth*, 116 B.R. 127, 131 (Bankr. W.D. Wis. 1990 (same); *Greening Donald Co. v. Okla. Wire Rope Prods., Inc.*, 766 P.2d 970, 972 (Okla. 1988) (citing 26 U.S.C. § 408(a) and holding that the IRA in question was tax exempt because it satisfied the

two of Ms. Aliberti's cases expressly involved trusteed IRAs. *See id.*[7] Finally, two of Ms. Aliberti's cases acknowledge that a custodial IRA is considered a "trust," but solely for purposes of "obtain[ing] deductibility for federal income tax purposes."[8] These cases actually undermine Ms. Aliberti's claim that 26 U.S.C. § 408 somehow dictates whether an IRA is a trust for purposes of State law. In short, Ms. Aliberti's survey of the case law is irrelevant and unhelpful to her cause.

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requirements of Section 408(a)); *In re Gantner*, 893 N.W.2d 896, 902-03 (Iowa 2017) (quoting 26 U.S.C. § 408(a) and analyzing treatment of IRAs under state transfer-on-death laws); *In re Luken*, 551 N.W.2d 794, 800 (N.D. 1996) (quoting the language of 26 U.S.C. § 408(a) to conclude that "IRAs are not pensions" and therefore should be included in the decedent's augmented estate); *McDonald & Co. Secs. Inc. v. Alzheimer's Disease & Related Disorders Ass'n*, 140 Ohio App. 3d 358, 363 (2000) (analyzing whether the name of a listed beneficiary was ambiguous and simply quoting 26 U.S.C. § 408(a)); *Robbins*, 233 A.D.2d at 854-55 (failing to analyze whether IRA custodians have fiduciary obligations).

[7] *See Adams v. Fiserv ISS*, No. D051778, 2008 WL 3890036, at *3 (Cal. App. Aug. 22, 2008) (non-precedential) (analyzing a trusteed IRA and quoting 26 U.S.C. § 408(a)); *see also Masi v. Ford City Bank & Trust Co.*, 779 F.2d 397, 399 (7th Cir. 1985) (explaining that the "district court [had] found that the IRA agreement itself was sufficient to create a trust relationship").

[8] *McCarty v. State Bank of Fredonia*, 795 P.2d 940, 943-44 (Kan. 1990) (quoting 26 U.S.C. § 408(a)), *overruled on other grounds by Taliaferro v. Taliaferro*, 843 P.2d 240 (Kan. 1992); *see also In re Mastroeni*, 57 B.R. 191, 193 (Bankr. S.D.N.Y. 1986).

II. IMPOSING A FIDUCIARY DUTY TO ACCOUNT BENEFICIARIES WOULD HAVE SIGNIFICANT MARKET CONSEQUENCES AND IS UNNECESSARY TO SAFEGUARD BENEFICIARY RIGHTS.

A. Creation of a Fiduciary Duty to Account Beneficiaries Would Impose Costs Not Currently Accounted for in Client Agreements.

The relationships among IRA custodians, accountholders, and beneficiaries are created and defined by contract. Contracts define the duties of custodians, and the rights of accountholders and beneficiaries, and courts defer to those agreements. *See, e.g.*, *BNP Paribas*, 866 F. Supp. 2d at 269 (enforcing contractual waivers of fiduciary duties); *Mastroeni*, 57 B.R. at 194 (holding that the terms of the custodial agreement trumped the statutory right of offset in bankruptcy).

A ruling that IRA custodians owe fiduciary duties to account beneficiaries would be contrary to the bargained-for relationship between custodians and accountholders, and impose significant costs not currently accounted for in client agreements. The relationships between broker-dealers and clients are priced and diligenced according to the current understanding that broker-dealers do not owe fiduciary duties to account beneficiaries. Thus, custodial IRAs are inexpensive. Once a client relationship with UBS is established, for example, a client may open a custodial IRA for $75.00—and it may even be free if the IRA is bundled with other services or accounts.

The establishment of fiduciary duties to beneficiaries would impose obligations on custodians far beyond what is currently contemplated, making IRAs far more expensive to establish and maintain. Under industry custom, IRA custodians are hands-

off with respect to beneficiaries. IRA custodians generally do not perform diligence, collect social security numbers or detailed personal identifying information, or otherwise track beneficiaries' whereabouts. Because beneficiaries are not clients, and can be changed at any time, custodians have no compliance or other obligations with respect to them.

This hands-off approach continues when an accountholder dies. Upon an accountholder's death, the account is essentially frozen; services authorized by the accountholder are terminated; the account is no longer actively managed (if it ever was); and investment advisory fees (if any) cease to accrue. A minority of financial institutions, as custodians, may attempt to locate named beneficiaries, but this is not the prevailing practice, and there is no contractual obligation to do so. Instead, the executor of the client's estate is left to make arrangements to notify beneficiaries.

The imposition of fiduciary duties to beneficiaries would fundamentally transform the industry. A fiduciary duty would require financial institutions to, for example, hire staff to identify and locate beneficiaries, manage beneficiary relationships, implement a process for gathering and tracking beneficiaries' personal identifying information and contact information, and proactively locate beneficiaries upon an accountholder's death. A fee of $75.00 does not account for this type of activity. By way of contrast, trusteed IRAs can cost a thousand or more dollars in fees per year to cover the many services that go into managing that product. *See, e.g.*, *EdwardJones Trust*

Company, Disclosures & Fee Schedule at 5, *available at* https://www.edwardjones.com/images/disclosures-fee-schedule-trustco.pdf.

Further increasing costs, a fiduciary duty to beneficiaries could conceivably increase a financial institution's compliance obligations, to ensure that named beneficiaries do not run afoul of State or federal law. As just one example, financial institutions have significant compliance obligations under the Bank Secrecy Act and regulations of the Office of Foreign Assets Control, which are designed to detect and identify illegal activity and prevent financial institutions from doing business with sanctioned persons. *See* 15 U.S.C. § 5311 *et seq.*; 31 C.F.R. § 501.101 *et seq.* To illustrate, imagine that an IRA client named as a beneficiary an individual listed by the federal government as a proliferator of weapons of mass destruction. Under the Appeals Court's rationale, UBS would owe a fiduciary duty to this individual, notwithstanding the fact that providing funding to him would violate federal law. *See, e.g.*, Executive Order 13,382, *reprinted at* 70 Fed. Reg. 38,567 (July 1, 2005). And even if UBS were able to perform sufficient research to learn about the federally-barred beneficiary, it is unclear whether fiduciary principles would allow UBS to retroactively disavow the accountholder's choice of beneficiary. By contrast, under a contractual regime, an accountholder's choice of a barred beneficiary would be void *ab initio.*

These increased costs, complications, and obligations will have real market consequences. In analogous circumstances, the U.S. Court of Appeals for the Fifth Circuit vacated the "Fiduciary Rule" promulgated by the Department of Labor, which

had significantly expanded the circumstances under which financial services professionals are considered fiduciaries under the Employment Retirement Income Security Act of 1974 and Internal Revenue Code. *See Chamber of Commerce*, 885 F.3d at 363. The Fifth Circuit explained some of the practical consequences of, and costs associated with, imposing such duties:

> The Fiduciary Rule has already spawned significant market consequences, including the withdrawal of several major companies, including Metlife, AIG and Merrill Lynch from some segments of the brokerage and retirement investor market. Companies like Edward Jones and State Farm have limited the investment products that can be sold to retirement investors. . . . The technological costs and difficulty of compliance compound the inherent complexity of the new regulations.

Id. at 368. Here, creating a fiduciary duty to beneficiaries would impose costs on custodians not currently contemplated or contracted for between the custodian and its clients. This, in turn, would raise the cost of investing in IRAs, mandating an approach to beneficiaries that the market has previously not demanded.

B. Creation of Fiduciary Duties to Account Beneficiaries Presents Significant Investment Advisory Concerns.

In addition to increasing costs, fiduciary duties to account beneficiaries would create significant practical problems. As discussed in Part I.B above, such a fiduciary duty will place custodians in the impossible position of having to navigate conflicts between competing beneficiaries, or even between accountholders and beneficiaries. And navigating those conflicts may prove impossible, because one beneficiary could argue that using interpleader to resolve a dispute over who is the appropriate beneficiary

is inconsistent with the custodian's duty of undivided loyalty to that beneficiary. Finally, a fiduciary obligation will invite significant litigation risk and uncertainty. If financial firms are forced to choose sides in the face of beneficiary-beneficiary or beneficiary-accountholder disputes, they will be subject to suit—no matter the outcome.

Moreover, if a custodian determines that a future relationship with a beneficiary would run afoul of State or federal law, it is unclear how the custodian could disavow that relationship given that there is no actual business relationship to disavow. With respect to account administration upon a beneficiary's death, one could envision an argument that custodians may no longer freeze an account upon death if that action is detrimental to the beneficiary. But because financial institutions do not have direct relationships with beneficiaries, they likely lack sufficient information to determine how to manage the account in a beneficiary's best interests, and lack trading authorization. If the custodian cannot locate the beneficiary quickly, then the custodian is placed in the impossible situation of being forced to freeze the account while incurring potential liability for breach of fiduciary duty. And locating beneficiaries upon an accountholder's death may take significant time, or even be impossible, in light of the practical realities of insufficient beneficiary contact information, unknown beneficiary disputes, and delays in the custodian learning of the accountholder's death.

Lastly, beneficiaries are often unaware that they were named as a beneficiary. In some cases, accountholders might even name unborn children as beneficiaries. Thus, imposing a fiduciary duty to beneficiaries creates unknowing and involuntary fiduciary

relationships. This is legally problematic and also impractical, because a fiduciary relationship requires a conscious assumption of responsibility on the part of the fiduciary. *Broomfield v. Kosow*, 349 Mass. 749, 755 (1965) (holding that a fiduciary relationship requires that the defendant "know[] of the plaintiff's reliance upon him"); *Prof'l Serv. Indus., Inc. v. Kimbrell*, 802 F. Supp. 383, 383 (D. Kan. 1992) (holding that fiduciary relationships require "conscious assumption of the alleged fiduciary duty").

C. Other Avenues of Relief Are Available to Account Beneficiaries.

Fiduciary obligations are not necessary to protect account beneficiaries. The relationship between accountholders and IRA custodians is created and defined by contract, and an account beneficiary may pursue contractual remedies as a third-party beneficiary to the contract. Indeed, here, Ms. Aliberti brought a claim for breach of contract, and UBS has acknowledged that it has contractual obligations to third-party beneficiaries to its IRA contracts. *See* Application for Further Appellate Review 3 ("UBS does not dispute that it has certain obligations to account beneficiaries following the death of an account owner. However, UBS submits that those obligations are contractual in nature . . . ."). If there were a desire in the market for custodians to offer greater services to account beneficiaries than what is currently contemplated, such an arrangement could be created by contract. For example, financial institutions could offer greater obligations to beneficiaries in exchange for higher payments.

Investing is never a one-size-fits-all proposition. And yet, if the judgment of the Appeals Court is affirmed, investors and financial institutions will be limited in the

options that they can select to plan for retirement. The Appeals Court's decision is therefore not simply founded on bad law and an erroneous understanding of fiduciary obligations, but it would set bad policy as well.

CONCLUSION

The judgment of the Appeals Court should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule of Appellate Procedure 16(k), I hereby certify that this brief was prepared and submitted in compliance with the rules of this Court that pertain to the filing of briefs. The brief was prepared using Microsoft Word 2016, with Garamond proportionally-spaced font in 14-point size. This brief contains 5,853 words, exclusive of the material not counted under Rule of Appellate Procedure 20(a)(2)(D), which is less than the 7,500 words permitted by Rule of Appellate Procedure 20(a)(2)(C).

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that, on March 11, 2019, which is within the time fixed for filing by Rule of Appellate Procedure 17(b), the foregoing Brief of the Securities Industry and Financial Markets Association as *Amicus Curiae* was filed by overnight courier via Federal Express with the Clerk for the Massachusetts Supreme Judicial Court, in the case *Donna A. Aliberti v. UBS Financial Services Inc.*, SJC Docket No. 12662.

I further certify that, on March 11, 2019, service was made on behalf of the Securities Industry and Financial Markets Association by overnight courier via Federal Express on counsel for all parties of record:

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