Case Number: 20-11719-HH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RAYMOND JAMES FINANCIAL SERVICES, INC.,
Plaintiff-Appellant,

v.

ADA SERENA CORDOVA ARMIJOS, ET AL.,
Defendants-Appellees

On Appeal from the United States District Court
For the Southern District of Florida

THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION'S MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

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July 6, 2020

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1, *Amicus Curiae* discloses that the following trial judges, attorneys, persons, associations of persons, firms, partnerships or corporations may have an interest in the outcome of this case:

1. Aguirre, Juan Oswaldo Vinelli.
2. Aguirre, Sonia Violeta Vinelli.
3. Akerman LLP.
4. Albornoz, Diego Xavier Calisto.
5. Angel A. Basantes C.
6. Araque, Hugo Patricio Vergara.
7. Arias, Hernán Antonio Jaramillo.
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125. Pinto, Carlos Jamil Helou.

126. Proano, Germanico Javier Davila.

127. Puga, Francisco Xavier Paez.

128. Raymond James & Associates, Inc.

129. Raymond James Financial Services, Inc.

130. Recalde, Carlos Ivan C.

131. Reinhart, Bruce E., U.S. Magistrate Judge, Southern District of Florida.

132. Rodriguez, Francisco A.

133. Rohan, Sean G.

134. Romoleroux, Jaime Antonio Toledo.

135. Ruiz, II, Rodolfo A., U.S. District Court Judge, Southern District of Florida.

136. Safadi, Paola Asunción Cortes.

137. Saint Salvatore Ltd.

138. Securities Industry and Financial Markets Association.

139. Salazar, Paul Patricio Ortega.

140. Sandoval, Karen Elizabeth.

141. Segovia, Gonzalo David Carrera.

142. Segovia, Hernán Patricio Calderón.

143. Sevilla-Sharon, Maia.

144. Silva, Herrman Gonzalo Cevallos.

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164. Vinelli, Soledad.

165. Viteri, Gilmer Rodrigo Lopez.

166. Vivanco, Gonzalo.

167. Vorbeck, Sylvia Albornoz.

168. Wayco, Stefanie M.

169. Weiss, Terry R.

170. Yanez, Martha Eugenia Lopez.

171. Yar, Fabian.

172. Yarza, Antonio Arregui.

173. Zambrano, Linda Andrade.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1 through 26.1-3, *Amicus Curiae* The Securities Industry and Financial Markets Association is a non-profit corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

/s/ Joseph C. Coates, III
Joseph C. Coates, III

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE

Pursuant to Federal Rule of Appellate Procedure 29(a)(3) and Eleventh Circuit Rule 29.1, The Securities Industry and Financial Markets Association ("SIFMA") respectfully moves for leave to file a brief as *amicus curiae* in support of Plaintiff-Appellant Raymond James Financial Services, Inc.'s ("RJFS") appeal of the order denying its motion for a preliminary injunction to enjoin the arbitration of an underlying dispute before the Financial Industry Regulatory Authority ("FINRA").[1] The proposed brief (one-half the length of the party briefs) accompanies this motion. All parties to this appeal have consented to the filing of this brief.

1. SIFMA requests that the Court grant leave to file a brief *amicus curiae*. This brief is desirable and the matters asserted are relevant to the disposition of this appeal because the issue on appeal directly affects the financial services industry of which *amicus curiae* has vast experience and interest.

2. SIFMA is a trade association representing the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's members include the leading investment banks, broker-dealers, and mutual fund companies. SIFMA's

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

mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

3. SIFMA has a particular interest in this litigation because the decision below affects the scope of arbitration in FINRA arbitration disputes. SIFMA's members are parties to thousands of disputes each year, including both judicial proceedings and arbitrations, many of them before FINRA. SIFMA has a substantial interest in ensuring that courts enforce agreements among participants in the securities industry reflecting their choice of forum for the resolution of disputes-whether that choice is arbitration, litigation, or some other means.

WHEREFORE, SIFMA respectfully requests the Court grant this motion and permit the filing of the accompanying brief *amicus curiae* in support of RJFS.

Dated: July 6, 2020

Respectfully submitted,

GREENBERG TRAURIG, P.A.

By: */s/ Joseph C. Coates, III*

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Attorneys for Amicus Curiae, The Securities Industry and Financial Markets Association

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) and contains 1407 words.

This motion complies with the typeface and type style requirements of Fed. R. App. P. 27(d)(1)(E) because it has been prepared using Microsoft Word 365 in Times New Roman, 14-point font.

/s/ Joseph C. Coates, III
Joseph C. Coates, III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of July, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Joseph C. Coates, III
Joseph C. Coates, III

Case Number: 20-11719-HH

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On Appeal from the United States District Court
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BRIEF OF AMICUS CURIAE THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF PLAINTIFF – APPELLANT RAYMOND JAMES FINANCIAL SERVICES, INC. REQUEST FOR REVERSAL

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/s/ Joseph C. Coates, III
Joseph C. Coates, III

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STATEMENT OF INTEREST

SIFMA is a trade association representing the shared interests of hundreds of securities firms, banks, and asset managers. SIFMA's members include the leading investment banks, broker-dealers, and mutual fund companies. SIFMA's mission is to support a strong financial industry, investor opportunity, capital formation, job creation, and economic growth, while building trust and confidence in the financial markets. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association.

SIFMA has a particular interest in this litigation because the decision below affects the scope of arbitration in FINRA arbitration disputes. SIFMA's members are parties to thousands of disputes each year, including both judicial proceedings and arbitrations, many of them before FINRA. SIFMA has a substantial interest in ensuring that courts enforce agreements among participants in the securities industry reflecting their choice of forum for the resolution of disputes-whether that choice is arbitration, litigation, or some other means. [2]

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

STATEMENT OF THE ISSUE

Whether the district court's interpretation of Financial Industry Regulatory Authority ("FINRA") Rule 12200 regarding the obligation of FINRA members to arbitrate certain disputes was inconsistent with the plain terms of the Rule and FINRA members' reasonable expectations as to their obligation to arbitrate.

SUMMARY OF ARGUMENT

Arbitration is a matter of contract and as this Court has ruled, the Financial Industry Regulatory Authority ("FINRA") arbitration rule at issue should be interpreted according to its plain terms and consistent with the "reasonable expectations of [FINRA] members." Wheat First Sec. Inc. v. Green, 993 F.2d 814, 820 (11th Cir. 1993). Under FINRA Rule 12200, FINRA members must arbitrate certain disputes with their customers. In ruling that a FINRA member must arbitrate claims involving non-customers based on the activities of a former associated person after his termination from the member firm, the district court stretched the scope of FINRA arbitration beyond this Court's precedent and the reasonable expectations of FINRA member firms. Participants in the securities industry need a clear standard for when a party seeking to bring a FINRA arbitration to resolve a dispute is entitled to arbitration of that dispute. The district court created a new unpredictable standard that opens the door to unnecessary litigation.

Prior rulings from this Court make clear that under FINRA Rule 12200 member firms are obligated to arbitrate disputes with their customers involving claims arising from the business activities of the member firm and its associated persons in their capacity as associated persons of that member firm. FINRA members expect to arbitrate disputes with *their own* customers regarding the business activities of their associated persons while they were associated with the

member firm. That common sense interpretation achieves a number of important goals. It provides clarity to market participants and courts by supplying an easily administrable standard that allows parties to predict with fair certainty, without litigation, whether their dispute is subject to mandatory arbitration. It is based on and consistent with the decisions of this Court and other courts of appeals which have looked to activities of the associated persons while they were registered with (and subject to the supervision of) the member firm. Finally, it accords with the reasonable expectations of FINRA members.

FINRA members do not expect, however, to be required to arbitrate disputes with *other institutions'* customers or based on activities of associated persons after they have been terminated by a member firm. The district court's ruling extended the scope of FINRA arbitration to include disputes arising from activities undertaken by a former associated person after he was terminated and when he was associated with another member firm. The district court reached this conclusion by engaging in an analysis focusing on the subjective beliefs of former customers and essentially disregarding the legal distinctions between affiliated corporations because they shared the name "Raymond James." The district court's subjective liability-based approach is at odds with the law of this Circuit. The district court's interpretation of FINRA Rule 12200 will also create confusion and unnecessary litigation because arbitration under the district court's interpretive framework would be subject to a

case-by-case analysis of individual investors' subjective beliefs rather than an objective and easily determinable standard.

This case demonstrates the importance of predictability in determining which cases are subject to FINRA arbitration. FINRA performs a valuable service in protecting the interests of investors through fair and efficient member-customer arbitration. But in agreeing to arbitrate member-customer disputes, FINRA members do not also obligate themselves to arbitrate disputes with parties that are not their customers, such as the customers of other FINRA members or affiliates or from the business activities of persons who are no longer associated with the member firm.

ARGUMENT

I. FINRA ARBITRATION PROVIDES A FAIR AND EFFICIENT FORUM TO RESOLVE MEMBER-CUSTOMER DISPUTES.

Regulators and participants in the securities industry have long recognized that, in appropriate circumstances, investors and markets greatly benefit from alternative dispute resolution. Arbitration is a popular and effective method for resolving many types of disputes.

FINRA, a self-regulatory organization, has established an arbitration process tailored to resolving certain disputes within the securities industry.[3] SIFMA supports

[3] "FINRA is a self-regulatory organization established under the Securities Exchange Act of 1934, 15 U.S.C. § 78o-3, with the authority to exercise comprehensive oversight over all securities firms that do business with the public."

FINRA arbitration as an appropriate forum for alternative dispute resolution for member-customer disputes. FINRA arbitration provides an impartial and efficient forum for resolving such disputes and, in so doing, bolsters the public's trust in the industry and the markets. "[S]ecurities arbitration affords investors the opportunity to have their claims heard close to home, before highly trained and experienced arbitrators, in a forum that has proven to resolve disputes at least as fairly as the judicial system, and much faster and less expensively." SIFMA, *White Paper on Arbitration in the Securities Industry* (Oct. 2007).[4]

There are a number of aspects that make arbitration well-suited for handling disputes between financial services firms and their customers. For example:

- "FINRA serves the claim on the broker that the investor complained about, with a fee structure favoring the investor, saving them time and money.
- The hearing is sited where the investor lived when the events occurred, with hearing locations in all 50 states.
- The process includes a motion-to-dismiss rule severely limiting motions made before the claimant rests their case and provides sanctions for frivolous motions.
- Parties have access to the FINRA discovery guides and codified discovery provisions in the Code of Arbitration Procedure for Customer Disputes.

Pictet Overseas Inc. v. Helvetia Trust, 905 F.3d 1183, 1187 (11th Cir. 2018) (quoting UBS Fin. Servs., Inc. v. W. Va. Univ. Hosp., Inc., 660 F.3d 643, 648 (2d Cir. 2011)).

[4] http://www.sifma.org/wp-content/uploads/2017/03/White-Paper-on-Arbitration-in-the-Securities-Industry-October-2007.pdf (last visited on June 22, 2020).

- The customer has the option of an all-public panel, and in close calls, if the investor wants an arbitrator removed for bias, they are removed."

SIFMA, *Securities Arbitration System Works Effectively and to the Benefit of Investors*. Carroll, K. https://www.sifma.org/resources/news/securities-arbitration-system-works-effectively-and-to-the-benefit-of-investors/. December 9, 2019 (last visited on June 22, 2020).

SIFMA believes that the enforceability of pre-dispute arbitration clauses is vital to the just, effective, and efficient resolution of disputes between broker-dealers and their customers. Interpretation of the FINRA rules requiring arbitration should, however, be based on the plain terms of the arbitration provisions and consistent with the reasonable expectations of FINRA member firms. Predictability and consistency in the interpretation of such clauses is a benefit to all who participate in the FINRA arbitration process.

II. THE DISTRICT COURT'S APPROACH IS INCONSISTENT WITH THE PLAIN TERMS OF THE FINRA ARBITRATION RULE AND CREATES UNCERTAINTY AND UNNECESSARY LITIGATION.

Although SIFMA supports FINRA arbitration as a method of resolving member-customer disputes, it does not follow that an arbitration claimant should be entitled to compel FINRA arbitration against a FINRA member firm based on the business activities of a former associated person or because they are customers of an

affiliate sharing a similar corporate name. [5] The district court's ruling stretches the scope of the FINRA arbitration clause far beyond the reasonable expectations of FINRA members, ignores the distinction between separate corporations and creates the prospect of more litigation concerning the arbitrability of disputes.[6]

A. The Proceedings Below Demonstrate the Need for Certainty and Clarity with Respect to the Member-Customer Relationship.

One of the primary benefits of FINRA arbitration is that it allows investors to have their claims decided more quickly and at lesser cost than would be the case if the claim had to be litigated in court. This benefit is undercut when the threshold determination whether a dispute is arbitrable requires proceedings before the district court (or state court) including a determination concerning the subjective beliefs of investors who were not customers of the member firm.

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[5] This brief presumes familiarity with the facts of this dispute, as set out in the Plaintiff-Appellant's Brief. See Brief of Plaintiff-Appellant Raymond James Financial Services, Inc. at pp. 4-16. This brief refers to Plaintiff-Appellant Raymond James Financial Services, Inc. as "RJFS" and the Defendants – Appellees as the "Investors."

[6] According to RJFS' Brief, the investments at issue were purchased beginning in 2010, two years after Chatburn's brief five-month affiliation with RJFS terminated in August 2008. See RJFS Brief at pp. 9-10. After his termination, Chatburn became an associated person of another firm - Biscayne Capital (BVI). That firm was not an RJFS affiliate and RJFS did not have a relationship with it. See RJFS Brief at p. 5. Instead, Biscayne BVI had a relationship with another entity – Raymond James & Associates, Inc. ("RJA") which acted as clearing firm for Biscayne BVI . RJFS Brief at p. 4. RJA has not opposed FINRA arbitration of this dispute. This brief focuses on whether FINRA Rule 12200 applies to Investors who made investments during the time period when Chatburn was *not* associated with RJFS.

B. Arbitration is a Matter of Contract.

It is a fundamental principle that under the Federal Arbitration Act, 9 U.S.C. § 1 et. seq. ("FAA"), arbitration is a "matter of contract" and a party cannot be required to arbitrate unless that party had "agreed in advance to submit this grievance or type of grievance to arbitration." Pictet Overseas Inc., 905 F.3d at 1187 AT&T Techs., Inc. v. Communications Workers of America, 475 U.S. 643, 648-49 (1986)). The FAA, "does not confer a right to compel arbitration of any dispute at any time; it confers only the right to obtain an order directing that arbitration proceed in the manner provided for in [the parties'] Agreement." Volt Info. Sciences, Inc. v. Bd. of Trustees of Leland Stanford Junior Univ., 489 U.S. 468, 478 (1989) ("[T]he FAA does not require parties to arbitrate when they have not agreed to do so."). As this Court has recognized, "[s]imply put, parties cannot be forced to submit to arbitration if they have not agreed to do so." Chastain v. Robinson-Humphrey Co., 957 F.2d 851, 854 (11th Cir. 1992).

Here, there is no direct written arbitration agreement between the parties. Instead, the only basis for arbitration is through RJFS' membership in FINRA. The FINRA Rules require member firms such as RJFS "to arbitrate certain disputes with customers before FINRA upon the customer's demand." Pictet, 905 F.3d at 1187. The applicable FINRA Rule 12200 provides for arbitration only if:

> Arbitration under the Code is either:
>
> (1) required by a written agreement; or
>
> (2) requested by the customer.
>
> - The dispute is between a customer and a member or associated person of a member; and
>
> - The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance activities of a member that is also an insurance company.

FINRA Rule 12200.

FINRA Rule 12200 has a two-part test that must be satisfied before arbitration is required: (1) that the claim involves a dispute by a customer; and (2) the dispute arises in connection with the business activities of the member firm. See Mony Sec. Corp. v. Bornstein, 390 F.3d 1340, 1343 (11th Cir. 2004). This Court has also made clear that FINRA Rule 12200 should be interpreted as "a contract under applicable state law." Pictet, 905 F.3d at 1188. In so doing, the Court should "determine the parties' intent from the words of the contract as a whole." Id. (quoting City of Tampa v. Ezell, 902 So. 2d 912, 914 (Fla. Dist. Ct. App. 2005). Importantly, Rule 12200 should also be construed in a manner consistent with the "reasonable expectations of [FINRA] members." Wheat First, 993 F.2d at 820; Wachovia Bank, N.A. v. VCG Spec. Opp. Master Fund, 661 F.3d 164, 171 (2d Cir. 2011) (in construing FINRA Rule 12200 "terms such as 'customer' should be construed in a manner consistent

with the 'reasonable expectations' of FINRA members.'") (quoting Wheat First, 993 F.2d at 820).

FINRA members' reasonable expectations of Rule 12200 based on the language of the Rule is to arbitrate disputes brought by their customers involving the business activities of associated persons while they were associated persons of the member firm, not disputes arising from the business activities of former associated persons occurring when they were no longer associated with the member firm. See Raymond James Financial Servs, Inc. v. Cary, 709 F.3d 382, 386 (4th Cir. 2013) ("When it accepted FINRA Rule 12200, RJFS agreed to arbitrate disputes with its customers, not with those who fell outside that category."). This interpretation is fully consistent with the text of the rule and the Court's prior rulings regarding the scope of FINRA Rule 12200.

In ruling that the Investors were customers of RJFS even after Chatburn's association with the firm was terminated upended the clear language of the rule and the reasonable expectations of FINRA members. In interpreting FINRA Rule 12200, this Court has consistently recognized the importance of the associated person acting in his or her capacity as an associated person of the member firm at the time of the events giving rise to the dispute.

Pictet illustrates the proper application of FINRA Rule 12200 and explains why the rule requires a showing that the associated person was acting in his capacity

as an associated person of the member firm. 309 F.3d at 1188. In Pictet, two investment trusts opened custodial accounts at a Swiss bank, Banque Pictet, and hired an unrelated investment advisor to manage their accounts. Id. at 1185-86. After the monies were deposited into Banque Pictet, the investment advisor allegedly stole the funds from the accounts. The investment trusts initiated a FINRA arbitration against Banque Pictet's eight partners and several corporate affiliates of Banque Pictet. Id. at 1186.

One of the affiliates, Pictet Overseas, Inc., which was also owned by the eight Banque Pictet partners, was a FINRA member. As such, the partners were also associated persons of the FINRA member. Id. at 1188. The investment trusts argued that "the dispute was arbitrable because it arose in connection with the business activities of the Partners who, the Trusts claim, are associated persons of Pictet Overseas." Id. In other words, the Investment Trusts contended that "a dispute arising out of any type of business activity of an associated person is covered by Rule 12200...." Id. The Court rejected this overly broad interpretation of FINRA and held that Rule 12200, "was intended to bind a FINRA member's associated persons to arbitrate disputes only when the dispute arises in connection with the business activities of the associated person undertaken in his or her capacity as an associated person of the FINRA member." Id. at 1188 (emphasis added). The Court further emphasized that Rule 12200 did not require arbitration based on the activities

of an associated person not tied to his or her relationship with a FINRA member: "In addition, common sense dictates that FINRA and its members could not have intended to require FINRA arbitration of any claim that arose out of activities of the associated person that are unrelated to his or her relationship with the FINRA member." Id. at 1189. Pictet, which is based on the plain language of Rule 12200 sets forth a reasonable and workable standard that is consistent with the reasonable expectations of FINRA members - that is to arbitrate disputes with customers arising from business activities of their associated persons while they acted in their capacity as an associated person of the member firm. Following Pictet, it necessarily follows then that activities of an associated person after he was terminated and while registered with another member firm, fall outside the scope of FINRA Rule 12200.[7]

This Court has not hesitated to reject arbitration where the events at issue occurred at another firm. In Wheat First, a group of investors sought arbitration under the predecessor rule to FINRA Rule 12200.[8] 993 F.3d at 814, 819-820. The

[7] For the same reason it cannot be said that the Investors were customers of RJFS after Chatburn's termination. Therefore, the first prong of Rule 12200's two-part test cannot be satisfied. The Investors did not have accounts with the firm nor any dealings with RJFS that could be characterized as a customer relationship. See RJFS Brief at pp. 5-11.

[8] "FINRA was created in 2007 through a consolidation of the National Association of Securities Dealers, Inc. ("NASD") – a self-regulatory organization registered under the Securities Exchange Act of 1934 ("1934 Act") and the regulatory arm of the New York Stock Exchange Group, Inc." Wachovia Bank, N.A. v. VCG Spec. Opp. Master Fund, Ltd., 661 F.3d 164, 172 (2d Cir. 2011). FINRA Rule 12200 was

investors had accounts and dealings with a predecessor brokerage firm that was later acquired by Wheat First. Id. at 816. The investors transferred their accounts to Wheat First and were customers of Wheat First at the time of arbitration filing. The alleged activity giving rise to the arbitration claims, however, arose while the investors' accounts were with the predecessor firm. Id. The Court focused on the time period of the alleged wrongdoing and held that arbitration was not required under the rule because "customer status for purposes of the 'customer' requirement of NASD Code §§ 1 and 12(a) must be determined as of the time of the events providing a basis for the allegations of fraud." Id. at 820. Reviewing the text of the rule, the Court ruled:

> We cannot imagine that any [FINRA] member would have contemplated that its [FINRA] membership alone would require it to arbitrate claims which arose while a claimant was a customer of another member [firm] merely because the claimant subsequently became its customer. The potential for abuse under this scheme is manifestly apparent from the facts of the present case.

Id. at 820.[9]

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derived from the predecessor NASD arbitration rules and is not materially different than the NASD rules.

[9] One part of the Wheat First decision concerning the question of whether arbitrability of the dispute should be litigated in district court or before the arbitrators has been abrogated by later decisions. See Larsen v. Citibank FSB, 871 F.3d 1295, 1303 n. (11th Cir. 2017). Wheat First's interpretation of the NASD predecessor to FINRA Rule 12200, however, remains good law.

Departing from this standard, the district court ignored the common sense temporal limitations of the FINRA arbitration rule and Pictet's requirement that the dispute arises from the associated person's business activities undertaken while associated with the firm at the time of the events at issue.

The other two cases from this Circuit interpreting FINRA Rule 12200 have similarly found the status of the associated person to be a crucial part of its analysis interpreting the rule. These cases involved claims of "selling away" in which an associated person sold unapproved or unauthorized investments to investors without the brokerage firm's permission. In these selling away cases, while the investor did not have accounts with the member firm, it was an important and necessary component of the Court's ruling that the associated person was registered with the member firm at the time of the events at issue. For example, in Multi-Financial Sec. Corp. v. King, 386 F.3d 1364, 1370 (11th Cir. 2004), an associated person allegedly sold investors an investment that was not approved by the firm. In ruling that the member firm must arbitrate, the Court found that the investors were customers of the financial advisor at the time he was associated with the member firm:

> [I]n the universe of member-customer disputes, only a portion will arise in connection with the member's business and only those satisfy the Code's arbitration provisions. [The investor's] cause of action, for example, arises from the actions of Micciche in giving advice regarding investments at a time when he was a person associated with IFG, a brokerage firm in the business of providing investment advice through its representatives.

Id. at 1371 (emphasis added).

Similarly, in Mony Sec. Corp., 390 F.3d at 1342, the investor alleged that the member firm's associated person sold unapproved viatical investments. The Court ruled that the member firm was required to arbitrate because the investors were customers of its associated person. Id. at 1344 (the investors "are customers under the applicable NASD Rules because it is undisputed that they are customers of Keller, and that Keller was an associated person with the member firm."). The Court then examined whether the events arose while the financial advisor was an associated person of the member firm. "What matters is that Keller was also an associated person with [the member firm]." Id. at 1344.

As the Court has recognized, while the definition of a customer under FINRA Rule 12200 may be broad, the requirement that the dispute arise in connection with the business activities of the member firm provides an important limit to the type of disputes subject to arbitration under the Rule. King, 386, F.3d at 1370. Focusing on the business activity prong of FINRA Rule 12200's two-prong test the Court in Mony Sec. Corp., ruled that activities of the associated person involved the firm's business because "the Eleventh Circuit and most other courts hold that supervision of associated persons arise in connection with the member's business." Id. at 1344-45. See also Vestax Sec. Corp. v. McWood, 280 F.3d 1078, 1080 (6th Cir. 2002) ("A dispute that arises from a broker-dealer's lack of supervision over its brokers

arises in connection with its business."); Sagepoint Fin., Inc. v. Small, 2015 WL 2354330, *4 (E.D.N.Y. May 15, 2015) (holding that a member firm was not required to arbitrate a dispute arising from the actions of a former associated person that took place after he left the firm and distinguishing other cases as "materially different in that the member had the ability to exercise supervisory control over its associated persons at the time of the alleged misconduct) (quotations and citations omitted).[10]

The Court's focus on the duty to supervise as the connection to the member firm's business activities further supports the common sense interpretation of Rule 12200 that an associated person must be associated with the member firm at the time of the events at issue. That is so because the duty to supervise only applies while a person is associated with a member firm. Indeed, FINRA's supervisory rule -- Rule 3100 provides that "[e]ach member shall establish and maintain a system to supervise the activities of each associated person that is reasonably designed to achieve compliance with applicable securities laws and regulations, and with applicable FINRA rules. Final responsibility for proper supervision shall rest with the member." See FINRA Rule 3100 (Supervisory Responsibilities). See also FINRA Rule 3200 (Responsibilities Relating to Associated Persons) (detailing specific supervisory responsibilities with respect to associated persons). FINRA

[10] See also John Hancock Life Ins. Co. v. Wilson, 254 F.3d 48, 59-60 (2d Cir. 2001) (holding that member firm was required to arbitrate in a selling away case based on the financial advisor's status as an associated person of the firm.).

rules make clear that the duty to supervise applies to the time period the associated person is associated with the Firm. It does not extend after they are terminated or move to another firm.

In contrast to the district court's subjective approach, Wheat First's and Pictet's common sense interpretation of FINRA Rule 12200 is also easily applied because the dates of a person's association with a member firm are readily ascertainable and publicly available on FINRA's BrokerCheck website. [11]

C. The District Court's Subjective Approach is Contrary to FINRA Rule 12200 and Will Lead to Unpredictable Results.

The district court's ruling also illustrates why deviating from this Court's common sense approach is fraught with such uncertainty. Because Chatburn was associated with RJFS for only a few short months, the district court had to create a

[11] When a member firm registers an associated person with FINRA, the member firm submits a Form U4 (Uniform Application for Securities Industry Registration or Transfer) and certain information is included in FINRA's publicly available BrokerCheck website. Similarly, when a member firm terminates the registration of an associated person, the firm files a Form U5 (Uniform Termination Notice for Securities Industry Registration). See https://finra.org./registration-exams-cc/individuals/terminate. The fact of termination including the date is made publicly available by FINRA. See FINRA Rule 8312 (describing the type of information released through FINRA's Broker Check website). FINRA's BrokerCheck website is FINRA's free online tool that assists investors researching the background of brokers and FINRA member brokerage firms. See FINRA, "About Broker Check," available at https://www.finra.org/investors/about-broker-check. As the district court recognized, Chatburn's registration and termination from RJFS was reported to FINRA on a Form U-5 (Dkt. 107 at 5). Chatburn's termination was also reported and publicly available on FINRA's BrokerCheck website. RJFS Brief at 9.

subjective analysis test to reach the conclusion that RJFS was required to arbitrate claims that arose from events that took place years after RJFS terminated him and while he was no longer its associated person. The district court opined because investors may have been confused about the financial advisor, Chatburn's role and the use of the generic corporate name "Raymond James," Chatburn's actual status as an associated person of RJFS did not matter because the investors believed they were dealing with "Raymond James" which presumably included RJFS. Dkt. 107 at 6, 13.[12] In other words, according to the district court, because Chatburn was registered with RJFS for a short time in 2008 and held himself out as being associated with "Raymond James," the Investors were somehow confused and this confusion meant they would be considered "customers" of RJFS for years afterwards. Dkt. 107 at 13.

Instead of looking to the language of FINRA Rule 12200 in context as Pictet requires, the district court also focused on a liability argument noting that accepting RJFS' interpretation would "absolve Raymond James of any liability." Dkt. 107 at 14. But that is not the proper analysis. The issue before the district court was the arbitrability of a dispute, which is a contract-based determination, not a liability

[12] As discussed in RJFS's Brief, the Investors were customers of another Raymond James affiliate – Raymond James & Associates, Inc. ("RJA"), which cleared certain transactions for Investors. RJFS Brief at pp. 4, 11. RJA has not opposed FINRA arbitration with the Investors.

analysis. See Pictet, 905 F.3d at 1187 (arbitration is a matter of contract and subject to rules of contract interpretation). The Investors' alleged confusion is not the proper test under FINRA Rule 12200. Rather, as this Court has repeatedly observed, the Rule depends on the objective status of the associated person -- not the subjective beliefs of investors as the district court held. Simply put, FINRA members did not have a reasonable expectation to arbitrate claims with non-customers whose claims arose from dealings with a former associated person at a time when he was no longer associated with the firm.

It is also easy to envision how the district court's liability-based analysis would lead to unpredictable results, create confusion and further litigation. For example, investors who had an account or relationship with one affiliate could claim they believed they were dealing with another affiliate who happened to be a FINRA member. Litigation would then ensue over whether it was reasonable for them to believe they were customers of the FINRA member firm. This would likely entail competing declarations and/or testimony along with emails, communications, and other documents that the court would then have to sort out making the process more costly and time-consuming – not to mention unpredictable.

The Second Circuit's decision in Citigroup Global Markets Inc. v. Abbar, 761 F.3d 268 (2d Cir. 2014), also explains why the district court's subjective approach is so unworkable. Abbar involved questions of arbitrability under FINRA Rule

12200 in the context of affiliated entities which shared the name "Citigroup." In Abbar, the investor entered into investment agreements with "Citi UK," a non-FINRA member but had some dealings regarding the transaction with employees of "Citi NY" which was a FINRA member and an affiliate of Citi UK. Id. at 270-71. The investor filed an arbitration claim based on his dealings with Citi NY, the FINRA member firm. Id. at 270. The parties engaged in protracted litigation before the district court concerning, among other issues, the level of dealings between the investor and the various persons who dealt with him to determine whether "the facts would coalesce into a functional concept of the customer relationship capable of supporting a judicial determination." Id. at 273. To avoid such a detailed examination, the Abbar court adopted a bright line test to rule that a customer under FINRA Rule 12200 "is one who, while not a broker or dealer, either (1) purchases a good or service from a FINRA member, or (2) has an account with a FINRA member." Id. at 275. The Abbar court went on to hold that its interpretation of the term "customer" meant:

> [I]t will not be necessary to make a detailed examination (as the district court felt compelled to do here) of the 'substance, nature and frequency of each interaction and task performed by the various persons..., their contemporaneous understandings..., and the extent to which the person's activities shaped or caused the transaction.

Id. at 276 (citing CGMI v. Abbar, 943 F. Supp. 2d 404, 407 (S.D.N.Y. 2013)).

In a ruling that carries particular resonance here, the Abbar court observed:

> As this case illustrates, finance nowadays often involves worldwide services, networks of information, talent and technology. But multiple inputs do not necessary create customer relationships in different places simultaneously. The proceedings conducted in this case amount to a controlled experiment in what happens when customer status emails inquiring into each communication, agreement, side agreement, understanding, and rendering of advice, and when big guns are drawn into contentious discovery disputes and at trial. The sprawling litigation that can (and did) result defeats the express goals of arbitration to yield economical and swift outcomes.

Abbar, 761 F.3d at 276.

These same concerns are apparent from the district court's subjective liability-based analysis that will potentially create more litigation and undermine the primary goals of arbitration which are centered around the just and effective resolution of disputes. The district court's opinion and resulting interpretation of FINRA Rule 12200 is at odds with this Court's precedent and undermines the utility of arbitration by fostering potential litigation.

D. The District Court's Disregard of Separate Corporations is Not Supported by FINRA Rule 12200 and is Against Public Policy.

In analyzing the Investors' subjective beliefs, the district court seemingly declined to recognize that RJA and RJFS were separate legal entities. Dkt. 107 at 6. The district court's approach to the corporate form is not supported by the FINRA rule or this Court's precedent. Nothing in FINRA Rule 12200 suggests that it is appropriate to disregard separate corporations even if owned by the same ultimate

parent corporation. Affiliate structures are common in the financial services industry and it is important that courts recognize them.[13] "The corporate entity is an accepted, well used and highly regarded form of organization in the economic life of our state and nation. Their purpose is generally to limit liability and serve a business convenience." Dania Jai-Alai Palace, Inc. v. Sykes, 450 So. 2d 1114, 1120-21 (Fla. 1984); see also Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1320 (11th Cir. 1998) ("corporations are legal entities by fiction of law. Their purpose is generally to limit liability and serve a business convenience. Courts are reluctant to pierce the corporate veil and only in exceptional cases will they do so.") (citations and quotations omitted).

The district court's approach also runs afoul of this Court's ruling in Pictet which like this case involved affiliated but separate legal entities operating under the Pictet name. In Pictet, several entities shared the generic name "Pictet" that the court

[13] It was undisputed below that RJA and RJFS are separate corporations and were separate FINRA members with separate registration numbers provided by FINRA and the Securities and Exchange Commission ("SEC"). See RJFS Brief at p. 5. While the district court observed that RJA and RJFS shared "a campus, share resources when possible, and ultimately report to the same General Counsel for compliance matters . . . share a database of client records and information . . ." and that RJFS associated persons may sell RJA products. Dkt. 107 at 6. There is nothing unusual about such arrangements between affiliates and certainly nothing that suggests the separate corporate entities of the Raymond James entities should be disregarded. See, e.g., Johnson Enter., 162 F.3d at 1320 (describing normal relationship between affiliates); Hilton Oil Trans. v. Oil Trans. Co., S.A., 659 So. 2d 1141, 1151-53 (Fla. Dist. Ct. App. 1995) (rejecting effort to disregard corporate form); Cook v. Smith, 2006 WL 580991 (M.D. Fla. Mar. 8, 2006) (same).

described as "an international network of banks and investment companies," Pictet, 903 F.3d at 1186. Yet, the court's analysis was focused on the specific role of the associated persons and whether they were acting in their capacity as an associated person of the FINRA member. Id. at 1188-89. Courts have rejected similar efforts to lump affiliated entities together in interpreting FINRA Rule 12200. See, e.g., Citigroup Global Markets, Inc. v. VCG Spec. Opp. Master Fund, 598 F.3d 30, 39 (2d Cir. 2010) (holding that if the investments "were never handled by an agent of CGMI, acting for that purpose, then VCG was not the 'customer' of CGMI under any reasonable construction of that term") (emphasis added); Abbar, 761 F.3d at 275. While the Investors may have had accounts with RJA, they cannot ride the coattails of their relationship with RJA to create a customer relationship with RJFS particularly in the years after Chatburn's termination from RJFS.

There is no rule unique to FINRA arbitration that allows a court to disregard the corporate form of related entities to find that a relationship with one entity converts a person into an associated person of all related entities or makes a customer of one entity the customer of other affiliates. Not only is there no textual or contextual basis for the district court's approach, it is bad policy.

Instead of following Pictet and Wheat First, in rejecting a temporal limitation to arbitration under FINRA Rule 12200, the district court relied on Metlife Sec., Inc. v. Pizzano, 2010 WL 2545170 (D.N.J. June 10, 2010), and FINRA Rule 12100(u).

While FINRA Rule 12100(u) defines "associated person" to include "a person formerly associated with a member," the meaning of that definition when read in the context of FINRA Rule 12200 is clear. That definition merely clarifies that an associated person (or member firm) cannot avoid arbitration simply by the associated person leaving the member firm after the alleged wrongdoing but before the arbitration filing. It is also a jurisdictional rule that prevents an associated person from avoiding FINRA arbitration by leaving the industry. FINRA Rule 12100(u) does not mean as the district court or the Pizzano decision suggests that investor claims involving former associated persons arising from conduct occurring after their association with a member firm has terminated can be brought against member firms.

Not only is Pizzano, which focuses solely on the customer-prong of FINRA Rule 12200 inconsistent with Wheat First, but it cannot be squared with Pictet's analysis of the "business activity" prong of FINRA Rule 12200. See Pictet, 309 F.3d at 1188-89. According to Pictet, the business activities prong of FINRA Rule 12200 requires that the business activities of the associated person be undertaken in their capacity as an associated person of the member firm. Id. That logically cannot be satisfied when the associated person is no longer associated with the member firm.

The combination of the district court's subjective analysis and disregard of the corporate form creates a confusing standard for a straight-forward question. It

also creates the potential for further litigation as the status of associated persons would depend on a customer's subjective belief as to their role and whether customers may be confused about the name of corporate affiliates.

Such a result would undermine well-established law regarding when arbitration may be compelled by the courts and disregards the language of FINRA Rule 12200, thus contravening FINRA member firms' reasonable expectations regarding what disputes they agreed to arbitrate. Indeed, adopting the Investors' approach would make it unreasonably and unnecessarily difficult for participants in the financial industry to predict when mandatory arbitration applies. Sweeping this dispute within the scope of mandatory customer arbitration would not only violate the imperative regarding the reasonable expectations of parties to arbitration agreements, it would make it difficult for FINRA members even to formulate reasonable expectations going forward, because it would undermine the predictability on which reasonable expectations would be based.

CONCLUSION

For the foregoing reasons, the decision of the district court should be reversed.

Dated: July 6, 2020

Respectfully submitted,

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

I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) because this brief contains 6330 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief also 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 365 in Times New Roman, 14-point font.

/s/ Joseph C. Coates, III
Joseph C. Coates, III

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of July, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Joseph C. Coates, III
Joseph C. Coates, III

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