STATE OF WISCONSIN
COURT OF APPEALS
DISTRICT IV

CHRISTOPHER LEACH,
DANIEL CUNNINGHAM, and
PV WEALTH ADVISORS, LLC,

Petitioners-Appellants,

v.

STATE OF WISCONSIN DEPARTMENT
OF FINANCIAL INSTITUTIONS,
DIVISION OF SECURITIES,

Respondent-Respondent.

APPEAL NO. 2023-AP-1133
Dane County Case No. 22-CV-2323
The Honorable Stephen E. Ehlke, Presiding

NON-PARTY BRIEF IN SUPPORT OF THE WISCONSIN DEPARTMENT OF FINANCIAL INSTITUTIONS

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IDENTITY AND INTEREST OF *AMICUS CURIAE*

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. NASAA has 68 members, including the Wisconsin Department of Financial Institutions (the "WDFI"). The overriding mission of NASAA and its members is to protect investors, particularly retail investors, from fraud and abuse.

NASAA and its members have a substantial interest in this case because it involves the interpretation of uniform statutory provisions. Like most other states, Wisconsin's securities law is based on the Uniform Securities Act. A core goal of these statutes, second only to investor protection, is to achieve uniformity where possible among state and federal securities laws. *See* Uniform Securities Act (2002) § 608, Official Comment 1. Courts interpreting such uniform provisions regularly look to decisions interpreting similar provisions in federal and other states' securities laws for guidance. As such, it is important that the Wisconsin Uniform Securities Law ("WUSL") is interpreted and applied correctly, in its proper context, and consistent with the purposes of the legislation.

ARGUMENT

I. The WDFI has jurisdiction over Appellants' violations of the WUSL.

State securities laws, such as the WUSL, are meant principally to protect investors. In order to achieve that purpose, they are written broadly and must be construed flexibly to maximize the substantive protections therein. *See State v. McGuire*, 2007 WI App 139, ¶ 12, 302 Wis. 2d 688, 735 N.W.2d 555; *Affiliated Ute Citizens of Utah v. U.S.*, 406 U.S. 128, 151 (1972). Consistent with these overarching principles, the WUSL defines its jurisdictional reach broadly. *See* Wis. Stat. § 551.613.[1] These provisions were written to ensure that each state would have broad, concurrent jurisdiction over violations involving interstate transactions because each state has an interest in both protecting investors within its borders and protecting the public as a whole from unscrupulous conduct by those within the state. *See Benjamin v. Cablevision Programming Invs.*, 499 N.E.2d 1309, 1315 (Ill. 1986). Thus, under Wis. Stat. § 551.613, the WDFI has jurisdiction to enforce the antifraud and registration provisions against both in-state and out-of-

[1] The WUSL is modeled on the Uniform Securities Act of 2002 ("USA 2002"), Wis. Stat. § 551.615, and the relevant statutory provisions in the WUSL are materially identical to those in the model legislation. The USA 2002 is available at https://bit.ly/46XlFOY.

state actors so long as the underlying offers, purchases, and sales of securities are made in Wisconsin. That is precisely what occurred here.

A. Appellants sold securities in Wisconsin by trading securities in Seago's brokerage account.

The WDFI cogently demonstrates that Appellants made offers to sell securities in Wisconsin.[2] Without restating the WDFI's well-reasoned arguments, NASAA fully supports the WDFI's interpretation of the statute as it is consistent with the plain language and intent of the law. But there is another ground on which the Court can and should affirm the WDFI's jurisdiction in this case: in addition to making offers to sell securities in Wisconsin, Appellants also *sold* securities in Wisconsin by trading securities directly in a Wisconsin investor's account.

The WUSL defines "sale" to include "every . . . disposition of a security or interest in a security for value." Wis. Stat. § 551.102(26). This definition is intended "to exclude nothing that could possibly be regarded as a sale" and encompasses "every step toward the completion of a sale[.]" *Benjamin*, 499 N.E.2d at 1315. In Appellants' own words, "Cunningham signed on to Seago's [brokerage] account . . . and *bought and sold*

[2] As the WDFI explains in its own brief, the term "offer" is broad enough to cover the entire selling process and squarely encompasses Appellants' conduct in this case. Brief of Respondent-Respondent ("WDFI Br."), 28-32 (Dec. 6, 2023).

securities." Brief of Petitioners-Appellants ("App. Br."), 32 (Oct. 5, 2023) (emphasis added). He did so pursuant to a limited power of attorney, Findings of Fact, Conclusions of Law, and Final Orders (Aug. 16, 2022) (R. 26:23-24), and without discussing individual trades with Seago before making them, App. Br. at 32.

Cunningham did all of this under the guise of an investment management business, PV Wealth Advisors. (*See* R. 26:12-20, 46-47.) Although Leach was not named on the limited power of attorney, he played an integral role in obtaining Seago's investment and setting up the accounts, and he was the only one of the Appellants with *any* experience trading securities. (R. 26:5, 12-22, 24-25, 34-35, 39.) In substance, Appellants exercised discretionary trading authority in Seago's account, making all investment decisions for her, and their conduct is not meaningfully different from the same conduct by a registered broker.[3]

[3] In a related but distinct context, the U.S. Supreme Court explained that "[i]t long has been quite clear, that when a broker acting as agent of one of the principals to the transaction successfully solicits a purchase," he is liable as a "seller" in a private civil suit under the Securities Act of 1933. *Pinter v. Dahl*, 486 U.S. 622 (1988). *Pinter* is of limited use in this case because the underlying statute differs from those at issue here. *Pinter* involved a statutory cause of action in which the plaintiff must have "*purchas*[*ed*] *such security from*" the defendant. *See* 15 U.S.C. § 77*l*(a)(2). Thus, while that cause of action requires a degree of privity between the parties, similar to Wis. Stat. § 551.509, there is no such requirement under Wis. Stat. §§ 551.401, 551.402, 551.501, or 551.613.

As explained by the WDFI, both the U.S. Court of Appeals for the Eleventh Circuit and the Supreme Court of Florida have held that the same conduct constituted the sale of securities in Florida, and thus required registration in that state based on language substantially similar to Wis. Stat. § 551.613. *See Ainsworth v. Skurnick*, 909 F.2d 456, 461 (11th Cir. 1990), *certified question answered,* 591 So. 2d 904, 906-07 (Fla. 1991). *See also* WDFI Br. at 34-36 (discussing *Skurnick*).

As the WDFI correctly explains in its brief, it does not matter that Appellants engaged in this conduct from California. *See* WDFI Br. at 32. The drafters of Wis. Stat. § 551.613 fully intended that a person's physical location would not determine the jurisdictional reach of a given state's law. *See* USA 2002 § 610, Official Comment 1 ("The law is now settled that a person may violate the law of a particular state without ever being within the state or performing each act necessary to violate the law within that state.").

The circumstances in this case are also the opposite of the facts that led the Supreme Court of Kansas to conclude in *State v. Lundberg* that no sales had taken place in Kansas. 445 P.3d 1113, 1118-19 (Kan. 2019). In that case, none of the various steps in the transactions occurred in Kansas. *Id*. at 1119. Investors were solicited by California intermediaries at presentations made in California; all investors whose

claims were at issue were outside of Kansas when they accepted the offers and none of them lived in Kansas; and investors purchased the securities by wiring funds to bank accounts in Minnesota. *Id*. at 1115-17. The *only* connection to Kansas was that the securities were issued by a limited liability company organized under Kansas law. *Id*. at 1115. Here, all of the underlying trades were completed in Seago's account while she resided in Wisconsin, using her funds, and she owned all of the securities. (R. 26:34-35.)[4]

This Court should therefore deem Appellants to have sold securities in Wisconsin. It would be anomalous for a court to hold that conduct like that of Appellants in this case falls outside the bounds of Wis. Stat. § 551.613 and is therefore not subject to any meaningful regulation or substantive protections under the law. NASAA is aware of no authority supporting such a result. The Court should therefore affirm the WDFI's jurisdiction over Appellants' violations of the WUSL because they not only offered to sell, but actually sold, securities in Wisconsin.

[4] Appellants contend further that they did not sell securities because (1) they never owned or had any other affiliation with the relevant securities, App. Br. at 34, and (2) they never received compensation from Seago, as purportedly required by the "for value" language in the definition of "sale," App. Br. at 36-38. The WDFI has capably addressed these arguments and the Court should reject Appellants' arguments for the reasons provided by the WDFI. *See* WDFI Br. at 33-38.

B. The correct interpretation of Wis. Stat. § 551.613 requires the Court to consider the WUSL as a whole in order to effectuate the statutory scheme.

In construing the meaning of Wis. Stat. § 551.613, the Court should read it in context with the WUSL as a whole, and in a way that avoids absurd or unreasonable results. *See State v. Jendusa*, 2021 WI 24, ¶ 24, 396 Wis. 2d 34, 955 N.W.2d 777; *James v. Heinrich*, 2021 WI 58, ¶ 19, 397 Wis. 2d 517, 960 N.W.2d 350. In other words, Wis. Stat. § 551.613 must be read in a way that applies to different provisions with different text and different purposes.

Wis. Stat. § 551.501 prohibits, *inter alia*, materially false or misleading statements "in connection with" the offer, sale, or purchase of securities. Wis. Stat. §§ 551.401 and 551.402 prohibit a broker-dealer or agent from "transacting business" in Wisconsin without being registered or exempt. Both provisions apply broadly to "a[ny] person." These provisions are enforceable only by the WDFI, and violations are subject to the full panoply of remedies available to the WDFI under the WUSL. *See* Wis. Stat. §§ 551.603, 551.604. The available remedies include both remedial measures, such as injunctions and cease and desist orders, as well as punitive and deterrent measures like civil penalties. Because securities regulators generally enforce the law to protect the investing public, the Court's interpretation of Wis. Stat.

§ 551.613 must be flexible enough to allow the WDFI to effectively enforce these provisions to prevent investor harm.

In contrast, Wis. Stat. § 551.509 establishes private liability of a seller "to *the* purchaser," a purchaser "to *the* seller," and an unregistered broker-dealer "to the customer." Wis. Stat. § 551.509(2)-(4) (emphasis added). Each of these causes of action presumes strict liability and includes remedies implying a degree of privity between plaintiff and defendant, such as rescission. Wis. Stat. § 551.509(2)(a), (3)(a), (4). It was in the context of closely analogous provisions in the Securities Act of 1933 that the U.S. Supreme Court decided in *Pinter* that a "seller" is a person "who successfully solicits the purchase, motivated at least in part by a desire to serve his own financial interests or those of the securities owner." 486 U.S. at 647. While it makes sense to limit who may be considered a seller when "impos[ing] rescission based on strict liability," *id.*, those concerns are not implicated by the WDFI's enforcement of the antifraud and registration provisions in this case.

In sum, the Court should reject Appellants' flawed interpretation of the WUSL. Instead, the Court should affirm the WDFI's jurisdiction over Appellants on the grounds laid out in the WDFI's brief and above.

II. Receipt of compensation is not a prerequisite to being a broker-dealer.

Section 551.401 makes it unlawful to "transact business" in Wisconsin as a "broker-dealer" without being registered or exempt. A "broker-dealer" is "a person engaged in the business of effecting transactions in securities for the account of others or for the person's own account." Wis. Stat. § 551.102(4).[5] Neither of these provisions include any language requiring that the person receive compensation to be "engaged in the business" or "transact[ing] business."

Although the WUSL does not directly define "effect[ing] transactions," state and federal courts have employed a functional approach to that question. Thus, effecting transactions can include the very act of trading securities, as well as any other acts to bring a transaction about, accomplish it, make it happen, or cause it to happen. *See*, *e.g.*, *SEC v. Murphy*, 50 F.4th 832, 845 (9th Cir. 2022) ("In sum, we hold that when someone places another's capital at risk by trading securities as his or her agent, he or she is trading securities 'for the account of others,' and is a 'broker' subject to [the Securities Exchange Act of 1934's] registration requirements."); *Pransky v. Falcon Group*, 874

[5] Section 551.402 follows the same pattern for an "agent," which is defined in pertinent part as "an individual, other than a broker-dealer, who represents a broker-dealer in effecting or attempting to effect purchases or sales of securities," Wis. Stat. § 551.102(2).

N.W.2d 367, 374 (Mich. Ct. App. 2015) (explaining that "the person's business must involve bringing about or accomplishing the transactions in securities"); *Legacy Resources, Inc. v. Liberty Pioneer Energy Source, Inc.*, 322 P.3d 683, 688-90 (Utah 2013) (holding that "one who is engaged in the business of 'effecting' a securities transaction is one who is involved in 'bring[ing it] about; mak[ing it] happen, caus[ing] or accomplish[ing it]'").

The requirement that a broker-dealer be "engaged in the business" of effecting transactions is meant principally to distinguish broker-dealers from investors. *See* USA 2002 § 102, Official Comment 6 (acknowledging "[t]he distinction between 'a person engaged in the business of effecting transactions in securities' and an investor, who may buy and sell with some frequency and is outside the scope of this term"). Appellants cite an "array of factors" often considered by federal courts to determine whether a person is a "broker" under the federal securities laws, and contend that "compensation is a key factor[.]" App. Br. at 40. As an initial matter, Appellants cite no state cases relying upon these factors. Further, these factors are part of a "totality-of-the-circumstances approach" and no one factor is decisive. *See Murphy*, 50 F.4th at 843.

Appellants also misconstrue the significance of the factors themselves. The *nature* of the compensation received may be relevant to distinguish those "engaged in the business of effecting transactions" from those effecting transactions as part of another role, such as employment by the issuer. *See SEC v. Hansen*, No. 83 Civ. 3692, 1984 WL 2413, at *10 (S.D.N.Y. Apr. 6, 1984) ("Among the factors listed as relevant . . . are whether that person 1) is an employee of the issuer; [or] 2) received commissions *as opposed to* a salary . . .") (emphasis added); Nicholas Wolfson *et al.*, *Regulation of Brokers, Dealers and Securities Markets,* ¶ 1.06 (1st ed. 1977) at 1-11 to 1-12 (describing such factors as relevant to "cases where an issuer is seeking to distribute its own securities through its officers, directors, and employees"). That does not mean that the receipt of compensation is a prerequisite to being a broker-dealer. Indeed, the literature from which the above factors were derived shows that one's status as a broker-dealer does not depend on the receipt of compensation. *Id.* at 1-12 to 1-13 (discussing Securities and Exchange Commission no-action letters requiring broker registration in the absence of commissions and not requiring broker registration despite the receipt of commissions).

There are many reasons why a business might choose, as Appellants did, not to collect a fee from a certain customer or for certain services, opting instead for other valuable benefits. Indeed, the record shows that Appellants made the "business decision" not to collect agreed-upon fees until they had gained valuable experience and built a successful track record. (*See* R. 26:45-47.) The fact that Appellants made that choice here does not mean that they were not engaged in or transacting business while trading securities in Seago's account. One of the purposes of requiring registration of broker-dealers, and especially of their agents, is to ensure that individuals providing services to investors are appropriately qualified to do so and impose necessary oversight. *See* Wis. Stat. §§ 551.411, 551.412(d); *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1334 (M.D. Fla. 2011). To exclude individuals from the standard knowledge examinations and ethical requirements because they are not established or experienced undermines the purpose of the registration framework.

In contrast, state and federal courts have clarified that "regularity of participation" in securities transactions, not compensation, is the "primary indicia." *See*, *e.g.*, *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12 (D.D.C. 1998); *SEC v. Bravata*, No. 09-12950, 2009 WL 2245649, *2 (E.D. Mich. July 27, 2009). *See also Pransky*, 874 N.W.2d at 374

(explaining that "the Legislature limited ["broker-dealer"] to those persons whose business operations regularly include transactions in securities"); *Heligman v. Otto*, 411 N.W.2d 844, 847 (Mich. Ct. App. 1987) ("If he performs the acts in question often enough to support the inference that they are part of his business, he will be deemed to be 'engaged in the business' within the definition."). Under the prevailing approach, the Court can readily affirm WDFI's conclusion that Appellants effected transactions in securities for Seago's account over a period of more than two years as part of the requisite business.[6]

Last, the Court should reject Appellants' attempt to miscast their conduct as merely "a solicitation to provide investment advice." App. Br. at 35. This argument fails for two reasons. First, as explained above and by the WDFI, Appellants unequivocally effected securities transactions in Seago's, and therefore satisfy the definition of "broker-dealer." Second, even if Appellants could also be found to have acted as investment advisers and violated statutes in addition to those charged, the securities laws do not require the WDFI to choose because "broker-dealer" and "investment adviser" are not mutually exclusive.

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[6] The WDFI appropriately concluded that Appellants solicited Seago as, and she ultimately became, a client of PV Wealth. As the WDFI explains, this factual finding is supported by substantial evidence and must be affirmed. WDFI Br. at 42-47.

This is evident in the fact that the WUSL expressly excludes some, but not all, broker-dealers and agents from the definition of "investment adviser." Wis. Stat. § 551.102(15)(c). Furthermore, it has long been the case that "investment advisers who effect securities transactions for clients, as agents, are subject to broker-dealer registration, even though no compensation for the execution service is to be paid to the investment adviser . . . ." Wolfson *et al*., ¶ 1.09 at 1-21. As such, this argument lacks merit and the Court should disregard it.

CONCLUSION

For the reasons stated above, the Court should affirm the Circuit Court's ruling and the findings of the WDFI.

Respectfully submitted this
20th day of December, 2023.

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CERTIFICATION REGARDING FORM AND LENGTH

I hereby certify that this brief conforms to the rules contained in Wis. Stat. (Rule) § 809.19(8)(b), (bm), and (c) for a non-party brief. The length of those portions of the brief referred to in § 809.19(8)(c) is 2,873 words.

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