Nos. 16-1916 and 16-1896 (cons.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREDERICK J. GREDE, not individually but as Liquidation Trustee of the Sentinel Liquidation Trust Plaintiff-Appellee/Cross-Appellant, v. FCSTONE, LLC, Defendant-Appellant/Cross-Appellee.	)	On Appeal From The United States District Court For The Northern District Of Illinois, Eastern Division No. 09-cv-0136 Hon. James B. Zagel

MOTION OF FUTURES INDUSTRY ASSOCIATION, INC., FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF FCSTONE, LLC'S CROSS-APPEAL

Pursuant to Federal Rule of Appellate Procedure 29, the Futures Industry Association ("FIA") respectfully moves for leave to file an *amicus curiae* brief in support of the position of Appellant/Cross-Appellee FCStone, LLC's cross-appeal and urging reversal. Its *amicus curiae* brief is submitted with this Motion. Counsel for Appellant FCStone, LLC has consented to the relief requested; counsel for Appellee Grede does not consent to the relief requested.

The FIA was granted leave to file and filed an *amicus* brief in the

appeal in this case from the district court's January 2013 decision, *Grede v. FCStone, LLC*, 485 B.R. 854, 879 (N.D. Ill. 2013). FIA respectfully believes that the district court's rulings in its March 2016 decision warrant the further and specific analysis provided in FIA's brief submitted with this motion. The FIA respectfully submits that its brief will aid the Court's consideration and understanding of the important issues for futures markets and their participants raised by the district court's decision.

The FIA is the leading trade organization for the futures, options and cleared swaps markets worldwide. FIA's mission is to support open, transparent, and competitive markets, to protect and enhance the integrity of the financial system, and to promote high standards of professional conduct. FIA's core constituency consists of futures commission merchants ("FCMs"), which provide clearing and execution services for clients active in financial markets around the world. FIA's FCM members play a critical role in the managing of systemic risk in the global financial markets. They provide the majority of the funds that support clearinghouses and commit a substantial amount of their own capital to safeguard customer transactions. FIA's membership also

includes the major global exchanges, clearinghouses, trading platforms, technology vendors, legal services, and consulting firms representing the futures and derivatives industry.

FIA plays a leading role in commenting on proposed legislation and regulations and developing consistent standards and practices throughout the industry. In addition, the FIA and its members are deeply involved in the operational aspects of the futures industry, and, in particular, the operations of FCMs and depositories. As a result, the FIA has a unique level of expertise with respect to the operational and custodial practices – including the operation of futures and securities clearing accounts and the pooling of futures customer assets in segregated customer accounts – that are central to the decision on appeal and the importance of those practices to futures market participants and the markets themselves.

The FIA's interest in this case concerns the potential significant harm to futures market customers and to the vitality and efficiency of the markets themselves from certain of the district court's findings, if not reversed. The FIA's views will be helpful to the Court's understanding of why certain erroneous analyses and findings of the

district court regarding the application of Section 4d(a)(2) of the Commodity Exchange Act, 7 U.S.C. § 6d(a)(2), could have harmful effects on the workings and vitality of the futures markets generally and interests of futures customers and FCMs in those markets. The FIA's views also will assist the Court by providing its members' collective expertise with respect to the common, lawful and accepted practices in the holding and investment of customer funds, which the district court's decision did not seem to have taken into account and could thwart in the future.

The FIA membership has an overriding interest in the proper interpretation and application of CEA Section 4d(a)(2) as one of the foundations of futures markets. The district court's errors in its analytical approach to Section 4d(a)(2) and its rulings on the effect of commingling and the purported legal barrier to tracing are borne of misunderstandings of Section 4d(a)(2)'s protections and, in certain respects, the mechanics of accepted practices for holding and investing futures customers' funds through omnibus customer accounts. General application of the district court's erroneous rulings threaten the vitality and efficiency of futures trading to the detriment of all market

participants.

The FIA's interest in the industry and market effects of the decision and the technical information about investment of futures customer funds it can provide are distinct from the personal interests and arguments of Appellant FCStone. Further, the FIA has made every effort to hew closely and faithfully to the Court's guidance that *amicus* participants not regurgitate the arguments of the parties.

The FIA was granted leave to file and filed an *amicus* brief in the appeal in this case from the district court's January 2013 decision, *Grede v. FCStone, LLC*, 485 B.R. 854, 879 (N.D. Ill. 2013). FIA respectfully believes that the district court's rulings in its March 2016 decision warrant the further and specific analysis provided in FIA's brief submitted with this motion. The FIA respectfully submits that its brief will aid the Court's consideration and understanding of the important issues for futures markets and their participants raised by the district court's decision.

CONCLUSION

For all the foregoing reasons, the FIA's Motion for Leave to File an *Amicus Curiae* Brief should be granted.

Respectfully submitted,

/s/ Charles R. Mills
Charles R. Mills
Tyechia L. White
Steptoe & Johnson LLP
1330 Connecticut Ave NW
Washington, DC 20036
(202) 429-6472
Counsel for FIA

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016, the Motion of Futures Industry Association, Inc., For Leave to File Amicus Curiae Brief In Support of FCStone, LLC's Cross-Appeal was filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 27(c)(E)(3), and upon notice of this Court's acceptance of the electronic motion for filing, I certify that I will cause an original and 3 copies of the above motion to be transmitted to the Court via hand delivery and 2 copies of the above filing to be served upon counsel listed below using FEDEX overnight delivery.

Stephen Bedell, Esq. Foley & Lardner, LLP 321 N. Clark Street, Suite 2800 Chicago, IL 60654-5313 *Counsel for FCStone, LLC*	Catherine L. Steege Jenner & Block LLP 353 N. Clark Street Chicago, IL 60654 *Counsel for Frederick J. Grede*

August 29, 2016

/s/ Charles R. Mills
Charles R. Mills
Tyechia L. White
Steptoe & Johnson LLP

1330 Connecticut Ave NW
Washington, DC 20036
(202) 429-6472
Counsel for FIA

Nos. 16-1916 and 16-1896 (cons.)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

FREDERICK J. GREDE, not individually but as Liquidation Trustee of the Sentinel Liquidation Trust	)	On Appeal From The United States District Court For The Northern District Of Illinois, Eastern Division
Plaintiff-Appellee/Cross-Appellant,	)	
v.	)	
FCSTONE, LLC,	)	No. 09-cv-0136
Defendant-Appellant/Cross-Appellee.	)	Hon. James B. Zagel

BRIEF OF *AMICUS CURIAE*, FUTURES INDUSTRY ASSOCIATION, INC., IN SUPPORT OF APPELLANT/APPELLEE FCSTONE, LLC'S CROSS-APPEAL AND URGING REVERSAL

STEPTOE & JOHNSON LLP
Charles R. Mills
Tyechia White
Attorneys for *Amicus Curiae*,
Futures Industry Association, Inc.
1330 Connecticut Avenue, N.W.
Washington, DC 20036
(202) 429-6472

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-1916, 16-1896

Short Caption: Grede as Liquidation Trustee of the Sentinel Liquidation Trust v. FCStone, LLC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[X] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Futures Industry Association, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Steptoe & Johnson LLP

K&L Gates LLP, prior firm of the undersigned counsel

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ Charles R. Mills Date: August 29, 2016

Attorney's Printed Name: Charles R. Mills

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes X No

Address: 1330 Connecticut Avenue NW, Washington, DC 20036

Phone Number: (202) 429-6472 Fax Number: 202-429-3902

E-Mail Address: cmills@Steptoe.com

CIRCUIT RULE 26.1 DISCLOSURE STATEMENT

Appellate Court No: 16-1916, 16-1896

Short Caption: Grede as Liquidation Trustee of the Sentinel Liquidation Trust v. FCStone, LLC

To enable the judges to determine whether recusal is necessary or appropriate, an attorney for a non-governmental party or amicus curiae, or a private attorney representing a government party, must furnish a disclosure statement providing the following information in compliance with Circuit Rule 26.1 and Fed. R. App. P. 26.1.

The Court prefers that the disclosure statement be filed immediately following docketing; but, the disclosure statement must be filed within 21 days of docketing or upon the filing of a motion, response, petition, or answer in this court, whichever occurs first. Attorneys are required to file an amended statement to reflect any material changes in the required information. The text of the statement must also be included in front of the table of contents of the party's main brief. Counsel is required to complete the entire statement and to use N/A for any information that is not applicable if this form is used.

[X] PLEASE CHECK HERE IF ANY INFORMATION ON THIS FORM IS NEW OR REVISED AND INDICATE WHICH INFORMATION IS NEW OR REVISED.

(1) The full name of every party that the attorney represents in the case (if the party is a corporation, you must provide the corporate disclosure information required by Fed. R. App. P 26.1 by completing item #3):

Futures Industry Association, Inc.

(2) The names of all law firms whose partners or associates have appeared for the party in the case (including proceedings in the district court or before an administrative agency) or are expected to appear for the party in this court:

Steptoe & Johnson LLP (New)

K&L Gates LLP, prior firm of counsel Charles R. Mills

(3) If the party or amicus is a corporation:

i) Identify all its parent corporations, if any; and

None

ii) list any publicly held company that owns 10% or more of the party's or amicus' stock:

None

Attorney's Signature: /s/ Tyechia L. White Date: August 29, 2016

Attorney's Printed Name: Tyechia L. White

Please indicate if you are Counsel of Record for the above listed parties pursuant to Circuit Rule 3(d). Yes ____ No X

Address: 1330 Connecticut Avenue NW, Washington, DC 20036

Phone Number: (202) 429-6463 Fax Number: 202-429-3902

E-Mail Address: twhite@Steptoe.com

Table of Contents

TABLE OF AUTHORITIES

CASES **PAGE(S)**

FEDERAL STATUTES

FEDERAL REGULATIONS

MISCELLANEOUS

GLOSSARY

CEA	Commodity Exchange Act
CFTC	Commodity Futures Trading Commission
Code	Bankruptcy Code
FCM	Futures Commission Merchant
FIA	Futures Industry Association, Inc.
FCStone I	*Grede v. FCStone, LLC*, 485 B.R. 854 (N.D. Ill. 2013)
FCStone II	*Grede v. FC Stone, LLC*, No. 09C136, 2016 WL 1181738 (N.D. Ill. March 28, 2016)
SEG 1	Sentinel Segment 1 accounts
SEG 3	Sentinel Segment 3 accounts
Petition	Sentinel Bankruptcy Petition
Plan	Sentinel Bankruptcy Plan

I. THE IDENTITY OF THE *AMICUS CURIAE* AND ITS INTEREST IN THE CASE

The Futures Industry Association, Inc. ("FIA") is the leading trade organization for the futures, options and cleared swaps markets worldwide. FIA's mission is to support open, transparent, and competitive markets, to protect and enhance the integrity of the financial system, and to promote high standards of professional conduct. FIA's core constituency consists of futures commission merchants ("FCMs"), which provide clearing and execution services for financial market participants around the world. FIA's FCM members play a critical role in managing systemic risk in the global financial markets. They provide the majority of funds that support clearinghouses and commit a substantial amount of their own capital to safeguard customer transactions. FIA's membership also includes the major global exchanges, clearinghouses, trading platforms, technology vendors, legal services, and consulting firms representing the futures and derivatives industry.

The FIA is uniquely positioned to understand and express the concerns of the futures market from a commercial, operational and regulatory perspective. FIA plays a leading role in commenting on proposed legislation and regulations and developing consistent

standards and practices throughout the industry. In addition, the FIA and its members are deeply involved in the operational aspects of the futures industry, and, in particular, the operations of FCMs and depositories. As a result, the FIA has a unique level of expertise with respect to the operational and custodial practices – including the operation of futures clearing accounts and the pooling of futures customer assets in segregated customer accounts – that are central to the decision on appeal and the importance of those practices to futures market participants and the markets themselves.

The FIA's interest in this case concerns the potential significant harm to futures markets and their participants from the district court's rulings that futures customer account funds and property should be treated as assets of Sentinel's estate and divided *pro rata* among all creditors, including unsecured general creditors. The district court's rulings undermine the statutory trust that Congress established in Commodity Exchange Act ("CEA") Section 4d(a)(2) and (b), 7 U.S.C. § 6d(a)(2) and (b), for the protection of futures customer property and create legal uncertainty over the protection and ownership of futures customer property, even when maintained by FCMs in complete

compliance with the regulations of the Commodity Futures Trading Commission ("CFTC"). The proper interpretation and application of CEA Section 4d(a)(2) and (b) is a foundation for the assumption of market and financial risks by futures market participants and their FCMs and for efficient and vibrant futures markets. The FIA, therefore, has an overriding interest in this appeal.[1]

II. THE DISTRICT COURT'S RULINGS OF CONCERN TO THE FIA

The three groups of creditors vying for distribution of assets under the aegis of the bankruptcy court are FCStone and the other FCMs who maintained futures margin accounts with Sentinel (known as the "Segment 1" or "SEG 1" accounts), Sentinel's former securities investment advisory account customers (whose assets were held in Sentinel's "Segment 3" or "SEG 3" accounts), and Sentinel's general unsecured creditors.

Several of the district court's rulings in *Grede v. FC Stone, LLC*, No. 09C136, 2016 WL 1181738 (N.D. Ill. March 28, 2016) ("*FCStone II*"), are concerning to the FIA and erroneous. First, the district court ruled

[1] The Court granted FIA leave to file and it filed an *amicus curiae* brief in the appeal in this case from the district court's January 2013 decision, *Grede v. FCStone, LLC*, 485 B.R. 854, 879 (N.D. Ill. 2013) ("*FCStone I*").

that the futures account funds (the SEG 1 funds) are the property of the Sentinel estate to be distributed *pro rata* to all creditors. They include both:

(1) The funds that transferred to FCStone and the other FCMs from their SEG 1 futures margin accounts with Sentinel after the Sentinel's Chapter 11 bankruptcy petition ("petition") was filed (*FCStone II*, 2016 WL 1181738 at *7-8), and

(2) The remaining funds in what is known as the "SEG 1 Reserve" under the Plan of Bankruptcy ("the Plan"), which are the undistributed funds that remain from the SEG 1 accounts at the time petition was filed (*id.*); and

Second, although it is unclear from the conclusory nature of the district court's disallowance of tracing whether it intended to rely on the same legal rationales for that expressed in *FCStone I*, if it did, its legal conclusions were erroneous. Assuming that was the district court's intent, it declared tracing to be impossible because:

(1) The cash and securities allocated to the segregated omnibus futures customer accounts were commingled within those accounts giving each customer only a *pro rata* interest in the pool of cash and securities in the account, implying that it is a legal prerequisite to the right to trace to demonstrate a personal and exclusive ownership interest in specific property (here, the securities allocated to the segregated account) (*FCStone I*, 485 B.R. at 879);

(2) Sentinel commingled SEG 1 and SEG 3 customer cash and Sentinel proprietary funds in a Sentinel proprietary clearing account in connection with making original allocations of

securities to the SEG 1 and SEG 3 accounts in exchange for the respective customers' cash (*FCStone II*, 2016 WL 1181738 at *2);

(3) After originally allocating specific securities to SEG 1 and SEG 3 accounts, Sentinel at various later times improperly transferred the securities to and held them in Sentinel proprietary accounts to serve as collateral for loans Sentinel received from the Bank of New York and as the securities used in Sentinel's proprietary repo transactions with third parties (*id.*); and

(4) The interest that Sentinel credited to the SEG 1 accounts was not generated from any specific securities owned by the SEG 1 account holders, but, rather, were only "guestimates" of interest paid from Sentinel's proprietary funds (*id.* at *7).

The FIA respectfully submits that these bases for not permitting tracing are erroneous as a matter of law and risk significant harm to futures markets. The FIA strongly urges that they be reversed.

III. THE HISTORY OF RULINGS IN THIS CASE ON THE RIGHTS TO FUTURES CUSTOMER PROPERTY

The district court's January 2013 decision, *FCStone I*, held in favor of the Bankruptcy Trustee that the pre-petition and post-petition transfers of funds from the SEG 1 accounts may be and should be avoided, returned to the Sentinel estate, and distributed *pro rata* to all creditors. The district court based its ruling on its conclusions that:

(1) the Bankruptcy Code authorized it to avoid the transfers, and

(2) equitable principles of fairness required that the funds be treated as those of the Sentinel estate because:

(a) Both Sentinel's commingling at various times of futures customer funds and securities allocated to their SEG 1 accounts with the funds and securities of Sentinel and the SEG 3 customers and its commingling of futures customers' cash and securities within a segregated futures customer omnibus account rendered it impossible to trace the true ownership of the funds and securities, and

(b) the SEG 3 customers' interests were protected by a separate statutory trust of equal standing to the statutory trust governing futures customer property.

FCStone I, 485 B.R. at 879-80.

This Court's March 2014 decision, *Grede v. FCStone, LLC*, 746 F.3d 244 (7th Cir. 2014), reversed the district court's avoidance of the pre-petition and post-petition transfers on the basis that they were final and irreversible under the Bankruptcy Code. The Court did not reach the issue of whether the transferred funds should be deemed the exclusive property of the SEG 1 account holders or the property of the Sentinel estate. *Grede*, 746 F.3d at 258. The Court's decision effectively treated that issue as moot based on its finding that the post-petition transfer was final and its belief that pursuant to the Plan all creditors had agreed that the remaining property would be distributed *pro rata* to

all creditors. *Id.*

On remand, the district court concluded that a determination of FCStone's and the other SEG 1 account holders' rights to the SEG 1 Reserve funds was necessary because they in fact had not relinquished their claim to exclusive rights to those funds under the Plan. *FCStone II*, 2016 WL 1181738 at *8. The district court incorporated by reference many of its factual findings in *FCStone I*. *Id.* at *2.

The district court held that it would be unfair to accord FCStone and the other FCMs priority to the segregated futures account cash and securities because, notwithstanding that under the Plan the SEG 3 customers had waived their rights to any priority under a statutory trust and were now of equal standing with general unsecured creditors, they originally had a priority in interest pursuant to an equal and competing statutory trust to that of the futures customers. *Id.* Accordingly, the district court declared pursuant to its equitable powers that the funds in the SEG 1 Reserve and the funds received by FCStone and the FCMs in the post-petition transfer should be treated as the property of the Sentinel estate to be distributed *pro rata* to all creditors. The district court ruled that in determining the *pro rata* distribution for

FCStone and the other SEG 1 account holders, the funds they already had received as part of the post-petition transfer from the SEG 1 accounts should be credited against their *pro rata* shares. *Id.*

Notably, as described above at page 4, *supra*, the district court appears to have relied upon its legal rationale in *FCStone I* that tracing futures customers' ownership to the securities held in the segregated omnibus account for futures customers was impossible because no futures customer had a personal, exclusive interest in any specific security in the account, but, rather, had only an indirect *pro rata* ownership in the account's pool of cash and securities. *Id.* at *2; *FCStone I*, 485 B.R. at 879). The district court concluded that tracing ownership to the securities in the segregated omnibus futures account was impossible for two additional separate reasons. First, Sentinel had commingled SEG 1 funds with SEG 3 and proprietary funds in a Sentinel proprietary clearing account in advance of making the original allocations of securities to the SEG 1 accounts in exchange for the cash. *FCStone II*, 2016 WL 1181738, at *2, *8. As the district court concluded in *FCStone I,* "The fungible nature of cash alone makes it impossible to trace specific securities back to original customer deposits in this case."

485 B.R. at 879. Second, the district court found that, after originally allocating specific securities to SEG 1 and SEG 3 accounts, Sentinel had at various later times prior to the filing of the petition improperly transferred the securities to and held them in Sentinel proprietary accounts to serve as collateral for loans Sentinel received from the Bank of New York and as the securities used in Sentinel's proprietary repo transactions with third parties. *FCStone II*, 2016 WL 1181738, at *2. The district court also concluded that futures customers had no exclusive right to the cash that Sentinel had credited to the SEG 1 accounts as interest because those amounts were not sourced from the securities allocated to their accounts, but, rather, were paid from Sentinel's proprietary funds. *Id.* at *7.

The district court maintained its position from *FCStone I* that tracing was difficult, presumably by incorporating its prior rejection of the report of FCStone's expert, Frances McCloskey. The court did not provide a detailed explanation for its rejection of Ms. McCloskey's report, which traced securities allocated to SEG 1 accounts to SEG 1 customer deposits. *FCStone I*, 485 B.R. at 879. Instead, it rejected Ms. McCloskey's tracing on the rationale that it failed to "account for the fact

that none of Sentinel's customers held specific ownership interests in securities." *Id.* The court, therefore, did not challenge the merits of Ms. McCloskey's tracing analysis, but, rather, deemed it legally irrelevant on grounds that no customer had personal and exclusive ownership of any individual security due to the commingling of futures customers assets within the segregated futures account.

The district court also ruled that, independent of its equitable powers to treat the SEG 1 Reserve funds as property of the Sentinel estate, the Plan granted it discretion to treat the SEG 1 Reserve as property of the Sentinel estate irrespective of its true ownership. The court therefore also supported its treatment of the SEG 1 property on its perceived authority under the Plan. *Id.*[2]

IV. THE STATUTORY TRUST FOR FUTURES CUSTOMER PROPERTY

Section 4d(a)(2) and (b) of the CEA establish a statutory trust for the benefit of futures customers' cash, securities and other property deposited with or received by FCMs to support their futures positions.

[2] The FIA will not address the district court's interpretation of its powers under the Plan, as this issue relates to discrete matters of bankruptcy law and contract principles that do not have precedential effect for our larger membership and the industry.

E.g., *Marchese v. Shearson Hayden Stone, Inc.*, 822 F.2d 876, 878 (9th Cir. 1987); *see also In re Smith*, 72 B.R. 61, 62-63 (N.D. Iowa 1987) ("The Court finds that [Section 4d(a)(2) of] the [Commodity Exchange] Act and regulations created a technical trust[.]").

Section 4d(a)(2) of the CEA requires that all customer property intended to support futures trading be accounted for and treated by the FCM as "belonging to the customer" and prohibits commingling futures customer property with the property of any non-futures customer.[3] But it expressly permits futures customer property to be commingled with other futures customer property within an omnibus account that is segregated from the property of the FCM and non-futures customers:

> [I]n accordance with such terms and conditions as the Commission may prescribe by rule, regulation, or order, such money, securities, and property of the customers of such futures commission merchant may be commingled and deposited as provided in this section with any other money, securities, and property received by such futures commission merchant and required

[3] An FCM must treat all customer funds and property received to support the margining of futures contracts as customer property upon receipt. The exact amount of a customer's margin funds will vary over time due to, for example, debits to account for commissions to the FCM, margin payments to clearing houses, customer withdrawals and redemptions, and gains or losses on trades. At all times, the FCM is required to keep enough money or other assets in the segregated customer account to cover the net calculated amount of customer funds. CFTC Rules 1.20 and 1.32(c), 17 C.F.R. §§ 1.20 and 1.32(c) .

> by the Commission to be separately accounted for and treated and dealt with as belonging to the customers of such futures commission merchant[.]

7 U.S.C. § 6d(a)(2).

CFTC Rules 1.20 – 1.23, 17 C.F.R. §§ 1.20 – 1.23, also expressly permit commingling of futures customer property in an omnibus account for that property, but require the property to be segregated as belonging to futures or option customers. 17 C.F.R. § 1.20(a). A segregated customer account must be maintained at a proper depository, which can include a bank, trust company, clearing organization, or an FCM. *Id*. No depository "that has received futures customer funds for deposit in a segregated account . . . may hold, dispose of, or use any such funds as belonging to any person other than the futures customers of the futures commission merchant which deposited such funds." 17 C.F.R. § 1.20(f)(3).[4]

[4] FCMs are permitted to invest customer money in certain specified types of investments such as government bonds and certificates of deposit. CFTC Rule 1.25(a),17 C.F.R. § 1.25(a). CFTC Rule 1.26(a) requires FCMs to "segregate such instruments as funds belonging to . . . such futures customers[.]" 17 C.F.R. § 1.26(a). However, CFTC Rule 1.29, 17 C.F.R. § 1.29(a), permits an FCM, in the absence of an agreement to the contrary, to retain for its own account "any incremental income or interest" earned from the investment of customer funds. Nothing prohibits an FCM from paying or sharing such earnings with customers. If there are losses on the instruments purchased with customer funds, the FCM must make up the loss by adding funds to the segregated account.

In connection with enacting the provisions of Subchapter IV of Chapter 7 of the Code, Congress has articulated additional relevant principles about what constitutes "customer property" in an FCM bankruptcy. Congress also expressly authorized the CFTC to promulgate rules that, among other things, provide what cash, securities and other property are to be included and excluded from futures "customer property." CEA Section 20(a)(1), 7 U.S.C. § 24(a)(1). The CFTC promulgated such rules in part 190 of its regulations, 17 C.F.R. Part 190.[5]

Although the definitions of customer property in Code Section 761(10), 11 U.S.C. § 761(10), and CFTC Rule 190.08(a), 17 C.F.R. §190.08(a), apply specifically to FCM bankruptcies administered under Chapter 7,[6] it is reasonable to assume that Congress intended for those principles to inform the administration of FCM bankruptcies under other chapters of the Bankruptcy Code where the same customer and market risks prevail. In this connection, the scope of Congress' definition of futures customer property reflects more than just its assessment of the

[5] Part 190 Final Rules, 48 Fed. Reg. 8716 and n. 5 (Mar. 1, 1983).

[6] Bankruptcy Code Section 103(d) provides that "Subchapter IV of chapter 7 of this title applies only in a case under such chapter concerning a commodity broker." 11 U.S.C. § 103(d).

proper rights of futures customers. It also reflects Congress's intention to protect the national interest in sound futures markets. To that end, Congress recognized that, due to the interconnectedness of market risk among all FCMs, there is a national interest in establishing rights to property in futures customer segregated accounts that will prevent the bankruptcy of any one FCM from causing the failure of other FCMs and a market collapse causing broad economic harm:

> A second basic objective of [subchapter IV of Title 7] is the protection of commodity market stability. Protection of market stability during a commodity broker insolvency is more difficult in the commodities markets than in other markets. Commodity futures, options, and leverage contracts all have limited duration. In addition, gains and losses on open positions in the futures markets are paid out on a daily basis through variation margin payments. Thus, the trustee of an insolvent commodity broker does not have the luxury of an extended period within which to analyze the debtor's business and determine the best course of action. Delay by the trustee can result in default in making the daily variation margin payments, or default on delivery, either of which could have a ripple effect that disrupts the entire market. Further, abrupt actions by the trustee could seriously disrupt orderly trading, resulting in substantial losses to the bankrupt, its customers, and other market participants. For these reasons the commodity broker subchapter strongly encourages the immediate transfer of customer accounts from the bankrupt

> to a solvent commodity broker. Such transfers should have no immediate adverse impact on the market, yet they minimize the possibility of default on margin payments and on delivery.

S. Rep. No. 95-989, at 7-8 (1978); *see also* H.R. Rep. No. 95-595, at 270 (1978) (same). All of those congressional concerns are equally pertinent in a Chapter 11 proceeding. *Cf., e.g.*, *Aaron v. SEC*, 446 U.S. 680, 691 (1980) (statute subject to same meaning regardless of nature of proceeding); *In re Diasonics Sec. Litig.*, 599 F. Supp. 447, 461-62 (N.D. Cal. 1984) (same).

Code Section 761(10) and the CFTC's implementing Rule 190.08(a) generally provide that futures customers have:

(1) the exclusive right to all funds and securities held in a futures customer's margin account at the time a bankruptcy petition is filed (Code § 761(10)(A)(i)-(vi); CFTC Rule 190.08(a)(1)(i) and (ii))), and

(2) a priority to virtually all property of the FCM that does not have a specific lien attached to it, to the extent the property segregated in the futures customer account is insufficient to satisfy the claims of futures customers to full recovery of the funds and property the FCM received from them or on their behalf to support their futures trading (*e.g.*, Code § 761(10)(A)(vii)-(ix); CFTC Rule190.08)(a)(ii)(J))).[7]

[7] Code Sections 761(10)(A)(viii) and (ix), for example, provide that customer property includes:

- "property that is unlawfully converted from and that is the lawful property *of the estate*" (§ 761(10)(A)(viii) (emphasis added)); and

As the CFTC's preamble to its *Federal Register* release adopting its Part 190 Rules explained:

> The Commission is adopting § 190.08(a)(1)(ii)(J) which generally treats as customer property all cash, securities, or other property of the debtor's estate, including the debtor's trading or operating accounts and commodities of the debtor held as inventory, subject to properly perfected liens on such property of the debtor, but only to the extent that the property segregated on behalf of customers is insufficient to satisfy in full the claims of "public" customers [*i.e.*, futures customers].

48 Fed. Reg. 8716 (Mar. 1, 1983).

In defining the debtor's property to be futures customer property in Part 190, the CFTC specifically intended to eliminate the need to trace specific customer ownership to specific debtor property in order to establish a customer right to the property. *Id.* at 8717. Congress had the same intent in the Code. It enacted Code Section 761(10) pursuant to the

---

- "other *property of the debtor* that any applicable law, rule or regulation requires to be set aside or held for the benefit of a customer, unless including such property would not significantly increase customer property" (§ 761(10)(A)(ix))(emphasis added)).

CFTC Rules 190.08(a)(i)(1)(F) and (G) and 190.08(a)(1)(ii)(B), (F) and (H) identify other more specific types of property of the FCM debtor that also is defined to be futures customer property. 17 C.F.R. § 190.08(a)(1)(i)(B), (F), (G) and (a)(1)(ii)(B), (F), (H).

CFTC's urging to establish clear statutory authority to permit converted customer property to be returned to the customers without the necessity of tracing. Then CFTC Chairman William T. Bagley testified before Congress that the *ad hoc* common law theories then used to justify tracing were inadequate:

> [T]he treatment which commodity customers will be accorded by a trustee in bankruptcy is, in the main, open to speculation. *To date, bankruptcy trustees have employed a form of tracing to protect commodity customers' funds in the event of the bankruptcy of a futures commission merchant.*
>
> * * *
>
> The CFTC believes such *ad hoc* approaches are inadequate to protect the funds of commodity customers on deposit with the various persons engaged in the commodity futures trading industry. The size of the industry and the unique problems which may be encountered in the event of the failure of a futures commission merchant *. . . make it imperative that Congress amend the Bankruptcy Act to provide specific statutory protection for commodity customers.*

Bankruptcy Act Revision: Hearings on H.R. 31 and 32, before the Subcomm. on Civil and Constitutional Rights of the H. Comm. on the Judiciary, 94th Cong. 2d Sess. 2377, 2378 (1976) (Statement of William T. Bagley, CFTC Chairman) (emphasis added) (cited by *H.R. Rep. No.* 95-595, at 270). Congress responded by enacting Code Section

761(10)(A)(viii), among others, that assured that customer property wrongfully removed from a segregated account would retain its status as customer property.

Further, the CFTC explained that its definition of customer property in Rule 190.08(a) was intended to minimize the need to trace customer property:

> The Commission believes that the Bankruptcy Act makes clear that the customer priority for commodities customers is to be broader than a priority in the property actually segregated by the debtor in their behalf. This intent is evident from the legislative history which, among other things, expressly states that the definition of customer property is to "include all property in customer accounts and property that should have been in those accounts but was diverted through conversion or mistake." Moreover, ordinarily priorities are charges on the assets of the full estate. *The Commission concludes that by granting authority to the Commission to expand or contract "customer property," Congress sought to minimize the need for the trustee to trace property belonging to customers. Thus, the Commission believes its definition of customer property may establish presumptions with respect to certain property of the debtor which was not segregated so as to enable its return to customers.*

48 Fed. Reg. at 8716-17 (emphasis added).

V. ARGUMENT

A. The District Court's Rulings Are Antithetical to the National Interests Congress Sought to Protect by Establishing the Statutory Trust for Futures Customer Property and Threaten Foundational Legal and Operational Underpinnings of Futures Markets

By refusing to enforce the Section 4d statutory trust for futures customer property and setting a precedent that rights to futures customer property may be decided instead by *ad hoc* judicial discretion and equitable considerations, *FCStone II* introduces harmful legal and financial uncertainty for futures markets. Uncertainty over whether the futures statutory trust or, instead, some other regime will govern futures customer funds materially changes the inherent risks in futures markets and threaten customer protection. *FCStone II's* precedent opens the door for non-futures claimants in future FCM bankruptcies to litigate rights to futures margin account property, creating perilous delay and rendering unpredictable the return of futures customers' assets. As set forth above in Section IV, these are outcomes that both Congress and the CFTC sought to avoid through the governing statutory law and regulations.

It is critical to the proper functioning and continued vitality of

futures markets that customers and FCMs know and be confident that the statutory trust that protects futures customer funds and property will be honored and enforced in the event of an FCM bankruptcy. Those protections serve two vital purposes. First, they assure customers that their funds and property will be protected from claims of the FCM's general creditors and non-futures customers. Second, in the event of an FCM financial failure, they assure that the funds and property can be immediately transferred to the segregated customer accounts of solvent FCMs to continue to support the ongoing obligations of open trades. This helps prevent the bankruptcy of one FCM from cascading and causing harm to other FCMs, market participants and markets.

Congress has expressed a clear preference for quickly transferring to solvent FCMs or liquidating open futures positions when a petition is filed. S. Rep. No. 95-989, at 8 ("Delay by the trustee can result in default in making the daily variation margin payments . . . which could have a ripple effect that disrupts the entire market."). As the CFTC provided with respect to a Chapter 7 bankruptcy, any open commodity contracts that are not transferred by the seventh calendar day after the filing of the petition in bankruptcy must be liquidated or offset by the trustee. 17

C.F.R. § 190.02 (e), (f). Transfer of open futures contracts to another FCM effectively cannot happen without the transfer of the margin supporting them.

As the CFTC also has explained:

> Customer segregation accounts are a critical customer protection feature of the United States commodity laws. The accounts are designed to ensure that customer funds *are protected and available for immediate withdrawal or transfer, even if an FCM experiences financial distress or enters into bankruptcy*.

In the Matter of JPMorgan Chase Bank, N.A., CFTC Docket No. 12-17, 2012 WL 1143791, at *2 (Apr. 4, 2012) (emphasis added). *Accord*, *e.g.*, *Hunter v. Madda Trading Co.*, CFTC Docket No. R78-64-78-161, 1981 WL 26142, at *2 (Sept. 2, 1981).

Similarly, the agency has emphasized that:

> Without immediate access to customer funds, the FCM is hindered in its ability to satisfy margin requirements. *In times where there is market disruption, any impediment or restriction upon the ability to immediately withdraw funds "could magnify the impact of any market disruption and cause additional repercussions."*

In the Matter of JPMorgan Chase Bank, 2012 WL 1143791, at *5 (quoting *Financial and Segregation Interpretation No. 10*, 70 Fed. Reg.

24,768 (May 11, 2005) (emphasis added)).

This is the same type of market protection concern that this Court recognized in the context of enforcing the terms of Code Section 546(e) with respect to Sentinel's pre-petition transfers of funds to settle securities contracts. As the Court explained, without the certainty of the safe harbor,

> one firm's bankruptcy could cause a domino effect as its clients could similarly default on their obligations, which in turn would trigger further bankruptcies, and so on. By preventing one large bankruptcy from rippling through the securities industry in this way, the § 546(e) safe harbor protects the market from systemic risk and allows parties in the securities industry to enter into transactions with greater confidence.

Grede, 746 F.3d at 252.

B. The District Court's Equitable Determinations Were Not Authorized and Lack Merit

The district court's ruling in *FCStone II* is an impermissible and faulty exercise of the court's discretion. The requirements of the statutory trust for futures customer property leave no room for *ad hoc* judicial decision-making contrary to their terms. The statutory and regulatory scheme predetermines the property rights of futures

customers. A court's proper role is to enforce those rights according to the statutory and regulatory terms.

Moreover, the district court's determination of the equities lacks merit because its balancing:

- Did not weigh the national interest in the protection of futures markets and their participants that the carefully developed statutory trust provides;
- Did not consider the potential market and societal harm that a system of *ad hoc* judicial declaration of property rights will have for futures markets because of the inherent delay and uncertainty of outcome it involves, which increases the risk that an FCM bankruptcy could trigger a broader market collapse;
- Effectively and erroneously flipped the presumption that FCM property is the property of futures customers by declaring that futures customers may secure property rights only if they trace their property under the most exacting standards;
- Failed to give proper effect to the fact that the SEG 3 customers by virtue of their agreement to the Plan had waived their statutory trust claims and their standing was reduced to that of general, unsecured creditors; and
- As discussed further below in Section V.C., appears to have relied on an erroneous legal standard for tracing.

With respect to the standing of the SEG 3 customers, in *FCStone I*, the district court refused to enforce the futures customers' priority of interest under the Section 4d statutory trust based on its view that the

SEG 3 customers had equally powerful priorities under their own statutory trust and, due to Sentinel's commingling, it would be unfair to deny them equal footing with the SEG 1 customers. *FCStone I*, 485 B.R. at 871-73, 877-78. That concern, however, is no longer relevant to the current dispute because in accepting the Plan the SEG 3 customers waived any putative special rights or priority to futures customer property or Sentinel property under their statutory trust. *FCStone II*, 2016 WL 1181738, at *6. Consequently, they now have the same standing as general unsecured creditors. *See id.* There can be no dispute that general creditors' rights are subordinated to those of futures customers. *Grede*, 746 F.3d at 259. Indeed, as this Court observed in the prior appeal:

> Where Congress has acted to establish a trust for certain customers to strengthen their confidence in capital markets, the trust may be more robust than one imposed by a court's equitable powers. The congressional protection indicates a national interest in protecting those customers.

Id.

The district court's misconceived assessment of the equities demonstrates why permitting the determination of the rights to futures customer property in an FCM bankruptcy to be made on the basis of *ad*

hoc judicial discretionary equitable assessments is perilous to futures markets. It is too unpredictable and slow, and errors can have catastrophic consequences on market participants and the vitality of markets as a whole. Underscoring this is the fact that if the court had come to the same conclusions at the time the petition was filed, the court would not have authorized the post-petition transfer of SEG 1 property to the FCMs, throwing the market into an extraordinary upheaval as many FCMs would have had to scramble to avoid insolvency, if they could. *See Grede*, 746 F.3d at 257 ("The amounts [transferred post-petition] were large enough that if FCStone could not transfer the money to meet its obligations to its customers, it would have been insolvent itself.").

Because FCMs provide access to futures markets and the capital that supports clearing houses, a reduction in the number of solvent FCMs will make it more difficult for financial and commercial entities to trade futures to manage their business risk and for clearing houses to protect traders against defaults.

C. The District Court's Treatment of Tracing Is Harmful to Futures Customers and CEA-Compliant Futures Market Practices

1. The district court's standards for tracing are contrary to the CEA and the Code's legislative and regulatory scheme that presume that property in futures customer accounts belongs to the futures customers

The district court's conclusion that commingling of futures customer cash and securities with the cash and securities of Sentinel and the SEG 3 customers effectively operated to extinguish the futures customers' ownership rights and priority contradicts the clear terms of the statutory trust established by the CEA. The terms of the trust provide that futures customers have (1) exclusive rights to funds in their margin accounts when a petition in bankruptcy is filed and (2) a priority of interest in a bankrupt FCM's property to the extent that the property in their segregated futures accounts is insufficient to allow full recovery of their property deposited with or received by the FCM for the benefit of their futures trading. See discussion in Section IV, *supra*.

Further, it is well established under the Code, the CFTC's implementing regulations, and CEA Section 4d(a)(2) and (b) that the unauthorized removal of customer property from a segregated futures

customer's account does not extinguish the customer's continuing property interest in it. See discussion in Section IV, *supra*. *E.g.*, *In re Bucyrus Grain Co., Inc.*, 127 B.R. 45, 51-52 (D. Kan. 1988).[8]

Thus, as long as the securities that were sold to Citadel from the futures customers' accounts had a value at the time(s) Sentinel allocated securities to the futures customers' accounts in exchange for their cash, the futures customers' right to such property is satisfied. *See, e.g.*, *Wilde v. Wilde*, 576 F. Supp. 2d 595, 604-605 (S.D.N.Y. 2008) (discussing constructive trusts) and authorities cited therein.

[8] Contrary to the district court's concern with the commingling of cash in a clearing account, the use of a single securities clearing account for purchasing securities should not defeat the application of CEA Section 4d(a)(2)'s protections as long as the securities allocated to the segregated accounts are equal to the customer funds withdrawn for that exchange. The dispositive issue under Section 4d(a)(2) is whether futures customer funds were exchanged for the securities. That an FCM originally purchased a security in its own name with its own funds or even commingled funds is not relevant to Section 4d(a)(2)'s protections. Where a security is allocated to a segregated customer account on the FCM's books, and customer funds were exchanged for it, its status as customer account property is clear. 17 C.F.R §§ 1.20(c),190.08(a)(1)(i).

2. Securities wrongfully removed from a futures customer account are entitled under Section 4d to be traced and returned to the futures customer account

The district court apparently relied on its prior rationale for disallowing tracing that, as a matter of law, a pool of securities wrongfully removed from FCStone's segregated futures customer account and then replaced before the petition was filed, are not subject to tracing if the futures customers in the first instance had only a *pro rata* interest in the pool of securities rather than personal title to particular securities themselves.[9] This premise is antithetical to Section 4d(a)(2) and (b) and the regulatory regime under which FCMs operate and on which futures customers rely to protect their property rights.

---

[9] *In FCStone I*, the district court ruled:

> But for tracing purposes the critical shortcoming of [FCStone's forensic accountant's] report is that it fails to adequately account for the fact that none of Sentinel's customers held specific ownership interests in securities. Rather, they owned *pro rata* portions of investment portfolios, which Sentinel was free to fill with any of the securities in its pool of assets so long as those securities met the portfolio's investment criteria.
>
> * * *
>
> Sentinel's investment model makes tracing essentially impossible because, upon deposit, customer funds were immediately converted into an abstract ownership interest. In other words, Sentinel's pooled investment

More troubling still, the district court's ruling implies that commingling futures customer securities in a segregated omnibus futures account precludes any claim of ownership or priority in interest by futures customers over the claims of general creditors. To the contrary, such commingling is expressly authorized by Section 4d(a)(2) and CFTC rules 1.20 – 1.23 and that is the uniform method among FCMs for handling futures customer margin assets. The district court's rationale thus confounds the regulatory requirements and scheme on which FCMs and their customers rely in protecting customer property rights.

CFTC Rule 1.21 expressly permits the commingling of futures customer property within a segregated omnibus account:

> Money and equities accruing in connection with futures customers' open trades, contracts, or commodity options *need not be separately credited to individual accounts but may be treated and dealt with as belonging undivided to all futures customers having open trades, contracts,*

> model renders tracing impracticable because there is no specific form of converted trust property to trace.

FCStone I, 485 B.R. at 879.

> *or commodity option positions* which if closed would result in a credit to such futures customers.

17 C.F.R. § 1.21 (emphasis added); see discussion at Section IV, *supra*. Similarly, the district court's unsupported conclusion is refuted by the established regime recognizing that the securities allocated to the segregated futures customer account are exclusively the property of those customers, each of which has a *pro rata* interest in them and to the proceeds from their sale. 17 C.F.R. §§ 190.01(n), 190.08(a)(1).

Significantly, contrary to the implication of the district court's ruling, holding futures customer securities in individual custody accounts would not be expected to provide futures customers with any greater priority over the claims of other futures customers to that property in the event of an FCM bankruptcy. In this regard, Section 766(h) of the Code, 11 U.S.C. § 766(h), provides, subject to exceptions not relevant here, that the bankruptcy trustee shall distribute customer property ratably to all futures customers on the basis and to the extent of such customers' allowed net equity claims, and in priority to all other creditors' claims to futures customer property. Pursuant to this provision, the trustee would not treat futures customer property held in individual custody accounts any differently from futures customer

property held in segregated omnibus futures customer accounts. To apply a different rule for Chapter 11 administered FCM bankruptcies, as the district court's decision implies, would harm futures markets by creating conflicting standards and legal uncertainty on issues that are foundational to customer property rights and protections from claims of general creditors.

It also should be recognized that pooling securities in a segregated omnibus customer account benefits the customer. For a customer to have a specific individualized interest in a particular security would require holding customer funds and securities in an individual custodial account for the customer. The operational complexity of holding customer securities in an individual account as margin to support futures trading would be very costly, potentially even affecting the economic utility of futures trading.

Further, it would be impractical, if not impossible, to try to tie a particular security to a particular customer's specific funds because such smaller lots of securities cannot be adjusted quickly and efficiently enough to respond to the volatility in the market value of a customer's open futures positions, the frequent changes in a customer's positions

themselves, and the changes in the market value of the securities. The longstanding futures market practice of segregated omnibus customer accounts should not be jeopardized by the erroneous rulings of the district court.

V. CONCLUSION

For all the foregoing reasons, the Court should reverse the district court's rulings (1) treating as property of the Sentinel estate and distributing to all creditors *pro rata* the funds transferred from the SEG 1 accounts after the petition was filed and the funds in the SEG 1 Reserve, and (2) rejecting tracing of futures customer property.

Respectfully submitted,

/s/ Charles R. Mills

Charles R. Mills
Tyechia White
Counsel for FIA

Dated: August 29, 2016

RULE 29(c)(5) STATEMENT

Pursuant to Fed. R. App. P. 29(c)(5), no party's counsel authored this Brief in whole or in part, no party or a party's counsel contributed money that was intended to fund preparing or submitting the Brief, and no person – other than the Futures Industry Association, its members, or its counsel – contributed money that was intended to fund preparing or submitting the Brief.

/s/ Charles R. Mills
Charles R. Mills
Tyechia L. White
Counsel for FIA

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because this brief contains 6,818 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Century Schoolbook.

/s/ Charles R. Mills
Charles R. Mills
Tyechia L. White
Counsel for FIA

August 29, 2016

CERTIFICATE OF SERVICE

I hereby certify that on August 29, 2016, the Brief of *Amicus Curiae*, Futures Industry Association, Inc., and related Statement and Certificates were filed with the Clerk of the Court for the United States Court of Appeals for the Seventh Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Pursuant to ECF Procedure (h)(2) and Circuit Rule 31(b), and upon notice of this Court's acceptance of the electronic brief for filing, I certify that I will cause 15 copies of the above brief to be transmitted to the Court via hand delivery and 2 copies of the above filing to be served upon counsel listed below using FEDEX overnight delivery.

Stephen Bedell, Esq. Foley & Lardner, LLP 321 N. Clark Street, Suite 2800 Chicago, IL 60654-5313 *Counsel for FCStone, LLC*	Catherine L. Steege Jenner & Block LLP 353 N. Clark Street Chicago, IL 60654 *Counsel for Frederick J. Grede*

August 29, 2016

/s/ Charles R. Mills
Charles R. Mills
Tyechia L. White
Counsel for FIA