NO. 14-12568

In the

UNITED STATES COURT OF APPEALS

For the

ELEVENTH CIRCUIT

Amegy Bank National Association,

Plaintiff/Appellee,

vs.

Deutsche Bank Alex.Brown, a division of Deutsche Bank Securities, Inc.

Defendant/Appellant

Amicus Curiae Brief of the Georgia Defense Lawyers Association ("GDLA") in Support of Petition for Rehearing En Banc

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to F.R.A.P. 26.1, Eleventh Circuit Rule 26.1-1, and Eleventh Circuit Rules 35-5(b) and 35-6, this amicus curiae adopts the statement of Petitioner/Appellant/Defendant Deutsche Bank Alex.Brown ("Alex.Brown") and adds to it the information pertinent to this amicus, as follows:

1. The following persons and entities may have an interest in the outcome of this case:

Adams, Eric S.

Amegy Bank National Association

Amegy Corporation

Bracken, Geoffrey H.

Brannock & Humphries

Brannock, Steven L.

Carlock, Copeland & Stair, LLP

Carroll, Hunter W.

Chappell, The Honorable Sheri Polster

Dalton Jr., The Honorable Roy B.

Daniel, Laurie Webb

DB Private Wealth Mortgage, Ltd.

DB USA Corporation

Deutsche Bank AG

Deutsche Bank Alex.Brown

Deutsche Bank Corporation

Deutsche Bank Securities Inc.

Deutsche Bank Trust Company Americas

Deutsche Bank US Financial Markets Holding Corporation

Eastmoore, Theodore C.

Frazier, The Honorable Douglas N.

Frisch, Eric J.

Gardere Wynne Sewell, LLP

Georgia Defense Lawyers Association ("GDLA")

Holland & Knight LLP

Jones, Foster, Johnson & Stubbs, P.A.

Labrit, Suzanne Youmans

Mariani, John F.

Matthews, Eastmoore, Hardy, Crauwels & Garcia, P.A.

Mirando, The Honorable Carol

O'Connor, Joanne M.

Obenhaus, Stacey R.

Seely, Mike

Shutts & Bowen, LLP

Sprinkle, Shannon M.

Steele, The Honorable John E.

Stringer, Jordan T.

Taunus Corporation

Tomlinson, Allen

Weber, Janelle A.

Zions Bankcorporation

2. Alex.Brown further provides this corporate disclosure:

(a) Deutsche Bank Alex.Brown is a division of Deutsche Bank Securities, Inc.

(b) Deutsche Bank Securities, Inc. is a wholly owned subsidiary of Deutsche Bank U.S. Financial Markets Holding Corporation.

(c) Deutsche Bank U.S. Financial Markets Holding Corporation is a wholly-owned subsidiary of Taunus Corporation. On July 14, 2014, Taunus Corporation changed its name to DB USA Corporation.

(d) DB USA Corporation is wholly owned by Deutsche Bank AG.

(e) DB Private Wealth Mortgage, Ltd. (a defendant below but not a party to this appeal) is a subsidiary of Deutsche Bank Trust Company Americas.

(f) Deutsche Bank Trust Companies Americas is a subsidiary of Deutsche Bank Trust Corporation.

(g) Deutsche Bank Trust Corporation is a subsidiary of Deutsche Bank AG.

(h) Since October 3, 2001, the shares of Deutsche Bank AG have been publicly traded on the New York Stock Exchange under the ticker symbol DB. Deutsche Bank AG also trades on the following exchanges:

Symbol	Exchange
DBK:GR	Xetra
DBN:MM	Mexico
DBK:IM	BrsaItaliana
LBND:US	NYSE Arca
SBND:US	NYSE Arca

(i) Plaintiff/Appellee Amegy Bank National Association is a wholly owned subsidiary of Amegy Corporation, a Texas corporation, which is in turn a wholly owned subsidiary of Zions Bankcorporation. Zions Bankcorporation is a publically traded company on the NASDAQ Stock Market under the ticker symbol ZION.

STATEMENT OF COUNSEL PURSUANT TO F.R.A.P. 29(c)(5) and ELEVENTH CIRCUIT RULES 35-5 AND 35-6

Counsel for the GDLA hereby expresses a belief, based on a reasoned and studied professional judgment, that this appeal involves a question of exceptional importance: whether the Georgia General Assembly intended to permit a jury to pierce the immunity granted to a securities intermediary under O.C.G.A. §11-8-115 (Georgia's version of UCC §8-115) based on alleged tacit collusion when the evidence, at best, only authorized a negative inference of an alleged agreement to engage in wrongdoing and did not authorize an inference of affirmative conduct. The GDLA respectfully submits that the divided panel decided this issue incorrectly and thus this Court should grant rehearing issue *en banc*. Moreover, the GDLA submits that, after granting rehearing, the Court should certify this issue to the Georgia Supreme Court to decide this important issue of Georgia law. Indeed, in the absence of rehearing *en banc*, the split panel decision in this case will have an undue adverse influence on Georgia law and on Uniform Commercial Code actions across the country under state analogues of UCC §8-115.

The GDLA further states that (A) no party's counsel authored this *amicus* brief in whole or in part; (B) no party or party's counsel contributed money that was intended to fund preparing or submitting the brief; and (C) no person – other than the *amicus curiae*, its members, or its counsel – contributed money that was intended to fund preparing or submitting the brief.

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STATEMENT OF THE ISSUE

The issue is whether O.C.G.A. §11-8-115 - Georgia's version of UCC §8-115 - permits liability against a securities intermediary for collusive conversion when the evidence only authorizes a negative inference of possible tacit collusion. The answer is no. The Georgia General Assembly did not intend to hold an intermediary liable for conversion based on evidence that the intermediary may have known that the seller of a financial instrument had an improper motive. Rather, in enacting Section 11-8-115, the General Assembly intended to protect intermediaries from liability absent proof of "egregious" active participation in such a scheme. In addition, the Uniform Commercial Code places on the plaintiff the burden of proving such active participation and makes clear that this is a high hurdle. The majority ruling of the splint panel in this appeal, however, nullifies the intent underlying this law and shifted the burden of proof to the defendants to disprove the negative inference.

Because of the ramifications of this decision, the Court should grant the petition for rehearing *en banc* and then certify the issue to the Georgia Supreme Court. As noted by the dissent, this is an issue of extraordinary importance that should be addressed by the Georgia Supreme Court. See Petition App. 48. Indeed, though the current panel decision is unpublished, it will have an immense adverse impact on this area of Georgia law, as there is no state appellate opinion construing

the law under similar circumstances. Thus, a rehearing *en banc* with certification to the Georgia Supreme Court would be the most efficient means to accomplish that worthy goal.

STATEMENT OF THE INTEREST OF THE *AMICUS CURIAE*

The Georgia Defense Lawyers Association ("GDLA") has more than 825 members, ranging from sole practitioners to lawyers in large firms. Though its members are diverse, they share a common interest in supporting and improving the civil defense bar, improving the adversary system of jurisprudence, eliminating delay in litigation, and otherwise improving the administration of justice.

The GDLA respectfully submits this amicus curiae brief because this appeal presents important issues regarding the burden and quantum of proof when an injured party seeks to hold an alleged tortfeasor liable pursuant to a collusion theory. As discussed below, this Court should rehear the appeal *en banc* and then certify the question to the Georgia Supreme Court because the panel's decision dilutes the "collusion" requirement of O.C.G.A. §11-8-115(2) and allows liability based on tacit collusion supported by negative inferences. It is the position of the GDLA that an *en banc* rehearing with certification to the Georgia Supreme Court is warranted because: (1) this case poses an important issue of Georgia UCC law that should be decided by the Georgia Supreme Court rather than by a divided panel of this Circuit; (2) there should be clarity regarding the burden of proof and

quality of evidence needed to prove collusion generally; and (3) the majority's opinion, while not binding precedent, may encourage frivolous litigation based on ambiguous circumstantial evidence.

STATEMENT OF OPPOSITION

GDLA believes Amegy Bank opposes the motion for hearing *en banc*.

SUMMARY OF THE ARGUMENT

The Georgia General Assembly did not intend to permit a jury to pierce the immunity granted to a securities intermediary under O.C.G.A. §11-8-115 (Georgia's version of UCC §8-115) based on alleged tacit collusion when the evidence, at best, only authorized a negative inference of an alleged agreement to engage in wrongdoing but not affirmative misconduct. The GDLA respectfully submits that the divided panel decided this issue incorrectly and thus this Court should grant rehearing issue *en banc*. Moreover, the GDLA submits that, after granting rehearing, the Court should certify the issue to the Supreme Court of Georgia to decide this important issue of Georgia law. In the absence of rehearing *en banc*, the split panel decision in this case will have an undue adverse influence on Georgia law and on Uniform Commercial Code actions across the country under state analogues of UCC §8-115.

ARGUMENT AND CITATION OF AUTHORITIES

Since 1998, the Georgia General Assembly has relieved securities intermediaries from liability to people having adverse claims to a financial asset unless the intermediary "acted in collusion with the wrongdoer in violating the rights of the adverse claimant." O.C.G.A. §11-8-115(2). The official commentary to this Code Section provides additional guidance on this issue:

> Knowledge that the action of the customer is wrongful is a necessary but not sufficient condition of the collusion test. The aspect of the role of securities intermediaries and brokers that Article 8 deals with is the clerical or ministerial role of implementing and recording the securities transactions that their customers conduct. Faithful performance of this role consists of following the instructions of the customer. It is not the role of the record-keeper to police whether the transactions recorded are appropriate, so mere awareness that the customer may be acting wrongfully does not itself constitute collusion. That, of course, does not insulate an intermediary or broker from responsibility in egregious cases where its action goes beyond the ordinary standards of the business of implementing and recording transactions, and reaches a level of affirmative misconduct in assisting the customer in the commission of a wrong.

O.C.G.A. §11-8-115, cmt. 5.

Under Georgia law, the courts look diligently for the intent of the General Assembly in the interpretation of all statutes and, in so doing, assign words their ordinary significance. O.C.G.A. §1-3-1. Black's Law Dictionary defines "collusion" as "an agreement to defraud another." This definition is consistent with the General Assembly's intent to protect intermediaries unless they engage in

"affirmative misconduct in assisting . . . in the commission of a wrong." O.C.G.A. §11-8-115, cmt. 5.The outcome here, however, nullified the intent of the General Assembly by imposing liability simply because the securities broker "should have known" that Johnson was up to no good. This ruling, in essence, imposes strict liability on Defendant Alex.Brown based on a series of disparate facts and negative inferences.

The implications of the decision in this case are far-reaching. In 2005, the Georgia General Assembly abrogated joint and several liability for tortfeasors in favor of apportionment of liability. O.C.G.A. §51-12-31, *et. seq*. Yet, the clients of the members of the GDLA are frequently accused of any number of creative joint liability theories to avoid the effects of several liability. To this end, any decision – published or unpublished – regarding a theory of joint liability like the collusion theory in this case impacts how claimants will proceed under Georgia law. Moreover, the impact of the panel decision is not minimized by its designation as an unpublished opinion. This Court has sanctioned the use of unpublished opinions as persuasive authority. *Mid-Continent Cas. Co. v. Am. Pride Bldg. Co., LLC*, 601 F.3d 1143 (11th Cir. 2010); *United States v. Moore*, 541 F.3d 1323 (11th Cir. 2008). Furthermore, the Georgia courts often look to decisions from this Court where, as here, there is a lack of judicial authority within the state. See, e.g., *Dee v. Sweet*, 268 Ga. 346, 350 (1997). Thus, the GDLA is concerned that other claimants

may use the majority's opinion as a sword to pierce the immunity that the Georgia legislature intended to shield securities intermediaries like Alex.Brown.

Finally, although it is unusual for the Court to grant a rehearing *en banc* and then certify the issue to a state Supreme Court, this is the most appropriate course of action in some cases. See *Sultenfuss v. Snow*, 35 F.3d 1494, 1503 (11th Cir. 1994) (*en banc*) (Carnes, J.) (dissenting from Court's *en banc* "failure to certify to the Georgia Supreme Court the unsettled questions of state law which control the disposition of this case"). The GDLA respectfully submits that this case warrants this action because it involves an important issue of Georgia U.C.C. law that should be decided by the Georgia Supreme Court in the first instance rather than a divided panel of this Circuit.

CONCLUSION

The Georgia General Assembly is presumed to have intended exactly what it said when it adopted U.C.C. § 8-115 and its commentary, which makes clear that a securities intermediary is not supposed to police its client's transactions. If there is concern that the statute means something other than what it says, the Georgia Supreme Court should hear the matter.

This 18th day of September, 2015.

CARLOCK, COPELAND & STAIR, LLP

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CERTIFICATE OF SERVICE

I certify that on September 18, 2015, I have e-filed a copy of this Amicus Curiae Brief of the Georgia Defense Lawyers Association in Support of Petition for Rehearing En Banc with the Clerk of Court and mailed and emailed copies of such filing to the following attorneys of record:

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