

**United States Bankruptcy Court, Northern District of Illinois**

Name of Assigned Judge	<b>Carol A. Doyle</b>	Case No.	12 B 27488
<b>DATE</b>	December 21, 2016	<b>ADVERSARY NO.</b>	
<b>CASE TITLE</b>	In re Peregrine Financial Group, Inc.		

**DOCKET ENTRY TEXT**

Claim No. 1014 filed by Acuvest Inc. is hereby reclassified as a general unsecured claim.

[For further details see text below.]

**STATEMENT**

Acuvest, Inc. filed a futures customer claim (Claim no. 1014) against the bankruptcy estate of Peregrine Financial Group, Inc. The trustee objected to Acuvest's claim in the Twenty-Fifth Omnibus Objection to Claims. He argued that the account maintained by Acuvest was not a futures trading account but instead was an indemnification account established for the payment of legal fees in connection with a lawsuit against Peregrine. Acuvest's former president and sole stockholder, John Caiazzo, responded to the objection. He asserted that the "indemnification [account] was for Acuvest's guarantee against loss or unsecured debits of any of Acuvest client futures accounts and should therefore be classified as an indemnity futures account." The trustee filed a reply explaining that Acuvest was an introducing broker and that the account contained funds to indemnify Peregrine against losses in Acuvest's clients' trading accounts. In response to questions asked by the court, the trustee filed a sur-reply, accompanied by a declaration of Susan O'Meara, the former Chief Compliance Officer of Peregrine. Based on the undisputed facts, the objection is sustained and the claim is re-classified as a general unsecured claim.

## STATEMENT

Acuvest was an introducing broker for Peregrine. In July 2008, Acuvest entered into a Clearing Agreement for Guaranteed Introducing Brokers. The Agreement required Acuvest to guarantee the “losses, charges and deficiencies” for the customers that Acuvest introduced to Peregrine. Acuvest was also responsible for the payment of each customer’s debits, which were deducted from Acuvest’s commissions at Peregrine’s discretion. To ensure Acuvest’s compliance, the Agreement required Acuvest to deposit with Peregrine such amounts as Peregrine would require from time to time. The Agreement also contained an indemnification clause in which Acuvest agreed to accept full financial responsibility for its activities and indemnify Peregrine “from any harmful results or action.” Clearing Agreement, ¶¶ 8, 12.

In 2009, a client of Acuvest sued Acuvest, its principals, and Peregrine for commodities fraud, breach of fiduciary duty by the Acuvest defendants, and guarantor liability as to Peregrine. Peregrine won a motion for summary judgment in its favor, which was affirmed in July 2013, about one year after this bankruptcy was filed. Pursuant to the Clearing Agreement, Peregrine is entitled to withhold Acuvest’s indemnification funds to compensate itself for the expenses of the lawsuit. The \$41,862 that the parties agree is in the Acuvest account is apparently the balance left over after payment of Peregrine’s legal fees in that lawsuit.

The trustee contends that Acuvest is an introducing broker, not a customer whose funds deposited with Peregrine are given top priority under the Bankruptcy Code. The court agrees. Claims of customers are entitled to priority over all unsecured claims except administrative costs. 11 U.S.C. § 766(h). “Customer” is defined in the Bankruptcy Code as a party who holds a claim against a futures commission merchant (like Peregrine) that arises from trading in commodities contracts. It provides that a customer is an entity that:

... holds a claim against such futures commodity merchant on account of a commodity contract made, received, acquired, or held by or through such futures commission merchant in the ordinary course of such futures commission merchant's business . . . ; or ...

arising out of-

- (I) the making, liquidation, or change in the value of a commodity contract of a kind specified in clause (i) of this subparagraph;
- (II) a deposit or payment of cash, a security, or other property with such futures commission merchant for the purpose of making or margining such a commodity contract; or
- (III) the making or taking of delivery on such a commodity contract; ...

11 U.S.C. § 761(9).

## STATEMENT

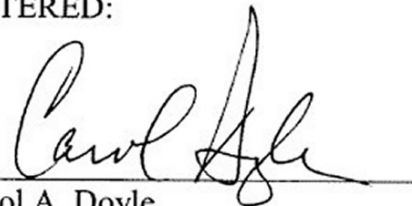
Here, Acuvest does not hold a claim on account of a commodity contract that was made, received, acquired or held by Peregrine, and the claim does not arise from the making, liquidation or change in value of a commodity contract or from making or taking delivery of a commodity contract. Instead, it arises from a separate contract Acuvest made with Peregrine to serve as an Introducing Broker. Acuvest admitted in its response that the money was held to indemnify Peregrine against potential losses in connection with Acuvest's clients. Acuvest therefore does not fall within the definition of a customer with respect to this claim. Courts have concluded, in analogous situations, that introducing brokers should not be afforded the same priority as customers. *Oxford Organisation, Ltd. v. Peterson (In re Stotler and Co.)*, 144 B.R. 385, 392 (N.D. Ill. 1992) (Congressional and CFTC intent is clear that the customer receives priority over introducing brokers of commodities); *In re Adler Coleman Clearing Corp.*, 204 B.R. 111 (Bankr. S.D.N.Y. 1997) (introducing broker not entitled to same priority as customers in Securities Investor Protection Act case for funds deposited to indemnify securities firm under clearing agreement). See also 17 C.F.R. §§ 1.3(k) and 1.3(mm) (definitions of "introducing broker" and "customer," which make clear that an introducing broker is not a customer). Acuvest is not a customer of Peregrine with respect to this account.

The trustee also argues that there is no statutory support for treating the funds in Acuvest's account as "customer property." The definition of "customer property" in the Bankruptcy Code includes only property of entities who fall within the definition of "customer." 11 U.S.C. § 761(10). Since Acuvest is not a customer, the money in the account in question cannot be customer property. The money in the account, which was held for purposes of indemnification, also does not fall within any of the categories in the definition of "customer property" in the Bankruptcy Code in any event. See 11 U.S.C. § 761(10).

For these reasons, Acuvest is not entitled to have its claim treated as a claim for customer funds entitled to high priority under the Bankruptcy Code. The trustee's objection is sustained and Acuvest's claim is re-classified as a general unsecured claim.

Dated: December 21, 2016

ENTERED:



Carol A. Doyle  
United States Bankruptcy Judge