NO. 936145

SUPREME COURT OF THE STATE OF WASHINGTON

NO. 73459-8

COURT OF APPEALS
STATE OF WASHINGTON
DIVISION 1

DONALD BURDICK, et al.
Appellants,

v.

ROSENTHAL COLLINS GROUP, LLC
an Illinois limited liability company,
Respondent

ANSWER TO PETITION FOR REVIEW

Christian T. Kemnitz
Patrick M. Smith
J Matthew Haws
KATTEN MUCHIN ROSENMAN LLP
525 W. Monroe St.
Chicago, Illinois 60661

Gavin W. Skok
RIDDELL WILLIAMS P.S.
1001 Fourth Avenue, Suite 4500
Seattle, Washington 98154
Attorneys for Respondent

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I. IDENTITY OF THE RESPONDENT

The Respondent to the Petition for Review is Rosenthal Collins Group, LLC ("RCG"). RCG requests the Court deny Appellants' Petition for Review.

II. COURT OF APPEALS DECISION

The unpublished decision at issue is *Burdick, et al. v. Rosenthal Collins Group, LLC*, No. 76459-8-I (Div. I, May 31, 2016).[1] On July 20, 2016, the Court of Appeals denied Appellants' motion for reconsideration.

III. INTRODUCTION

The Court should deny Appellants' Petition for Review because Appellants have not demonstrated that review is warranted under any of the factors set forth in RAP 13.4(b). The Court of Appeals' unpublished decision in this case is entirely consistent with the precedent of the Supreme Court and the Court of Appeals, presents no questions of constitutional law, and presents no issue of substantial public interest.

Appellants' appeal also fails on its merits. Both the trial court and the Court of Appeals thoroughly and properly applied the law to this case when they granted summary judgment on Appellants' securities claims and common law negligence claims. RCG never had any relationship or interaction with Appellants and had absolutely no involvement in their investments. Indeed, the only alleged sales of securities in this case were

[1] The opinion of the Court of Appeals is cited herein as "Opinion at __." Appellants' Petition for Review is cited as "Petition at __."

consummated exclusively between Appellants and their third-party investment manager in private meetings, without any involvement by RCG. Accordingly, the Court of Appeals properly held that "RCG's role in the sale of the relevant securities was insufficient as a matter of law," and RCG had no "special relationship" that could give rise to a duty to protect them from the fraud of their investment manager. Opinion at 12, 18, 20.

Finally, if the Petition for Review is granted, the Court should consider three additional issues which the Court of Appeals did not reach, but which are also dispositive of Appellants' claims. First, Appellants' RCW 21.20.430(3) claims fail for the independent reason that RCG is not a securities "broker-dealer" under the plain language of the statute. Second, Appellants have no claim under the Ohio Securities Act ("OSA") because Washington choice-of-law rules instruct that Washington law governs their claims. Finally, all of Appellants' state securities claims are preempted by the Commodity Exchange Act ("CEA"), which provides the exclusive regulatory scheme for the futures markets.

IV. COUNTERSTATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Did the Court of Appeals properly affirm summary judgment on Appellants' RCW 21.20.430(3) and O.R.C. § 1707.43(A) claims where RCG had no contact with the investors, engaged in no promotional conduct, received no money from investors, and played no role whatsoever in the alleged sale of securities?

2. Did the Court of Appeals properly affirm summary judgment on Appellants' negligence claims because no duty arose to protect Appellants from the fraud of their investment manager, Enrique Villalba, given that Appellants had no special relationship with RCG, and Villalba (the fraudster) was not an employee or otherwise affiliated with RCG?

3. Can Appellants establish that RCG is a "broker-dealer" for purposes of RCW 21.20.430(3) where RCG does not effect securities transactions and never transacted in securities for the alleged seller?

4. Can Appellants pursue a claim under the OSA where they claim that no conflict of law exists and the Washington State Securities Act ("WSSA") supplies their cause of action?

5. Are Appellants' securities claims preempted by the CEA because those claims are based entirely on conduct by a Futures Commission Merchant ("FCM") related to a futures trading account, which is governed exclusively by the CEA?

V. COUNTERSTATEMENT OF THE CASE

Villalba's Ponzi Scheme

This case arises out of the collapse of a Ponzi scheme conducted by Villalba from approximately 1996—18 months *before* any RCG account was opened—until September 2009. Opinion at 2.[2] Villalba held himself out to his clients as an "investment manager" who claimed to manage his clients' assets in accordance with their individual investment objectives

[2] *See also* CP 326–29; CP 447 (¶ 12(A)); CP 1163–64 ¶¶ 3–4; CP 1627–30.

and by utilizing his trading strategy, which he referred to as the "Money Market Plus Method." *Id.*

In reality, Villalba stole the money his clients invested with him. After receiving investors' funds into bank accounts held in the name of his company, Money Market Alternatives ("MMA"), Villalba used their money to, among other things, pay himself huge management fees, fund his lavish lifestyle, purchase commercial real estate in Ohio, support his coffee shops, and make Ponzi-type payments to other investors. *Id.* While none of Villalba's investors sent any money to RCG, Villalba transferred some money from MMA's banks accounts to a futures account to trade futures in MMA's name. *Id.*

Villalba concealed his theft from his clients with lies and fraudulent account statements reflecting steady gains in their accounts. *Id.* There is no dispute that RCG played no role in creating (and had no knowledge of) these fake account statements. *Id.* at 2 & n.2. Based upon these fake statements and believing Villalba was earning incredible returns, Appellants entrusted Villalba with more and more money of their money. *Id.* at 2.

The Appellants Invest with Villalba

The Appellants hired Villalba to manage their money at various times between 1996 and 2009. *Id.*

Appellant Bernard Goldberg met Villalba years before Villalba opened an account at RCG. *Id.* at 3. Goldberg and Villalba formed a general partnership, through which Goldberg effectively hired Villalba to manage

certain assets in return for a share of the partnership's trading profits. *Id.* Given his close, lengthy relationship with Villalba, Goldberg was able to convince many of his friends to hire Villalba as their investment advisor, including (directly or indirectly) all of the Appellants in this case. *Id.*

After being introduced to Villalba, the other Appellants each entered into Investment Management Agreements ("IMAs") with Villalba. *Id.* The IMAs detailed Villalba's role as "investment manager" of individually managed accounts, which never actually existed. *Id.* The IMAs make no mention of RCG and, in fact, gave Appellants the right to choose or change the brokerage firm that handled his/her account. *Id.* Appellants, however, trusted Villalba (and his large returns) and did not exercise these rights. By and large, Appellants had no knowledge of the brokerage firms Villalba was using, and each admitted that this was not a factor they considered when they decided to hire Villalba as their investment manager. *Id.* at 3–4.

Appellants admitted that (a) RCG played no role in the alleged sale of "securities" or in their decision to invest, (b) they never saw, received, or signed any subscription agreement or offering circular relating to their investment, and (c) they did not believe that they were purchasing an interest in Villalba's company, MMA (or a "security" issued by MMA). *Id.* Critically, Appellants admitted that they had no interaction whatsoever with RCG, never had a written agreement that mentioned RCG, and never did business with RCG in any way. *Id.*

Villalba's Trading in Futures Contracts

In June 1998, 18 months *after* Goldberg first invested, Villalba opened a nondiscretionary commodity futures account with RCG in the name of one of his companies, MMA. *Id.* at 4. RCG is a registered FCM that accepts and clears futures trades on behalf of thousands of customers. As a "nondiscretionary" customer, MMA retained complete control over its futures account and had full responsibility and liability for all trading decisions. *Id.*

Villalba's scheme began to unravel in 2009 after MMA suffered significant trading losses. *Id.* at 6. In early September 2009, Villalba started ignoring his clients' phone calls and e-mails, arousing their suspicions. *Id.* By September 2010, after an investigation by the SEC and FBI, Villalba pleaded guilty to felony wire fraud and was ordered to pay over $30 million in restitution and sentenced to almost nine years in federal prison. *Id.*

Procedural Background

Although Appellants were complete strangers to RCG, they have sought to recoup all of their investments with Villalba from RCG, including investments made prior to the time that MMA even had an account at RCG.[3] Alleging that their investment management relationships with Villalba constituted a "sale of securities," Appellants pursued claims against RCG under various state securities statutes,

[3] *See* CP 326–29; CP 547–58; CP 562–78.

including the WSSA, the California Corporations Act, and the OSA. Appellants also brought claims under the CEA, the Washington Consumer Protection Act, and common law negligence.[4] Appellants' CEA claims were dismissed by the U.S. District Court for the Northern District of Ohio because Appellants could not allege that RCG acted with the requisite knowledge and intent.[5] The case was later refiled in the King County Superior Court. On April 30, 2015, Judge North granted summary judgment in RCG's favor on Appellants' remaining claims.[6]

On May 31, 2016, the Court of Appeals issued an unpublished decision affirming summary judgment on all counts. The Court of Appeals held that "RCG's role in the sale of the relevant securities was insufficient as a matter of law" because:

(i) "RCG did not participate at all in Villalba's sale of interests in MMA to the investors";

(ii) "RCG did not issue, promote, or solicit the sale of alleged securities";

(iii) "[t]he securities sales were completed well before Villalba would send any money to an account at RCG to trade futures";

(iv) Appellants "admit[ted] that RCG did not factor into their decision to invest with Villalba"; and

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[4] CP 13–19 ¶¶ 59–91.

[5] *Burdick v. Rosenthal Collins Group*, No. 1:11-cv-02571-SO, ECF No. 51 (N.D. Ohio July 27, 2012). Appellants did not appeal the dismissal of their CEA claims.

[6] Appellants did not appeal summary judgment on their California Corporations Act or Washington Consumer Protection Act claims.

(v) RCG "had absolutely no contact whatsoever with the [Appellants]."

Opinion at 12. The Court of Appeals also affirmed summary judgment on Appellants' negligence claims, holding that "the investors had no relationship with RCG, let alone a 'special relationship' pursuant to which RCG might have owed them a duty." *Id.* at 21.

VI. ARGUMENT

The Court should deny Appellants' Petition for Review because Appellants have not demonstrated that review should be granted under any of the provisions of RAP 13.4(b). The Court of Appeals decision is consistent with the precedent of this Court, Ohio precedent, and published decisions of the Court of Appeals. The decision does not warrant reconsideration.

If the Court grants Appellants' petition, the Court should also consider the additional bases for granting summary judgment set forth below, which were not reached by the Court of Appeals.

A. Appellants Have Not Satisfied Any of the RAP 13.4(b) Factors.

RAP 13.4(b) provides that a petition for review will be granted by the Supreme Court only if the Court of Appeals decision (1) conflicts with a decision of the Supreme Court; (2) conflicts with a published decision of the Court of Appeals; (3) involves a "significant question" of constitutional law; or (4) involves "an issue of substantial public interest that should be determined by the Supreme Court." Appellants fail to acknowledge these factors in their petition, instead focusing exclusively

on the supposed merits of their appeal. Nevertheless, none of these factors supports their petition.

1. The Court of Appeals Decision Is Consistent with Supreme Court Precedent and Ohio Precedent.

RCW 21.20.430(3)

With respect to their WSSA claims, Appellants attempt to manufacture a conflict between the Court of Appeals decision in this case and *Haberman v. Washington Public Power Supply Systems*, 109 Wn.2d 109 (1987). Petition at 8–9. They argue that the Court of Appeals improperly applied *Haberman*'s "substantial contributing factor" standard applicable to RCW 21.20.430(1) to Appellants' claims under RCW 21.20.430(3), which require that the defendant "materially aid in the transaction." *Id.* at 9. Appellants' argument misreads the Court of Appeals' opinion.

The Court of Appeals did not rely on *Haberman* or the "substantial contributing factor" standard to decide Appellants' RCW 21.20.430(3) claims, as Appellants now suggest. *See id.* at 11–12. In fact, the Court of Appeals recognized that "[n]o Washington appellate court has opined in any significant way on the 'materially aids' standard" applicable to RCW 21.20.430(3). *Id.* at 11. Without clear guidance, the Court of Appeals surveyed the case law from across the country and adopted the approach of "other courts interpreting identical provisions," which have all "required the material aid to be given in the course of the sales transaction." *Id.* at 11–12 (collecting cases). Because RCG "did not participate at all in Villalba's sale of interest[s] in MMA to investors,"

"did not factor into their decision to invest," "did not issue, promote or solicit the sale of alleged securities and, in fact, had absolutely no contact whatsoever with the investors," the Court of Appeals held that RCG did not "materially aid *in the transaction*" for purposes of RCW 21.20.430(3). *Id.* at 12 (emphasis added). The Court of Appeals accurately stated and applied the law, and there is no basis to reconsider that ruling.

Unable to demonstrate that the Court of Appeals decision conflicts with Washington law, Appellants cite a handful of cases from Oregon and Kansas that they argue conflict with the Court of Appeals decision. Petition at 10–13. Appellants suggest that these cases support their argument that the "'materially aid' requirement is satisfied" by showing that the defendant merely "acquiesce[d] in a seller's wrongdoing even though the non-seller had no involvement in the sales transaction." *Id.* A conflict with the law of other states is not a proper basis for review under RAP 13.4(b). Regardless, Appellants' cases are easily distinguishable.

Appellants rely on *Koruga v. Fiserv Correspondent Services, Inc.*, 183 F. Supp. 2d 1245 (D. Or. 2001) and *Klein v. Oppenheimer & Co.*, 281 Kan. 330 (2006) to suggest that courts have found that clearing firms that perform "necessary functions related to each of the securities transactions with Plaintiffs" may "materially participate[]" in the transaction. Petition at 11–12. In each of those cases, however, the clearing firm defendant not only executed the fraudulent sale of securities, but also created customer accounts for the plaintiffs, loaned the plaintiffs money to purchase the securities on margin, and prepared and mailed

confirmation and monthly account statements directly to the plaintiffs. *See Koruga*, 183 F. Supp. 2d at 1246; *Klein*, 281 Kan. at 336. In other words, the defendant was "*directly involved in the challenged transaction.*" *Koruga*, 183 F. Supp. 2d at 1248 (emphasis added).[7] By contrast, Appellants dealt *only* with Villalba, received no loan from RCG, and, indeed, had no contact or legal relationship whatsoever with RCG.

Appellants' cases are also inapplicable for the simple reason that RCG did not clear any of the alleged securities transactions that Appellants claim were fraudulent. Indeed, the *Klein* court was careful to note that "if [the defendant] had not executed the trades at issue, Klein would have no cause of action . . . and [the case] would have been dismissed long ago on that ground." *Klein*, 281 Kan. at 336. Unlike in *Klein* and *Koruga*, the futures trades cleared by RCG on behalf of MMA are not "securities" and not the transactions that Appellants claim were fraudulent. The allegedly fraudulent sale of "securities" took place exclusively between Villalba and Appellants before any money ever reached RCG. Opinion at 12.[8]

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[7] To the extent that *Koruga* and *Klein* hold that a clearing firm's ministerial functions alone are sufficient to satisfy the "material aid" standard, those cases are inconsistent with other authority. *See Carlson v. Bear, Stearns & Co., Inc.*, 906 F.2d 315, 317–19 (7th Cir. 1990) (holding that clearing brokers generally perform merely operational and ministerial duties and are not material to the underlying transaction); UNIFORM SECURITIES ACT § 509 cmt. 11 ("[T]he performance by a clearing broker of the clearing broker's contractual functions . . . without more would not constitute material aid or result in liability.").

[8] Appellants also rely on *Ainslie v. Interstate Bank of Oregon, N.A.*, 939 P.2d 125 (Or. Ct. App. 1997). Petition at 12–13. That case, however, involved a defendant's management of escrowed funds between the investors and the venture. *Id.* at 138–39. In that peculiar case, Oregon law *required* the defendant's participation in the type of securities at issue, and, again, the defendant was directly involved in the allegedly fraudulent transaction.

O.R.C. § 1707.43(A)

The Court of Appeals decision affirming summary judgment on Appellants' OSA claims is also consistent with Ohio precedent. As the Court of Appeals recognized, the "crux of liability under section 1707.43 of the [OSA] is participation by the defendant in 'making [the] sale.'" *Id.* at 16 (quoting O.R.C. § 1707.43(A)). This section extends liability to non-sellers, but "the act 'do[es] not impose liability on anyone who aided the seller 'in any way.' Rather, [it] impose[s] liability on anyone who aided the seller in any way *in making an unlawful sale or contract for sale*." *Id.* (quoting *In re Nat'l Century Fin. Enters., Inc. Inv. Litig.*, 2006 WL 2849784, at *10 (S.D. Ohio Oct. 3, 2006) (emphasis in original)). Consistent with its holding under the WSSA, the Court of Appeals found no evidence that RCG had any role in "making [the] sale" of securities to Appellants and properly affirmed summary judgment on these claims. Opinion at 16–18.

Contrary to Appellants' assertion, the Court of Appeals correctly applied the most recent Ohio precedent on § 1707.43(A), *Wells Fargo Bank, N.A. v. Smith*, 2013 WL 938069 (Ohio Ct. App. Mar. 11, 2013). In *Wells Fargo*, the court surveyed the factors that Ohio courts have considered in deciding whether a person or entity aided in "*making such*

Id. at 127, 135. In fact, the court determined that Oregon law created a fiduciary relationship between the escrow holder and investors. *Id.* By contrast here, RCG did not participate in any way in the transactions between Villalba and his investors and had no legal relationship with the Appellants.

sale," each one aimed directly at planning, soliciting and consummating the sales transaction itself. *Wells Fargo*, at *5 (setting forth factors). As the Court of Appeals observed, *Wells Fargo* "makes clear the importance of the sales transaction" as the basis for liability under § 1707.43(A). Opinion at 17. In the end, the Ohio court granted summary judgment to a defendant who undoubtedly aided the seller in some ways but not in "making the sale," as required by the plain language of the statute.

The holding in *Wells Fargo* controls this case. As the Court of Appeals concluded, none of the factors Ohio courts consider in finding that a defendant aided in "making the sale" are present here. RCG did not relay information to investors, did not collect money from investors, did not distribute notes or documents, and did not "actively market" Villalba's investment. In short, RCG did not do any of the things that could make it a participant in "making [the] sale." O.R.C. § 1707.43(A).

The Court of Appeals' holding is also supported by other Ohio authority, including *Boomershine v. Lifetime Capital, Inc.*, 2008 WL 54803, at *2 (Ohio App. Jan. 4, 2008). There, the Ohio Appellate Court affirmed summary judgment in favor of the seller's bank and a policy administrator, who together "collected and held premiums for investors . . . , facilitated payments necessary to keep the policies in effect, and assisted in the distribution of insurance proceeds." *Id.* at *2. Although this conduct surely aided the seller in the administration of the unregistered investments (and placed the defendants in direct contact with investors, unlike here), the Ohio Court of Appeals held that the bank and

administrator did not aid in making "the *sale* of those policies, as required to establish a violation of . . . § 1707.43." *Id.* (emphasis in original). Just as in this case, the court held that the defendants' receipt of proceeds from the sale was insufficient involvement because it "came *after* [each plaintiff] had invested" in the instrument. *Id.* (emphasis in original).

Likewise, in *In re National Century*, the Ohio district court dismissed § 1707.43(A) claims against Bank One, who served as trustee to the issuer of an allegedly fraudulent note offering and who allegedly "knew about, facilitated, and participated in" the issuer's overall scheme. 2006 WL 2849784, at *2. There, the court was careful to point out that § 1707.43(A) "does not impose liability on anyone who aided the seller 'in any way,'" but rather it imposes liability on defendants that "aided the seller in any way *in making an unlawful sale or contract for sale*." *Id.* at *11 (emphasis in original). Even though the plaintiffs in that case had adequately alleged that Bank One had "aided in the scheme to defraud," the court dismissed the plaintiffs' § 1707.43(A) claims because they had not alleged that Bank One had "aided [the seller] in selling notes." *Id.*; *see also Strunk v. Settles*, 1980 WL 353191, at *5 (Ohio App. Ct. Feb. 13, 1980) (affirming summary judgment because "[a]bsent any evidence of the appellees' participation in the sale of [stock] to appellant," liability could not extend to appellees as a matter of law).

Appellants argue that the Court of Appeals decision conflicts with the interlocutory order of the *Pieretti* trial court, which also involved Villalba's investors. Petition at 14–16. But the *Pieretti* court expressly

refused to apply *Wells Fargo* because the case was on appeal and not binding on that court.[2] Nevertheless, the Court of Appeals decision does not create any conflict with Ohio law because trial court orders in Ohio are not precedential. *See Maurer v. Ctr. Twp.*, 2002 WL 1998438 (Ohio App. Ct. Aug. 30, 2002) ("A decision by a trial court [even] in the same district is not 'appropriate precedent.'"). The Court of Appeals and the trial court in this matter were unpersuaded by the *Pieretti* trial court order because that decision was neither well-reasoned nor consistent with the available Ohio precedent discussed above.

2. The Court of Appeals Decision Is Consistent with Published Decisions of the Court of Appeals.

Appellants also petition the Court to review the dismissal of their common law negligence claims, arguing that the Court of Appeals decision conflicts with *Garrison v. SagePoint Financial, Inc.*, 185 Wn. App. 461 (2015), *review denied*, 183 Wn.2d 1009 (2015). Petition at 17–20. Appellants are wrong; *Garrison* is easily distinguished. As the Court of Appeals recognized, *Garrison* involved the scope of the duty to protect third parties from the wrongdoing of *employees*. Opinion at 20. In this case, Villalba was not RCG's employee; he was merely the third-party manager of one of RCG's thousands of customers. In those circumstances, every court to address this issue has held that the FCM

[2] *See Pieretti v. Rosenthal Collins Group, LLC*, Erie C.P., No. 11-cv-0051, at 6 (May 22, 2013), Appendix O to Appellants' reply brief in the Court of Appeals.

owes no duty to protect non-customers from a customer's fraud. *See id.* at 19–20 (collecting cases).

The Court of Appeals decision is also consistent with the guidance of this Court. This Court has repeatedly instructed that "there is no duty to prevent a third party from intentionally harming others unless a special relationship exists between the defendant and either the third party or the foreseeable victim." *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 43 (1997) (quotations omitted); *Folsom v. Burger King*, 135 Wn.2d 658, 674–75 (1998) (absent a special relationship "no legal duty to come to the aid of a stranger exists"); RESTATEMENT (SECOND) TORTS § 315. Consistent with that instruction, the Court of Appeals has followed the nearly universal rule that financial institutions do not owe a duty of care to protect non-customers with whom they have no relationship from fraud. *See, e.g., Zabka v. Bank of Am. Corp.*, 131 Wn. App. 167, 174 (2005) (bank owed no duty to defrauded investors absent a direct relationship).

Garrison does not instruct otherwise. There, the Court of Appeals held that AIG could be responsible for negligently supervising its *employee*, Mark Garrison, who allegedly misappropriated money from third parties. Applying common law rules pertaining to negligent supervision of employees, the court found a duty in that case to control the employee for the protection of third parties. 185 Wn. App. at 484–85.

Appellants misrepresent *Garrison* to argue that "a duty to a non-customer *can arise* when the firm discovers troublesome 'red flags.'" Petition at 18 (emphasis added). Appellants misread *Garrison*. Far from

creating a new duty to monitor for "red flags," it was undisputed in *Garrison* that AIG already owed a common law "duty to control [its] employee for the protection of third parties."[10] *Garrison*, 185 Wn. App. at 484. The only dispute was "the *scope* of AIG's duty to supervise . . . [its] investment advisor." *Id.* at 487 (emphasis added). Thus, contrary to Appellants' claim, *Garrison* does not provide that NASD rules or "red flags" can create a duty to non-customers, and *Garrison* is entirely consistent with the Court of Appeals decision here.

Unlike the defendant in *Garrison*, RCG had no equivalent common law duty to supervise its *customer* (or more accurately, its customer's manager) to protect complete strangers from fraud. Opinion at 20. In fact, no legislature, regulatory body, or court has ever imposed such a duty.[11] The reasoning behind *not* imposing such a duty is "simple and sensible" and intended to avoid imposing insurer-like liability on financial institutions which would "expose [them] to unlimited liability for unforeseeable frauds." *Zabka*, 131 Wn. App. at 172 (quotations omitted).

3. This Appeal Does Not Involve a Significant Question of Constitutional Law or Substantial Public Interest.

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[10] That the duty in *Garrison* arose because of the employment relationship between AIG and Garrison is confirmed by the cases the court relied upon, including *Niece v. Elmview Group Home*, in which this Court specifically identified the employer/employee relationship as the kind of "special relationship" that may give rise to a duty to protect third parties from injury. 131 Wn.2d at 51 (citing REST. (2ND) TORTS § 315).

[11] Appellants' reliance on *McGraw v. Wachovia Sec., LLC*, 756 F. Supp. 1053 (N.D. Iowa 2010) and *As You Sow v. AIG Fin. Advisors, Inc.*, 584 F. Supp. 2d 1034, 1049 (M.D. Tenn. 2008) is misplaced. Both of those cases involved fraud and misappropriation by the defendant's own registered representative, not its customer.

Finally, Appellants make no attempt to demonstrate that either the third or fourth factors in RAP 13.4(b) are satisfied. This case does not present any significant questions of constitutional law or substantial public interest. As a private dispute between the thirteen individual investors and RCG, the case has little, if any, bearing on the public at large. Indeed, the Court of Appeals itself signaled that this case presents no issue of substantial public interest when it chose not to publish its opinion.

4. If the Petition Is Granted, the Court Should Consider Additional Dispositive Issues.

i. Appellants' RCW 21.20.430(3) claims fail because RCG is not a securities "broker-dealer."

Appellants argue that RCG is liable under the WSSA for "materially aiding the transaction," but they ignore the additional element of RCW 21.20.430(3) requiring that RCG be a "broker-dealer" for the seller. In fact, RCG is categorically excluded from liability under RCW 21.20.430(3) because RCG never served as a securities "broker-dealer" for MMA or Villalba. The definition of "broker-dealer" in the statute requires the defendant to be in the business of effecting "securities" transactions for the seller. RCW 21.20.005; *see also Bennett v. Durham*, 683 F.3d 732, 738–39 (6th Cir. 2012) (a "broker-dealer" must represent the issuer "in effecting or attempting to effect" the sale of securities).

RCG did not effect any securities transactions; the only transactions involving RCG were futures trades executed by MMA, in MMA's futures account. Because futures contracts and futures accounts are not

"securities," RCG could not have been a securities "broker-dealer" for purposes of RCW 21.20.430(3). *See Sherry v. Dierks*, 29 Wn. App. 433, 441 (1981) ("The nondiscretionary commodity [futures] account involved here is not a 'security.'"); *Sinva, Inc. v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 253 F. Supp. 259, 267 (S.D.N.Y. 1966) (commodity futures are not securities because their price movements are the result of market conditions and not the efforts of any promoters).

ii. The Ohio Securities Act is inapplicable under Washington choice of law rules.

Appellants also appeal the denial of their OSA claims arising under O.R.C. § 1707.43(A). Under Washington choice of law rules, however, the OSA is inapplicable because Appellants concede that "there is no actual conflict between Washington and Ohio securities laws" because these statutes "share the same interest of protecting investors." Opinion at 13 & n.12. In those circumstances, this Court has repeatedly held that Washington law controls. *See Woodward v. Taylor*, 184 Wn.2d 911, 918 (2016); *Seizer v. Sessions*, 132 Wn.2d 642, 648–49 (1997). Accordingly, the WSSA supplies Appellants with their cause of action, not the OSA.[12]

iii. Appellants' securities claims are preempted by the CEA.

[12] To the extent a real conflict of law exists, Washington has the more compelling interest in Appellants' claims than Ohio. *See FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn.2d 965 (2014) ("Washington has a more compelling interest in protecting investors from fraud and misrepresentation than [the seller's state] does in regulating sellers of securities . . . .").

Even if the Court were inclined to grant Appellants' petition, the Court should still affirm summary judgment because these claims are expressly preempted by the CEA. The CEA provides the *exclusive* regulatory scheme for the futures markets, and "[i]n light of Congress' plainly stated intent to have the [CEA] preempt the field of regulation of commodity futures trading, ***any claim under the federal or state securities statutes is barred***." *Bache Halsey Stuart Shield, Inc. v. Erdos*, 35 Wn. App. 225, 231 (1983) (emphasis added) (quotations omitted); *Sherry* 29 Wn. App. at 441 (1981) ("[U]nless a customer proves a violation of the antifraud provisions of the [CEA], recovery of damages against a broker is not available remedy."). Appellants did not appeal the dismissal of their CEA claims and cannot revive those claims under the guise of state securities laws, which do not regulate RCG's conduct in the futures market. *See, e.g.*, *Howard Family Charitable Foundation, Inc. v. Trimble*, 259 P.3d 850, 859–60 (Okla. App. 2011) (state securities claims by victims of a Ponzi scheme against an FCM were preempted by the CEA). Accordingly, the Court may affirm dismissal of Appellants' claims on this independent basis.

VII. CONCLUSION

For these reasons stated here, the Court should deny Appellants' Petition for Review.

Respectfully submitted this 19th day of September 2016.

RIDDELL WILLIAMS P.S.

By 

Gavin W. Skok, WSBA #29766
1001 Fourth Avenue, Suite 4500
Seattle, WA 98154
(206) 624-3000

KATTEN MUCHIN ROSENMAN LLP

Christian T. Kemnitz (pro hac vice)
Patrick M. Smith (pro hac vice)
J Matthew Haws (pro hac vice)
525 West Monroe Street
Chicago, IL 60661
(312) 902-5200

Attorneys for Rosenthal Collins Group, LLC

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the date written below, a true and correct copy of the foregoing document was served on the following attorneys, by the means indicated:

Service List	
Chris R. Youtz, WSBA #7786 Richard E. Spoonemore, WSBA #21833 Charles D. Sirianni, WSBA #40421 **Sirianni Youtz Spoonemore Hamburger** 999 Third Avenue, Suite 3650 Seattle, WA 98104 Tel. (206) 223-0303 Fax: (206) 223-0246 chris@sylaw.com rspoonemore@sylaw.com csirianni@sylaw.com Theresa@sylaw.com Matt@sylaw.com *Attorneys for Plaintiff*	☐ U.S. Mail ☐ By Facsimile ☒ By Messenger ☒ By Email

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct and that this declaration was executed on the 19th day of September, 2016, at Seattle, Washington.

Courtney R. Tracy

OFFICE RECEPTIONIST, CLERK

From: Courtney R. Tracy <ctracy@Riddellwilliams.com>
Sent: Monday, September 19, 2016 1:10 PM
To: OFFICE RECEPTIONIST, CLERK
Cc: Skok, Gavin; Haws, J Matthew W. (matthew.haws@kattenlaw.com); Smith, Patrick M.; Kemnitz, Christian T.
Subject: Donald Burdick, et al. v. Rosenthal Collins Group, LLC
Attachments: Answer to Petition for Review.pdf

Importance: High

Donald Burdick, et al. v. Rosenthal Collins Group, LLC
Supreme Court Case No. _____ (none assigned yet)
Court of Appeals No. 73459-8

Filed by:
Gavin W. Skok, WSBA #29766
gskok@riddellwilliams.com

Dear Clerk,

Attached for filing per RAP 13.4 is an Answer to Petition for Review.

Mr. Skok can be reached at the email above or (206) 624-3600 if you have any questions.

Best regards,

Courtney R. Tracy | Riddell Williams P.S.
Executive Assistant D 206.389.1736
ctracy@riddellwilliams.com

T 206.624.3600 1001 Fourth Avenue, Suite 4500
F 206.389.1708 Seattle, Washington 98154-1192