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**NO. 73459-8**

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I

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DONALD BURDICK, et al.,

Plaintiffs/Appellants,

v.

ROSENTHAL COLLINS GROUP, LLC,
an Illinois limited liability corporation,

Defendant/Appellee.

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On Review from King County Superior Court
Case No. 12-2-28409-1 SEA (Hon. Douglass A. North)

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# APPELLANTS' REPLY BRIEF

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## I. OVERVIEW

RCG raises two new issues: (1) that the customers' securities claims are preempted by federal law, and (2) that the customers cannot bring claims under the Ohio securities act under a conflict of laws analysis (an issue decided against RCG by the trial court but not appealed). As shown in Section A below, those arguments are meritless. RCG also makes many misleading and unsupported factual assertions, including:

1. "Appellants" opened their accounts with Villalba to invest in the MMA program before he signed up with RCG in 1998. Bernie Goldberg began working with Villalba when he worked for an investment firm in Tacoma.[1] There is no evidence or allegation that any fraud that took place during that time. In 1996, after Villalba moved back to Ohio to start his own investment business, Goldberg invested $6,000 with him.[2] The MMA offering circular and the MMA entities did not even exist until February 1998.[3] Villalba approached RCG and completed the account opening process in early June, 1998.[4] Goldberg then invested more than $756,000.[5] The remaining plaintiffs all made their MMA investments after that time.[6]

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[1] CP 1162.
[2] CP 1163.
[3] CP 1940-43.
[4] CP 1920-48.
[5] CP 1163.
[6] Byington CP 1132, Silverman and his daughters CP 1085, Stuck CP 1103, Burdick CP 1118, Elliott CP 1148, Golstein CP 1171, and Mulgrew CP 1184.

2. RCG was largely irrelevant to his scheme because Villalba supposedly took most of the money to fund a lavish lifestyle. Villalba did not simply collect money for investments that were never purchased, as in many Ponzi schemes. He planned to trade futures to meet the conservative goals of the MMA investment plan and make additional profits for his own benefit. He traded nearly every day, resulting in more than $1 million in commissions and fees for RCG.[7] He admits the losses stemmed from recklessly using leverage in the MMA account, which accelerated as he attempted to recover those losses.[8] He was fully involved with RCG, which relocated a broker to work with him in Ohio.[9] He met with the manager of RCG's Professional Services Division in Chicago in 1998,[10] and a RCG representative two or three times a year at the MMA offices.[11] RCG was not merely incidental to Villalba or his program.

3. RCG was just one of several FCM's handling Villalba's MMA program. The record shows that RCG is the only FCM that accepted the MMA program and established a commodity pool. RCG offers no evidence that other FCM's were involved. After Villalba refused to respond to RCG's

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[7] CP 1525, n. 6. and CP 1363-1495 (RCG account statements).

[8] CP 1518.

[9] CP 1511: "the RCG broker assigned to work on the MMA account relocated to Ohio for that purpose."

[10] CP 1250.

[11] *Id.*

request in 2009 for current business information, he opened an account in the name of Rico Latte, his coffee house, with another firm.[12] This time Villalba did not provide information about his programs or plans. His business was described as "coffee" rather than "money management" as it was on the RCG account.[13] No commodity pool was involved and no exemption from registration was suggested.[14] Shortly after that account was opened, Villalba was charged with fraud for the MMA account.

## II. ARGUMENT

### A. RCG is liable under the securities acts of Ohio and Washington for its role in Villalba's MMA scam.

#### 1. The customers' claims are not preempted.

RCG fails to meet the high standard required to show the Commodities Exchange Act ("CEA") preempts the customers' securities claims:

> this court applies "a 'strong presumption against finding preemption [of State law] in an ambiguous case. ... State laws are not superseded by federal law unless that is the clear and manifest purpose of Congress.'"[15]

First, the trial court granted summary judgment that the customers purchased securities when their money was invested in the commodity pool

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[12] CP 869-878.

[13] CP 871.

[14] CP 869-878.

[15] *Nw. Wholesale, Inc. v. Pac Organic Fruit, LLC*, 184 Wn. 2d 176, 184, 357 P.3d 650, 654-55 (2015).

established at RCG. RCG did not appeal that order. Thus, those purchases are governed by the securities acts, not the CEA.

Second, courts consistently hold that commodity pools are "securities" that are not within the exclusive jurisdiction of the CEA.[16] The CEA affirms private parties may bring securities claims regarding commodity pools:

> Nothing in this chapter shall relieve any person of any obligation or duty, or affect the availability of any right or remedy available to the Securities and Exchange Commission or any private party arising under the Securities Act of 1933 or the Securities Exchange Act of 1934 governing the issuance, offer, purchase, or sale of securities of a commodity pool, or of persons engaged in transactions with respect to such securities, or reporting by a commodity pool.[17]

State securities laws also apply to commodities pools.[18]

With one exception, the cases cited by RCG involve investors who opened individual accounts to trade commodities, not invest in commodity pools.[19] Those cases are irrelevant:

> In *Messer*, this Court concluded that T-bond futures, a type of commodity, were under the exclusive jurisdiction of the CFTC. The T-bond futures at issue in *Messer* were traded in individual discretionary accounts. In this case, however, as discussed above, the foreign currency options (allegedly) were traded in an

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[16] *S.E.C. v. Unique Fin. Concepts, Inc.*, 196 F.3d 1195, 1202 (11th Cir. 1999) (emphasis in original).

[17] 7 U.S.C. § 6m(2).

[18] Smith, A Securities Law Primer for Commodity Pool Operators, 1996 Colum. Bus. L. Rev. 281, 322 (1996) ("Because commodity pool interests are securities, they are subject to state securities laws.")

[19] *E.g.*, *Sherry v. Diercks*, 29 Wn. App. 433, 628 P.2d 1336 (1981) (plaintiff was a commodities broker who traded in his own account); *Bache Halsey Stuart Shields v. Erdos*, 35 Wn. App. 225, 667 P.2d 89 (1983) (stockbroker opened an account with a brokerage/commodities firm to trade commodity futures).

> investment or commodity pool. This distinction is critical. Commodities, such as the T-bond futures in *Messer*, are within the exclusive jurisdiction of the CFTC. Commodity ***pools***, such as the foreign currency options pool in this case, are within the concurrent jurisdiction of the CFTC and the SEC.[20]

The sole case cited by RCG not concerning an individual commodities account is *Howard Family Charitable Found., Inc. v. Trimble*, which involved a hedge fund.[21] The case contains no discussion regarding whether a commodity pool is a security. Neither that case nor any other authority cited by RCG justifies preemption of the customers' claims.

**2. The customers can assert claims under Ohio's Securities Act.**

The customers sent money to Ohio to purchase investments from Villalba, where the RCG broker assisting him was located. Even so, RCG argues a conflict of laws analysis bars the customers' Ohio securities claims.

The same wrong can violate more than one state's securities act. And "overlapping state securities laws do not present a classic conflict of laws question" when a plaintiff sues under more than one state's securities act.[22] If the seller is located in one state and the buyer in another, both states are affected. The buyer's state "is interested in protecting its defrauded citizen" and the seller's state "is interested in eliminating a base of fraudulent

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[20] *Unique Fin. Concepts,* 196 F.3d at 1203 (emphasis in original, citation omitted).
[21] 259 P.3d 850 (Ok. Ct. App. 2011). The court does not mention 7 U.S.C. § 6m(2).
[22] *Cromeans v. Morgan Keegan & Co.*, 303 F.R.D. 543, 556 (W.D. Mo. 2014).

operations located within its borders. Each state's interest is vindicated by permitting the plaintiff to pursue multiple theories, as long as he is limited to a single recovery based upon a finding of liability."[23]

A defendant in a California court argued, as RCG does here, that a conflict of laws analysis required the plaintiff to bring its securities claim under the California act rather than the Massachusetts act, which had a longer statute of limitations. The court ruled the plaintiff could bring claims under both states' laws: "The growing weight of authority indicates that Blue Sky laws are additive rather than exclusive."[24]

The case relied on by RCG, *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*[25] does not address whether securities plaintiffs may bring claims under more than one securities act. The plaintiff in *FutureSelect* brought its securities claim only under the WSSA. The defendants argued New York law applied, which, unlike Washington and Ohio, does not permit private actions under its securities act. Because this

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[23] *Simms Inv. Co. v. E.F. Hutton & Co.*, 699 F. Supp. 543, 545-546 (M.D.N.C. 1988).

[24] *Mass. Mut. Life Ins. v. Countrywide Fin. Cor*, 2012 U.S. Dist. LEXIS 59620, 9-13 (C.D. Cal. 2012), citing, *Lintz v. Carey Manor Ltd.*, 613 F. Supp. 543, 551 (W.D. Va. 1985) ("[j]ust as the same act can violate both federal and state law simultaneously, or a state statute as well as state common law, so too can it violate several Blue Sky laws simultaneously."). *Accord*, *BP P.L.C. Sec. Litig. v. BP P.L.C.*, 2013 U.S. Dist. LEXIS 142946, 2013 WL 5520067 *10 (S.D. Tx. 2013); *United Heritage Life Ins. Co. v. First Matrix Inv. Servs. Corp.*, 2009 U.S. Dist. LEXIS 91245, at *13 (D. Idaho 2009); *Barnebey v. E.F. Hutton & Co.*, 715 F. Supp. 1512, 1536 (M.D. Fla. 1989).

[25] *FutureSelect Portfolio Mgmt., Inc. v. Tremont Grp. Holdings, Inc.*, 180 Wn. 2d 954, 331 P. 3d 29 (2014).

raised "an actual conflict between the laws or interests of Washington and the laws or interests of another state," the court analyzed which state had the most significant relationship to the claim.[26]

Under the WSSA, "special emphasis is placed on protecting investors from fraudulent schemes."[27] Thus the court refused to apply New York law as it would deprive plaintiff of a private cause of action and frustrate that purpose.[28] RCG argues this means that the customers can only file securities claims under their own state's act. *FutureSelect* created no such restriction.

RCG contends a conflict exists because the breadth of secondary liability is much broader under the Ohio act than the WSSA. Washington's goal of protecting investors, however, is not hindered by allowing its residents to pursue claims that have a broader reach for recovery than under the WSSA. The WSSA "'is remedial in nature and has as its purpose ***broad protection of the public***.' When interpreting this 'remedial legislation,' the court is 'guided by the principle that 'remedial statutes are liberally construed to suppress the evil and advance the remedy.'"[29] Ohio shares that goal[30] and has an interest in pursuing claims against those who use Ohio as

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[26] *FutureSelect,* 180 Wn. 2d at 967.

[27] *Id.*at 970.

[28] *Id.* at 971.

[29] *Go2Net, Inc. v. FreeYellow.com, Inc.*, 158 Wn.2d 247, 253, 143 P.3d 590, 593 (2006) (citations omitted, emphasis in original).

[30] *In re Columbus Skyline Sec., Inc.*, 74 Ohio St.3d 495, 498, 660 N.E.2d 427 (1996) ("to prevent the fraudulent exploitation of the investing public through the sale of securities.")

a base for their fraud. Indeed, RCG convinced a federal court to transfer this case to Ohio because "Ohio has a strong interest in the instant litigation, as the conduct for which Plaintiffs complain involved actions on the part of Villalba, carried out in Ohio, which the Northern District of Ohio has already found to be criminal."[31]

RCG does not explain how allowing the customers to bring securities claims that advance both states' interests, while possibly affording greater protection and relief than available under the WSSA, conflicts with Washington's goal of protecting investors. The trial court was correct in concluding that the customers may pursue claims under the Ohio act.

### 3. RCG is liable under the Ohio Securities Act because it "participated in or aided" Villalba's scheme.

RCG argues that *Wells Fargo Bank v. Smith*[32] is the defining case for determining when someone sufficiently participates or aids in the sale of a security to be liable under the Ohio act. It isn't. The case provides no new or percipient legal guidance. It simply presents a set of facts where participation or aid was not found; a factual setting that was not deemed analogous by the two Ohio trial courts handling claims against RCG.

The facts in *Wells Fargo* are simple. Plaintiff Evelyn Smith purchased

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[31] CP 1508. An additional factor included "the RCG broker assigned to work on the MMA account relocated to Ohio for that purpose." CP 1511.

[32] *Wells Fargo Bank v. Smith*, 2013 Ohio App. LEXIS 751 (Oh. Ct. App. 2013) (attached as Appendix L). References are to paragraph numbers in the opinion.

a five year 12% note issued by Diversified Lending Group ("DLG") from defendant James Winkelman, an employee of American Benefits Concepts ("ABC").[33] ABC was paid a 5% commission by DLG.[34]

Ms. Smith borrowed money to make her investment. ABC maintained a list of available mortgage brokers. From that list, ABC referred Ms. Smith to Amerifirst Financial. After calls with the loan officer, she met with him, received approval for the loan, received the money, and ultimately used funds from the loan to purchase the investment. The *Wells Fargo* court held that the lender did not participate in or aid an illegal sale of securities.[35]

RCG attempts to spin the facts of *Wells Fargo* to liken RCG's assistance in Villalba's fraud to the mortgage broker's loan to the Ms. Smith, including an assertion that the loan was "required" in order for the sale to occur (much like Villalba's need for a compliant FCM to carry out his program).

*Wells Fargo*, however, does not say that a mortgage was required to purchase the investment. Further, the assistance provided by the mortgage broker was to Ms. Smith, not the seller (ABC). The loan proceeds were sent directly to Ms. Smith three days after the loan closed, not to ABC.[36] The

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[33] *In the matter of: James K. Winkelman*, 2010 Oh. Sec. Lexus 90 (October 15, 2010) (attached as Appendix M). The added boxed areas show the investments sold to Ms. Smith.

[34] *In the Matter of: American Benefits Concepts, Inc., Juberg*, 2011 Oh. Sec. LEXIS 3 (attached as Appendix N) (annotating added).

[35] *Wells Fargo*, ¶ 31.

[36] *Wells Fargo*, ¶ 7, ¶ 32, ¶ 49.

loan officer did not encourage her to use those funds to invest let alone tell her that they were required for the investment.[37] The mortgage company received no additional fee if the funds were actually used for the investment.[38] DLG paid the same commission to ABC regardless of the source of the funds to purchase the investment.[39]

RCG also asserts that the mortgage company "aided the fraudulent scheme" by providing the loan number, loan amount, and payment date to ABC so that a portion of the monthly returns would be used to pay the mortgage, much like an automatic withdrawal from a bank account to pay bills. This was an accommodation to Ms. Smith, not aid to ABC who gained no benefit from splitting the monthly payments to pay Ms. Smith's bills rather than sending her the entire amount.[40]

Further, there was no indication that the mortgage company, unlike RCG, acquiesced in any legal impropriety in order to provide the loan, Indeed, the court expressly found that the mortgage broker believed the seller "to be a lawful company."[41]

RCG used the *Wells Fargo* decision to seek reconsideration of the

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[37] *Wells Fargo*, ¶ 7, ¶ 32.
[38] *Wells Fargo*, ¶ 30.
[39] *See*, Appendix N (commision depends on total amount invested, not source of funds).
[40] Ms. Smith specifically agreed to this arrangement. *Wells Fargo*, ¶ 7.
[41] *Wells Fargo*, ¶ 32.

*Pieretti* court's order denying summary judgment on claims that it aided or participated in Villalba's illegal sales.[42] That court held that *Wells Fargo* was neither applicable nor persuasive.

> Neither the mortgage bank nor its loan officer received compensation from the security seller. *Id.* at ¶30. Further, the loan proceeds were given directly to the investor without any direction to invest with the security seller. *Id.* at ¶7. Thus, as the mortgage bank and its loan officer's actions primarily aided the investor and not the seller, such ease is materially distinguishable from the present matter.[43]

RCG also argues that the *Wells Fargo* Court "analyzed and synthesized all the Ohio cases applying section 1707.43(A)" to arrive at six factors to determine the applicability of that section. The *Wells Fargo* court, however, neither examined all the cases[44] nor created a multi-factored test under which the listed "factors" must be weighed to reach a conclusion regarding liability. The court's reference to "factors" are simply examples of fact patterns from prior cases where the described conduct resulted in liability. It did not establish all possible fact patterns constituting participating in or aiding the seller in any way in making an unlawful sale of securities.

And those "factors" are not required under settled law in Ohio. For

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[42] Opening Brief of Appellants, Appendix A.

[43] *Pieretti v. Rosenthal Collins Group, LLC*, Erie C. P. No. 2011-CV-0051, Opinion and Judgment Entry (May 22, 2013) (attached as Appendix O).

[44] *E.g.*, *Miller v. Griffith*, 196 N.E.2d 154 (Ct. Com. Pl. 1961) (signing stock certificate sufficient aid); *Escue v. Sequent, Inc.*, 2010 U.S. Dist. LEXIS 87043 (S.D. Ohio 2010) (approving merger agreement, which was a precondition to merger going forward sufficient to show "participated in or aided the seller in any way").

example, some of those "factors" require meetings with potential buyers and "actively marketing the security or preparing documents to attract investors." But "R.C. 1707.43 does not require that a person induce a purchaser to invest in order to be held liable. Rather, the language is very broad, and participating in the sale or aiding the seller in any way is sufficient to form a basis for liability under R.C. 1707.43."[45]

The trial court here, however, apparently agreed with RCG that promotional activity was required to find liability under R. C. 1707.43.[46] But as shown in our opening brief, "'Aiding ...' focuses upon activities which do not directly lead to the sale, but make it possible."[47] So RCG invokes the hypothetical raised by the trial court regarding whether a truck driver could be held liable under the Ohio act because a delivery was necessary to complete a transaction. An attempt at a similar analogy was dealt with by the Oregon Supreme Court in *Prince v. Brydon.*[48]

Oregon's secondary liability statute imposes liability on "every person who participates or materially aids in the sale..."[49] Oregon also finds

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[45] *Federated Mgmt. Co. v. Coopers & Lybrand*, 137 Ohio App. 3d 366, 384, 738 N.E.2d 842, 855 (2000).

[46] RP 78, where the trial court considered "promoting the sale" as a factor.

[47] *See*, Long, 12A Blue Sky Law (2010), pp. 9-185. *Sherter v. Ross Fialkow Capital Partners, LLP,* 2013 WL 1324818, *7 and 12 (Mass. Super. 2013) (applying "making the sale possible" test for "materially aids in the sale")

[48] *Prince v. Brydon*, 307 Or. 146, 149, 764 P.2d 1370, 1371 (1988).

[49] ORS 59.115(3) (quoted in part).

liability under that provision if a person's actions make the sale possible.[50] This principle does not extend to acts such as "typing, reproducing, and delivering sales documents [that] may all be essential to a sale, but [which] could be performed by anyone."[51] But if those actions invoke knowledge or judgment, then participation in the sale will be found.[52]

RCG did not simply drive a delivery truck or type forms at Villalba's bequest. It had to assess whether it should open an account as a commodity pool operated by an unregistered operator with a suspicious investment plan and a misleading offering circular. It used its expertise to recommend a bogus registration exemption so that Villalba could go forward with his sales. It then made trades for the account with the duty to monitor those trades to ensure the MMA investment plan was followed.

RCG also contends that facts regarding the opening and supervision of the account are irrelevant because RC 1707.43 is a strict liability statute with no *mens rea* requirement. RCG is correct that neither scienter nor

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[50] *Black & Co. v. Nova-Tech, Inc.*, 333 F. Supp. 468, 472 (D. Or. 1971) (defendant who prepared the legal papers necessary for a seller to complete the sale of its securities "was a participant in the sale because, without his assistance, the sale would not have been accomplished."); *See also*, *Adamson v. Lang*, 236 Or. 511, 389 P.2d 39 (1964) (lending funds needed for escrow account to enable stock to be sold constituted "participation" or and "aiding and abetting" in the sale of the stock under the prior version of ORS 59.115(3)).

[51] *Prince v. Brydon*, 307 Or. 146, 149, 764 P.2d 1370, 1371 (1988) (finding that an attorney sufficiently participates or materially aids in the sale of securities for secondary liability by preparing documents needed to complete the transaction). Unlike the Oregon statute, there is no "materiality" requirement in RC 1707.43 and its breadth is broader.

[52] *Id.*

knowledge of wrongdoing is needed for liability. But RCG's conduct is relevant to whether it is a participant in the sales of the securities.[53]

For example, in *Adams,* a lawyer preparing papers to register securities became aware that some of the securities had already been sold. The Oregon Supreme Court held that even if the lawyer did nothing more "than to prepare the legal documents required for execution of a security and attend to their execution," that by filing documents required for registration knowing that solicitations and sales had already taken place, he participated or materially aided in the sale of the securities.[54]

And in *Ainslie v. First Interstate Bank, N.A.,*[55] a venture sought financing from a securities offering. First Interstate was retained as the escrow agent to hold the sales proceeds. Registration requirements and the sales agreement required that a minimum amount of money be raised within a certain time before proceeds could be distributed to the venture. If that requirement was not met, the offering would be canceled and money returned to the investors. Sales were slow and the venture needed money. The venture's principals instructed a bank to provide a credit to First Interstate that increased the balance in the escrow account to the amount required for funds to be distributed. Those principals then directed First

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[53] *Adams v. Am. W. Sec., Inc.*, 265 Or. 514, 510 P.2d 838 (1973).
[54] *Id.* at 844.
[55] *Ainslie v. First Interstate Bank, N.A.*, 148 Or. App. 162, 939 P.2d 125, 137 (1997).

Interstate to provide a credit in the same amount back to Oregon bank. The net effect was that during that short transition the escrow account showed sufficient funds to distribute to the venture even though no new money had been added. The escrowed funds were provided to the venture. Although additional sales were made, and the full amount sought was ultimately received, the venture failed and investors sued, claiming that the sales never should have been finalized because the venture failed to meet the funding requirement by the required date. First Interstate claimed it simply held funds in escrow and followed instructions, as it was required to do.

The court disagreed and found First Interstate liable as a matter of law for participating or aiding in the sale of the securities. It held that the investors did not have to show that First Interstate did anything illegal but that "the extent and importance of the defendant's involvement in a sale can be shown by evidence of its connection with unlawful activities as much as with any other aspects of the sale."

Clearing firms have similarly been found liable for participating or materially aiding securities violations when they become aware of wrongdoing by the investment advisers whose accounts they are handling.[56]

While knowledge of suspicious activity by the seller is not required to

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[56] E.g., *Koruga v. Fiserv Correspondent Services, Inc.*, 183 F. Supp. 2d 1245 (D. Or. 2001), *aff'd*, 40 F. App'x. 364 (9th Cir. 2002).

prove a claim under RC 1704.43, it is another fact, combined with the many other facts of this case, that a jury should assess to determine whether RCG participated or aided in any way in Villalba's illegal sale of securities.

**4. RCG is liable under the Securities Act of Washington.**

The non-Ohio cases discussed above further demonstrate that RCG should be liable under RCW 21.20.430(3) for materially aiding Villalba's scheme. The courts in those states, like Washington, require that the aid be "material" for liability (Ohio does not; its standard is "aid in any way"). RCG's involvement in the illegal setup and operation of Villalba's program meets the requirements of the statute.

RCG also argues it has no liability because RCW 21.20.430(3) only applies to transactions in securities. It repeats its mantra that it was only involved in commodities transactions. To repeat what was stated earlier, RCG assisted Villalba in establishing and operating a commodity pool, which is a security subject to regulation under both the securities and commodities acts. And once again, the cases RCG cite involve individual commodities accounts, not commodity pools.

**5. Goldberg purchased securities when he invested money with MMA.**

RCG argues that because the agreement signed by Goldberg gives him general control over his partnership with Villalba that his investments in MMA were not securities. As shown in our opening brief, however, that is

not true when the investor-partner relies on the expertise of one of the other partners to determine the success of the investment. This exception is either not addressed or inapplicable in the cases cited by RCG. For example, *Bailey v. J.W.K. Properties, Inc.*,[57] distinguished a case cited by RCG[58] to reverse summary judgment and hold that an investment was a security "even though the plaintiffs had authority to exercise some control over their investments" because "the plaintiffs had little or no control over the ultimate success or failure of their investments" when they relied on another partner's expertise.[59] Another RCG case denied summary judgment against a partner because he relied on another partner who claimed "unique knowledge regarding the real estate market in central Florida and the contacts and expertise to structure highly profitable deals."[60]

Villalba touted his claimed expertise in combining holdings in treasury bills and money market funds with occasional purchases of futures contracts. Goldberg gave no input into that strategy nor did he make investment decisions. Villalba had total discretionary control over

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[57] *Bailey v. J.W.K. Properties, Inc.*, 904 F.2d 918 (4th Cir. 1990).

[58] *Rivanna Trawlers Unlimited v. Thompson Trawlers, Inc.*, 840 F.2d 236 (4th Cir. 1988).

[59] *Bailey,* 904 F.2d at 923("The district court improperly limited its examination under the *Howey* test to the language in the contracts. It should have considered the practical limitations faced by the plaintiffs given their lack of expertise and experience.").

[60] *Gordon v. Terry,* 684 F.2d 736, 741, 743 (11th Cir. 1982).

Goldberg's MMA investment.[61] Goldberg made his investment directly into the MMA business account like other investors; not into the partnership. Villalba's domination over Goldberg's interest is further reflected by the fact that Goldberg had no knowledge of the trading that was taking place, the money he had lost, or the actual performance of the MMA program.[62] His MMA investment is a security, just as the other customers' MMA investments are. At a minimum, whether he had control over the MMA investment is a factual issue precluding summary judgment.

**B. RCG is liable for negligently supervising its personnel and the MMA account.**

RCG had existing duties to supervise its employees and the accounts it carries. Those include duties to refuse to open an account in the presence of suspicious circumstances, to close an account for suspicious or unusual trading, and to train and supervise employees to monitor accounts and report instances of potential wrongdoing. Those duties arise from the statutes and regulations we describe in our opening brief, which exist to protect investors. A FCM must accept those responsibilities in return for the right to make money from handling transactions in a customer's account.

RCG contends that its duties can never extend to anyone but its customer. Its argument stems from cases holding that banks do not owe

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[61] CP 1164.
[62] *Id.*

non-customers a duty to protect them from their customer's torts.[63] But "the rule that banks owe no duty to third parties is not monolithic."[64]

> Like most, this rule is not without exception. New York courts have recognized that a bank may be held liable for its customer's misappropriation where (1) there is a fiduciary relationship between the customer and the non-customer, (2) the bank knows or ought to know of the fiduciary relationship, and (3) the bank has "actual knowledge or notice that a diversion is to occur or is ongoing."[65]

In *Fine v. Sovereign Bank*, for example, an investment advisor deposited funds received from his clients in an account at the defendant bank. He used the money for personal purposes rather than investments. The court held that his clients could sue the bank for negligence because the banker was aware that (1) money coming into the account was from investors and (2) the account holder was an investment advisor and, as a matter of law, was a fiduciary.[66] Once aware of that relationship, the bank had a duty to investigate suspicious activity and stop further diversion of funds.

RCG knew that Villalba was an investment advisor and budding commodity pool operator soliciting money to invest through RCG. It knew there was a fiduciary relationship between Villalba and the customers.

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[63] *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 286 (2d Cir. 2006).

[64] *Fine v. Sovereign Bank*, 634 F. Supp. 2d 126, 136 (D. Mass. 2008).

[65] *Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 232 (5th Cir. 2010) (negligence claims against a broker-dealer). *See also, Jackson v. Regions Bank*, 2013 U.S. Dist. LEXIS 75174 (M.D. Tenn. 2013) (summary judgment denied on claim by noncustomers when bank was aware client funds were being deposited into investment advisor's account).

[66] *Fine*, 634 F. Supp. 2d at , citing *SEC v. Capital Gains Research Bureau, Inc.*, 375 U.S. 180, 191, 84 S. Ct. 275, 11 L. Ed. 2d 237 (1963).

In *Garrison*, this court also recognized that a brokerage firm's duty of care can extend to noncustomers.[67] RCG contends that this duty does not extend to noncustomers contributing money to an account fraudulently managed by one of its customers, even though RCG is required to monitor and supervise the account and is aware of wrongdoing in the establishment and operation of the account.

"Whether a duty exists depends on "mixed considerations of 'logic, common sense, justice, policy, and precedent.'"[68] And when the *Garrison* court focused on the brokerage firm's duty, it turned to the statutes and regulations governing brokerage firms and the goal to "insure fair dealing and to protect investors from harmful or unfair trading practices."[69] Those regulations guided the court in determining the scope of the brokerage firm's duty to supervise.[70]

One of the regulations considered by the *Garrison* court required AIG to review the trust's account statements from Wells Fargo because Garrison was the trustee for the family trust. AIG argued that this requirement did not make it liable to the non-customer trust, because the regulation was

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[67] *Garrison v. SagePoint Fin., Inc.*, 185 Wn. App. 461, 345 P.3d 792, 808 (2015).

[68] *Shizuko Mita v. Guardsmark, LLC*, 182 Wn. App. 76, 83, 328 P.3d 962, 966 (2014) (citations omitted).

[69] *Garrison*, 185 Wn. App. at 485.

[70] *Id.* at 487.

intended to ensure that the transactions in the trust accounts did not conflict with the interests of AIG or its customers.[71] Even though that may have been the purpose of the review, once AIG had the account statements in hand, the court ruled it owed a duty to investigate suspicious activity appearing in the statements and that this duty extended to protect the non-customer trust.[72]

Thus the court recognized that a brokerage firm has a duty to non-clients when it becomes aware of suspicious activity affecting those investors:

> 'sufficiently suspicious' circumstances may place a broker-dealer on notice that her customer is perpetrating fraud on non-customer investors. Once aware of troublesome 'red flags,' the broker-dealer may have a duty which runs to non-customers to monitor and investigate any unusual account activity.[73]

RCG was also had regulatory duties to monitor the MMA account at RCG and act to respond to suspicious activity. The facts here are especially compelling because, unlike cases cited by RCG where there was no hint of wrongdoing until the scheme collapsed, RCG was already alerted to the potential for wrongdoing when it opened the account. From the arrangement for an illegal commodity pool to the superficial and misleading offering circular reviewed by at least two upper-level RCG employees including its

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[71] *Id.* at 482.
[72] *Id.* at 499-500.
[73] *Id.* at 500.

general counsel,[74] the whole program appeared suspicious. This was confirmed when trading began, which exhibited a reckless departure from the touted investment plan.

One key CFTC regulation requiring RCG to monitor and act upon suspicious activity in the MMA account is Rule 166.3. RCG, however, argues that rule is not applicable because it requires supervision of "employees." RCG Brief at 43.[75]

Rule 166.3 requires "diligent supervision" by officers and employees "of all commodity interest accounts carried." RCG acts through its officers and employees to supervise its accounts. When an account is improperly opened, suspicious activity is seen but disregarded, and red flags and compliance reports are ignored, the CFTC recognizes this conduct violates Rule 166.3.[76] The CFTC did not find violations and seek enforcement because RCG was neglecting its customer, Villalba; it did so because Villalba's activity was harming his investors and RCG failed to react. Similarly, in *Garrison* AIG was similarly required to review account statements where investments were made for non-customers and faces liability for failing to react to apparent wrongdoing in those accounts to

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[74] CP 14997-98; Appendix O at 6.

[75] *Garrison* also invoked NASD Rule 3010 – the NASD counterpart to Rule 166.3 – which requires brokerage firms to properly supervise representatives and other associated persons to comply with the securities laws. *Id.* at 488.

[76] *See* 2012 CFTC Order CP 1210, 1213-15.

protect the non-customer trust. The policy considerations that this court applied in finding AIG liable to non-customers applies here as well.

RCG also contends that we misuse the "know your customer" rule because NFA rule 2-30 only applied to individuals in 1998. We didn't cite that rule, because the applicable "know your customer" guidelines were contained in the RCG compliance procedures, which RCG doesn't discuss.[77] Of greater significance is the interpretive notice included with that rule, which states: "accounts opened by business entities such as corporations and partnerships present other concerns (such as compliance with NFA Bylaw 1101, which prohibits Members from transacting customer business with non-Members who are required to be registered).[78]

**C. The protective order denying discovery should be vacated.**

The BSA confidentiality requirement applies only to (1) actual SARs and (2) information revealing the existence of a SAR. It expressly does not include "the underlying facts, transactions, and documents upon which a SAR is based." The protective order goes substantially beyond those limits. We explained that the *Norton* decision excluded certain information because the only purpose the bank had for preparing that information was

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[77] CP 1211. "RCG's compliance procedures impose upon the company...a continuing duty to 'know the customers' with which RCG does business." *See also, Garrison*, 185 Wn. App. at 501, n.16 ("AIG's internal manual as evidence of the standard of care.")

[78] RCG Brief, Appendix E at 9 (emphasis added).

to file an SAR, thus arguably reviewing the existence of an SAR. Reports of RCG's monitoring and review of accounts, however, are also prepared to report suspicious activity in accordance with CFTC and NFA regulations. Preparation of this information does not show one way or another whether an SAR has been filed. RCG's discussion of when an SAR may be filed totally fails to address that point.

RCG also claims that once the protective order was modified, we received all the information we requested. That is false. The court only allowed us to obtain documents that were publicly available in court files or the public domain. The broad scope that prevented the customers from initially receiving documents that had been publicly filed is still in place, and the customers were improperly restricted from obtaining documents and testimony regarding the most basic information about RCG's monitoring and review of the MMA account. RCG also argues that the customers should have sought leave to use the limited number of publicly available documents. The modified protective order was signed the day before the summary judgment hearing.[79] The customers' reply memorandum requested the court to consider the documents provided with the motion, but the court did not address this request in its order[80].

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[79] CP 2373 (signed April 23, 2015); RP 1 (hearing on April 24, 2015 at 10:21 a.m.)

[80] CP 1986 ("Further, plaintiff should be permitted to use materials attached as exhibits

### D. The customers did not misuse the CFTC order.

RCG objects to the customers' use of the 2012 CFTC order in their opening brief. RCG did not appeal the trial court's order denying its motion to strike that order. Instead RGC adds the words "but not evidence [sic] any of the factual allegations stated in the Order" to the end of the court's decision[81] to argue that the customers' references to the order are improper. First, the court's reference to "conduct relating to those regulations" obviously refers to RCG's conduct, as that is the only conduct discussed in the order. Second, the facts stated in the order are not "allegations." They are uncontested findings that RCG may not dispute.[82] The order contains findings of fact and conclusions that result from the CFTC's statutory duties to investigate violations of the CEA and its own regulations. Thus

> the findings and opinions/conclusions of the SEC, being rendered pursuant to the SEC's independent obligations to enforce the securities laws and not as a part of the actual compromise negotiations, are not governed by Rule 408.[83]

## III. CONCLUSION

The relief requested by the customers in their opening brief should be granted.

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B-D to the Second Youtz Declaration to further respond to RCG's motion for summary judgment." Those exhibits are at CP 2218-2363.

[81] RCG's Brief at 10. The court's decision is located at RP 4-5.

[82] It is inappropriate for the CFTC to enter into a consent order "if the party against whom the findings and conclusions are to be entered is continuing to deny the alleged misconduct." 17 CFR part 10, Appendix A.

[83] *Option Resource Group v. Chambers Dev. Co.*, 967 F. Supp. 846, 850 (W.D. Pa. 1996).

DATED: January 29, 2016

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I certify, under penalty of perjury and in accordance with the laws of the State of Washington, that on January 29, 2016, I caused a copy of the foregoing document to be served on all counsel of record as indicated below by First Class Mail:

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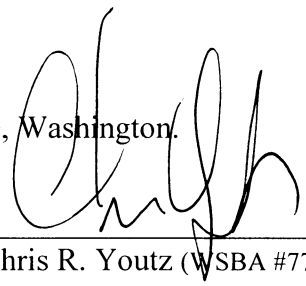

Chris R. Youtz (WSBA #7786)

# APPENDICES

# *Wells Fargo Bank v. Smith*

Court of Appeals of Ohio, Twelfth Appellate District, Brown County

March 11, 2013, Decided

CASE NO. CA2012-04-006

**Reporter**
2013-Ohio-855; 2013 Ohio App. LEXIS 751

WELLS FARGO BANK, Plaintiff/Appellee, - vs - DONALD RAY SMITH, EXECUTOR OF THE ESTATE OF EVELEN MAY SMITH, Defendant/Third-Party Plaintiff/Appellant, - vs - AMERIFIRST FINANCIAL, et al., Third-Party Defendants/Appellees.

**Subsequent History:** Discretionary appeal not allowed by *Wells Fargo Bank v. Smith, 136 Ohio St. 3d 1451, 2013-Ohio-3210, 991 N.E.2d 257, 2013 Ohio LEXIS 1780 (2013)*

**Prior History:** [**1] CIVIL APPEAL FROM BUTLER COUNTY COURT OF COMMON PLEAS. Case No. CVE20101299.

**Disposition:** Judgment Affirmed.

**Counsel:** Scott A. King, Austin Landing, Dayton, Ohio, for plaintiff/appellee.

Andrew M. Engel, Centerville, Ohio, for plaintiff-appellee, Wells Fargo Bank and defendant/third-party plaintiff/appellant, Donald Ray Smith, Executor of the Estate of Evelyn Mae Smith.

Dianne F. Marx, Sebaly, Shillito & Dyer, Dayton, Ohio, for third-party defendants/appellees, Amerifirst Financial and Gary Hamminga.

James Winkelman, third-party defendant, Pro se, Amelia, Ohio.

**Judges:** M. POWELL, J. RINGLAND, P.J., and PIPER, J., concur.

**Opinion by:** M. POWELL

## Opinion

**M. POWELL, J.**

[*P1] Third-party plaintiff/appellant, Donald Ray Smith, Executor of the Estate of Evelyn Mae Smith (Mrs. Smith), deceased, appeals a decision of the Brown County Court of Common Pleas granting summary judgment to third-party defendants/appellees, AmeriFirst Financial Corporation and Gary Hamminga. For the reasons stated below, we affirm.

[*P2] This case involves a failed investment in fraudulent unregistered securities purchased by Mrs. Smith. The fraudulent securities were part of a multi-million dollar Ponzi scheme run by Diversified Lending Group (DLG). American Benefits Concepts (ABC), [**2] a company that sold Medicare supplemental insurance and investments, offered the DLG investment to its clients. ABC structured the financing of the investment so that their clients would mortgage their homes and apply the proceeds to purchase the DLG investment. In return, DLG was to make the customer's monthly mortgage payments. Any extra proceeds from the customer's investments would be given directly to the customer. In order to close the loans, ABC used several mortgage banking firms, including AmeriFirst. Eventually, DLG was unable to meet its obligations and the Ponzi scheme collapsed.

[*P3] AmeriFirst started closing mortgage loans for ABC's clients in 2007. This relationship began when Gary Hamminga, a loan officer with AmeriFirst, unexpectedly encountered an acquaintance at a restaurant who was an ABC employee. The employee expressed to Hamminga that ABC was looking for banks to close mortgages for its customers that were investing with DLG and explained the DLG investment. Hamminga agreed to look at some of ABC's customers to see if he could assist them in obtaining a mortgage. Hamminga received many referrals from ABC during 2007 and 2008. Most of the referrals he received from [**3] ABC were customers who wished to invest in DLG.

[*P4] During the relationship with ABC, Hamminga did not solicit clients to invest in DLG or promote DLG in any way. Hamminga did not contact ABC's clients directly, instead an ABC employee would notify Hamminga if a customer was interested in obtaining a mortgage or the client would contact Hamminga directly. The compensation arrangement between the companies was customary, neither AmeriFirst nor ABC gave the other compensation for

referrals. Instead, AmeriFirst earned money once the loan was closed and the loan officers received their customary 40 percent of the gross revenue earned by AmeriFirst on the loan. AmeriFirst also did not plan or organize underwriting of the mortgage loans. There was no legal relationship between the two companies.

[*P5] In the fall of 2007, Hamminga was informed by an ABC salesman that Mrs. Smith was interested in obtaining a mortgage. Hamminga then contacted Mrs. Smith who told him that she was not interested in a mortgage. Hamminga relayed this information to ABC and did not speak with Mrs. Smith further. About a month later, Hamminga was contacted by an ABC employee who told him that Mrs. Smith had changed her mind [**4] about procuring a mortgage. Hamminga called her a second time. During this conversation, he reminded her that she previously did not want a mortgage. Mrs. Smith assured Hamminga that she had changed her mind and wanted a mortgage. Hamminga then proceeded with the mortgage process.

[*P6] After this conversation, Hamminga obtained financial information from Mrs. Smith and confirmed that she qualified for a mortgage. When filling out the loan application, Hamminga included the income Mrs. Smith expected to receive from the DLG investment on her application even though this income was not needed in order to qualify her for the mortgage loan. Hamminga then arranged a date for Mrs. Smith to sign documents so that she could close on the loan. During this process, Hamminga believed that Mrs. Smith was competent and not confused about the events that were taking place. Hamminga kept ABC informed of the status of Mrs. Smith's loan application even though this was not his normal custom. Except for this communication, Hamminga performed his normal banking procedures for closing a mortgage.

[*P7] In January 2008, Mrs. Smith closed on the mortgage loan. Three days after the closing, AmeriFirst performed its [**5] normal business practice of giving the loan proceeds directly to Mrs. Smith. AmeriFirst did not advise Mrs. Smith as to how to invest her money. Subsequently, Mrs. Smith used the loan proceeds to invest in the DLG notes. After Mrs. Smith's loan was closed, Hamminga provided information regarding Mrs. Smith's loan number, account number, and mortgage payment to ABC although this was not his normal custom. Hamminga communicated this information to ABC to facilitate DLG's payment of Mrs. Smith's mortgage as she had agreed. All other communications between the companies were according to Hamminga's normal business practices.

[*P8] Eventually, DLG ceased paying Mrs. Smith's mortgage. Following a SEC investigation, DLG was placed into a receivership in March of 2009. In December 2010, Wells Fargo filed a complaint for foreclosure. [1] Mrs. Smith responded and filed a third-party complaint against AmeriFirst and Hamminga alleging, among other things, that the parties participated in and aided the illegal sale of unregistered securities. In July 2011, Mrs. Smith passed away and her son, Donald Ray Smith, as the executor of her estate, proceeded with the suit. AmeriFirst and Hamminga moved for summary [**6] judgment on all the claims against them. On March 12, 2012, the trial court granted AmeriFirst and Hamminga's motion for summary judgment.

[*P9] Executor now appeals, raising two assignments of error.

[*P10] Assignment of Error No. 1:

[*P11] THE TRIAL COURT ERRED IN IMPLICITY OVERRULING [EXECUTOR'S] MOTION TO STRIKE THE AFFIDAVIT OF JASON JUBERG.

[*P12] Executor argues that the court erred in overruling his motion to strike the affidavit of Jason Juberg. Juberg was the president of ABC and submitted an affidavit that discussed ABC's relationship with AmeriFirst. Executor contends that Juberg's affidavit violated Civ.R. 56(E) because Juberg testified to the conduct of persons without setting forth the proper foundation for his personal knowledge of that conduct. Additionally, executor maintains that the affidavit was improper because it referenced certain documents that were not attached to the affidavit.

[*P13] The determination of a motion to strike is within the trial court's broad discretion. *Ireton v. JTD Realty Invests., L.L.C., 12th Dist. No. CA2010-04-023, 2011 Ohio 670, ¶ 19.* [**7] A court's ruling on a motion to strike will be not reversed on appeal absent an abuse of that discretion. *State ex rel. Ebbing v. Ricketts, 133 Ohio St.3d 339, 2012 Ohio 4699, ¶ 13, 978 N.E.2d 188.* A decision constitutes an abuse of discretion when it is unreasonable, arbitrary, or unconscionable. *State ex rel. Striker v. Cline, 130 Ohio St.3d 214, 2011 Ohio 5350, ¶ 11, 957 N.E.2d 19.*

[*P14] The trial court did not expressly rule on executor's motion to strike Juberg's affidavit in its final judgment

[1] Mrs. Smith initially filed a suit against AmeriFirst and Hamminga in a separate, earlier action. However, this case was voluntarily dismissed.

entry. Generally, when a trial court fails to rule on a motion, the appellate court will presume the trial court overruled the motion. *Lee v. Barber, 12th Dist. No. CA2000-02-014, 2001 Ohio App. LEXIS 2980, 2001 WL 733449, *3 (July 2, 2001)*. Therefore, executor's pending motion to strike Juberg's affidavit was implicitly overruled by the grant of summary judgment in favor of AmeriFirst and Hamminga.

[*P15] Civ.R. 56(C) provides an exclusive list of materials that a trial court may consider when deciding a motion for summary judgment. *State ex rel. Varnau v. Wenninger, 12th Dist. No. CA2009-02-010, 2011 Ohio 3904, ¶ 7*. Those materials are "pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written [**8] stipulations of fact." Civ.R. 56(C). To be considered in a summary judgment motion, an affidavit "shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify as to the matters stated in the affidavit." Civ.R. 56(E).

[*P16] Personal knowledge is defined as "knowledge of the truth in regard to a particular fact or allegation, which is original, and does not depend on information or hearsay." *Re v. Kessinger, 12th Dist. No. CA2007-02-044, 2008 Ohio 167, ¶ 32*. Absent evidence to the contrary, an affiant's statement that his affidavit is based on personal knowledge will suffice to meet the requirement of Civ.R. 56(E). *Churchill v. G.M.C., 12th Dist. No. CA2002-10-263, 2003 Ohio 4001, ¶ 11*. Additionally, in the absence of a specific statement, personal knowledge may be inferred from the contents of an affidavit. *Bank One, N.A. v. Swartz, 9th Dist. No. 03CA008308, 2004 Ohio 1986, ¶ 15*. However, "[i]f particular averments contained in an affidavit suggest that it is unlikely that the affiant has personal knowledge of those facts, then * * * something more than a conclusory averment that the [**9] affiant has knowledge of the facts would be required." *Id. at ¶ 14*, quoting *Merchants Natl. Bank v. Leslie, 2d Dist. No. 3072, 1994 Ohio App. LEXIS 159, 1994 WL 12433 (Jan. 21, 1994)*.

[*P17] Additionally, documents that are referred to in an affidavit must be attached to the affidavit and must be sworn or certified copies. Civ.R. 56(E). When an affiant relies on documents in his affidavit and does not attach those documents, the portions of the affidavit that reference those document must be stricken. *Third Federal S. & L. Assn. of Cleveland v. Farno, 12th Dist. No. CA2012-04-028, 2012 Ohio 5245, ¶ 10*. *See Wenninger at ¶ 10* (striking portions of affidavit where documents were reviewed and relied upon in drafting affidavit but not attached to affidavit or served therewith).

[*P18] In the case at bar, Juberg's affidavit contained several paragraphs which outlined the background of ABC's involvement with DLG, and ABC's and AmeriFirst's actions regarding Mrs. Smith and the DLG investment. Juberg explained that he was president of ABC and that ABC offered an investment to its clients through DLG. Juberg then states that he is named as a defendant in a separate civil case filed by Mrs. Smith and that he is "familiar with the claims" [**10] made in this case and has "reviewed relevant documents relating to it," including "telephone logs Bates labeled ABC Wert 0349-0571." Juberg avers in paragraph 11 that based on his review of these documents, any communication between ABC and AmeriFirst regarding Mrs. Smith's investment was solely for the purposes of determining if DLG had paid the monthly mortgage payment for Mrs. Smith. These documents were not attached to Juberg's affidavit. Additionally, Juberg makes statements regarding AmeriFirst's actions in paragraphs 11, 13, 14, and 16-19. For example, Juberg states that AmeriFirst never planned or organized the underwriting of the DLG investment, AmeriFirst never prepared any documents for ABC to attract potential investors, and AmeriFirst never offered any confidential information to ABC regarding Mrs. Smith.

[*P19] We find that the court abused its discretion when it admitted portions of Juberg's affidavit. First, the admission of the paragraphs of Juberg's affidavit that relied on his review of the telephone logs and other records was in error as these documents were not attached to the affidavit. Second, the court erred in admitting portions of Juberg's affidavits that discussed [**11] AmeriFirst's conduct in Mrs. Smith's transaction and the DLG investment in general. While Juberg's statement that he was president of ABC during all relevant times was sufficient to demonstrate personal knowledge of ABC's actions, this statement did not demonstrate how he acquired personal knowledge of AmeriFirst's conduct. We cannot infer Juberg's personal knowledge of AmeriFirst's behavior from the statements made in the affidavit as Juberg did not aver that he was also employed with AmeriFirst or had some other relationship that would provide him with this information. Juberg is not competent to testify regarding Amerifirst's actions without providing a basis for his personal knowledge of AmeriFirst.

[*P20] Therefore, the court abused its discretion when it admitted portions of Juberg's affidavit that relied on documents that were not attached to the affidavit. Additionally, the court erred when it admitted the portions of Juberg's affidavit that discussed AmeriFirst's actions when these statements were not based on personal knowledge. Thus, paragraphs 7, 9, 11, 13, 14, 16-19 are stricken. The rest of the affidavit is admissible.

[*P21] [**12] Executor's first assignment of error is partially sustained.

[*P22] Assignment of Error No. 2:

[*P23] THE COURT OF COMMON PLEAS ERRED IN GRANTING APPELLEE'S MOTION FOR SUMMARY JUDGMENT.

[*P24] In his second assignment of error, executor argues the court erred in granting summary judgment on a number of issues. This court's review of a trial court's ruling on a summary judgment motion is de novo, which means we review the judgment independently and without deference to the trial court's determination. *Simmons v. Yingling, 12th Dist. No. CA2010-11-117, 2011 Ohio 4041, ¶ 18*, citing *Burgess v. Tackas, 125 Ohio App.3d 294, 296, 708 N.E.2d 285 (8th Dist.1998)*. We utilize the same standard in our review that the trial court uses in its evaluation of the motion.

[*P25] Summary judgment is appropriate when there are no genuine issues of material fact to be litigated, the moving party is entitled to judgment as a matter of law, reasonable minds can come to only one conclusion, and that conclusion is adverse to the nonmoving party. Civ.R. 56(C); *Williams v. McFarland Properties, LLC, 177 Ohio App.3d 490, 2008 Ohio 3594, ¶ 7, 895 N.E.2d 208 (12th Dist.)*. To prevail on a motion for summary judgment, the moving party must be able to point to evidentiary [**13] materials that show there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. *Dresher v. Burt, 75 Ohio St.3d 280, 293, 1996 Ohio 107, 662 N.E.2d 264 (1996)*. The nonmoving party must then present evidence that some issue of material fact remains to be resolved; it may not rest on the mere allegations or denials in its pleadings. *Id.* All evidence submitted in connection with a motion for summary judgment must be construed most strongly in favor of the party against whom the motion is made. *Morris v. First Natl. Bank & Trust Co., 21 Ohio St. 2d 25, 28, 254 N.E.2d 683 (1970)*.

*R.C. 1707.43*

[*P26] Executor first contends that the trial court erred when it granted summary judgment in favor of AmeriFirst and Hamminga for his claim under *R.C. 1707.43*. Executor argues there was a genuine issue of material fact regarding whether AmeriFirst and Hamminga aided or participated in the sale of the DLG investment.

[*P27] *R.C. 1707.43* provides remedies for a purchaser in an unlawful sale of securities. The statute allows a purchaser to void every sale or contract for sale made in violation of Chapter 1707. *Id.* at (A). The statute goes on to state, "[t]he person making such sale or contract for sale, [**14] and *every person that has participated in or aided the seller in any way in making such sale or contract for sale*, are jointly and severally liable to the purchaser * * *." (Emphasis added.) *Id.* The language in this provision has been held to be broad in scope. *Fed. Mgt. Co. v. Coopers & Lybrand, 137 Ohio App. 3d 366, 391, 738 N.E.2d 842 (10th Dist.2000)*.

[*P28] Courts have considered several factors in deciding whether a person or entity shall be responsible for the sale of illegal securities under *R.C. 1707.43(A)*. These factors include relaying information, such as the proposed terms of the sale, from the sellers to the investors, arranging or attending meetings between the investors and the sellers, collecting money for investments, distributing promissory notes and other documents to the investors from the sellers, distributing principal and interest payments to the investors, and actively marketing the security or preparing documents to attract investors. *Boland v. Hammond, 144 Ohio App.3d 89, 94, 2001 Ohio 2680, 759 N.E.2d 789 (4th Dist.2001)*. *See Gerlach v. Wergowski, 65 Ohio App.3d 510, 513-514, 584 N.E.2d 1220 (1st Dist.1989)*; *Perkowski v. Megas Corp., 55 Ohio App.3d 234, 563 N.E.2d 378 (9th Dist.1990)*.

[*P29] In a case involving whether a creditor bank could be held [**15] liable under *R.C. 1707.43(A)*, the Tenth District noted that an important factor for determining liability is whether the bank's actions went beyond normal commercial banking activities. *Fed Mgt. Co. at 393*. In *Fed. Mgt. Co.*, summary judgment was inappropriate where a bank's action in reorganizing debt, directly participating in the underwriting of the investment, and sharing secret information about the investment with other bankers were not normal banking activities. *Id. at 377*. On the other hand, a bank was not liable for the illegal sale of securities when the bank simply collected and held premiums from investors, facilitated payments from the investment, and assisted in distribution of the investment. *Boomershine v. Lifetime Capital, Inc., 2nd Dist. No. 22179, 2008 Ohio 14, 15*. Instead, "[t]he willingness of a bank to become the depository of funds does not amount to a personal participation or aid in the making of a sale." *Hild v. Woodcrest Assn., 59 Ohio Misc. 13, 30, 391 N.E.2d 1047 (M.C.1977)*.

[*P30] We find that there was no genuine issue of material fact as to whether AmeriFirst or Hamminga "participated in or aided" ABC in selling the DLG investment. The evidence established that both AmeriFirst [**16] and Hamminga engaged in normal banking procedures in regards to the DLG investment. In Hamminga's deposition, he testified

that he would often receive referrals from ABC regarding mortgages that needed to be closed. Hamminga was aware that most of the mortgages would be used for an investment into DLG but he never solicited clients for this investment. AmeriFirst never paid ABC any compensation for these referrals and neither AmeriFirst nor Hamminga ever received a referral fee from ABC. Hamminga communicated with ABC like all other companies from which he received a referral except that he informed ABC of the client's loan number, loan amount, and the date the mortgage payment was due. He explained he did this to facilitate ABC's payments of these clients' mortgages every month. Further, the president of AmeriFirst averred that there was no legal relationship between the two companies, no AmeriFirst employees ever planned, organized, or participated in the underwriting of the DLG investment, and AmeriFirst did not prepare any documents for ABC to attract investors to DLG.

[*P31] The evidence also established that Hamminga's actions in processing Mrs. Smith's mortgage did not amount to "participating [**17] in or aiding" an illegal sale of securities. Hamminga did not solicit Mrs. Smith. Hamminga first contacted Mrs. Smith when an ABC representative told him she was interested in obtaining a mortgage on her home. However, Hamminga did not proceed with the mortgage at that time because Mrs. Smith told him that she was not interested in obtaining a mortgage. Approximately one month later, Hamminga contacted Mrs. Smith again after an ABC employee told him she was interested. Hamminga reminded her that she previously declined the mortgage offer, but she indicated that was she interested this time.

[*P32] Hamminga proceeded with his normal routine of obtaining the borrower's information and sending the loan to processing and underwriting. Hamminga acknowledged that he included the potential DLG income on Mrs. Smith's loan application but stated that she qualified for the mortgage without the inclusion of this income. Mrs. Smith's loan was closed and Hamminga directly forwarded her the proceeds of the loan as this was his usual practice. Hamminga did not encourage Mrs. Smith to invest the money into DLG. AmeriFirst and Hamminga's knowledge of Mrs. Smith's use of the money, investing in what they believed [**18] to be a lawful company, does not equate to participating in or aiding in the sale of securities. Further there was no evidence that Mrs. Smith was incompetent.

[*P33] Therefore, there were no genuine issues of material fact regarding whether AmeriFirst or Hamminga participated in or aided the illegal sale of securities. Thus, we find that the trial court did not err in finding summary judgment was appropriate for executor's *R.C. 1707.43* claim.

**Tort of Aiding and Abetting Fraud**

[*P34] Executor next argues that the trial court erred when it granted summary judgment to executor's civil claim of "aiding and abetting." While executor does not specify what tortious act AmeriFirst or Hamminga aided and abetted, he essentially argues that they aided and abetted fraud. [2] The trial court found that Ohio does not recognize a claim of aiding and abetting fraud.

[*P35] Until recently, Ohio courts [**19] of appeals expressed differing opinions regarding whether a claim for aiding and abetting tortious conduct was cognizable as outlined by 4 *Restatement of the Law 2d, Torts Section 876* (1979). *See Fed Mgt. Co., 137 Ohio App.3d at 382*; *Whelan v. Vanderwist of Cincinnati, Inc., 11th Dist. No. 2012-G-2999, 2011 Ohio 6844, ¶ 19*; *Collins v. Natl. City Bank, 2nd Dist. No. 19884, 2003 Ohio 6893, ¶ 32*. This Restatement section provides that a person acting in concert with a wrongdoer is liable if the person:

> (a) Does a tortious act in concert with the other or pursuant to a common design with him, or
>
> (b) Knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or
>
> (c) Gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

[*P36] The Ohio Supreme Court recently stated that "[t]his court has never recognized a claim under 4 *Restatement 2d of Torts, Section 876* (1979), and we decline to do so under the circumstances of this case." *De Vries Dairy, L.L.C. v. White Eagle Coop. Assn., Inc., 132 Ohio St.3d 516, 2012 Ohio 3828, ¶ 2, 974 N.E.2d 1194*. [**20] *See Sacksteder v. Senney, 2nd Dist. No. 24993, 2012 Ohio 4452, ¶ 76*. Therefore, Ohio does not recognize a cause of action for aiding and abetting a tortious act. A person is liable only if he engages in behavior that is unlawful and not simply

[2] Count XIII of executor's amended complaint alleges that AmeriFirst and Hamminga aided and abetted ABC and Winkleman in defrauding Mrs. Smith. However, executor's precise argument of the type of tortious act that the parties have concert liability for is irrelevant due to the Ohio Supreme Court's recent decision discussed below.

because he aided or abetted wrongful conduct. *Fed. Mgt. Co. at 381*. *See In re Natl. Century Fin. Ent., Inc., Invest. Litigation v. Deloitte & Touche, L.L.P., 905 F. Supp. 2d 814, 2012 U.S. Dist. LEXIS 154042, 2012 WL 5334027, *20 (Oct. 26, 2012)*. Consequently, the trial court did not err in granting summary judgment as to executor's aiding and abetting claim.

*R.C. 1345.031*

[*P37] Executor contends the trial court erred when it granted summary judgment on his claim under *R.C. 1345.031*. *R.C. 1345.031(B)(8)* requires suppliers of consumer residential mortgages to provide consumers with a disclosure form informing consumers of their rights when completing a mortgage transaction. Executor argues that the court erred when it relied on an affidavit which discussed this disclosure form but did not attach the form to the affidavit. Executor also asserts that genuine issues of material fact remain as to whether AmeriFirst or Hamminga violated the disclosure requirements under the statute.

[*P38] We [**21] begin by addressing executor's first argument, whether the court erred in relying on paragraphs of an affidavit that mentioned the disclosure form when the form was not attached to the affidavit. In support of their motion for summary judgment, AmeriFirst and Hamminga submitted an affidavit of Mark Jones, President of AmeriFirst. Jones' affidavit outlined AmeriFirst's relationship with ABC and the company's role in closing Mrs. Smith's mortgage. Paragraphs 15 and 16 of Jones' affidavit referenced the disclosure form that AmeriFirst provided Mrs. Smith in compliance with *R.C. 1345.031(B)(8)*. Jones stated that Mrs. Smith signed and returned this form. AmeriFirst and Hamminga did not provide a copy of this form to the trial court.

[*P39] We find that the trial court did not err in relying on paragraphs 15 and 16 of Jones' affidavit. While executor did not cite any legal authority in his brief to explain why the court erred in relying on this affidavit, it appears executor argues that the affidavit did not comply with Civ.R. 56(E). As discussed in the first assignment of error, Civ.R. 56(E) requires that all documents referenced in an affidavit be attached to that affidavit. When a party does [**22] not attach those documents, the portions of the affidavit that refer to the documents must be stricken. *Third Federal S. & L. Assn. of Cleveland, 12th Dist. No. CA2012-04-028, 2012 Ohio 5245, ¶ 10*. However, a party waives this argument if it fails to file a motion to strike the affidavit. *Hammock v. Sav. of Am., 12th Dist. No. CA90-01-006, 1990 Ohio App. LEXIS 3961 (Sept. 10, 1990)*; *Darner v. Richard E. Jacobs Group, Inc., 8th Dist. No. 89611, 2008 Ohio 959, ¶ 15*. In this case executor did not move to strike Jones' affidavit. Therefore, executor has waived this argument on appeal and the trial court properly considered Jones' affidavit under the *R.C. 1345.031* claim.

[*P40] Next, we determine whether the trial court erred in granting summary judgment to AmeriFirst and Hamminga regarding this claim. *R.C. 1345.031(A)* provides that no supplier shall commit an unconscionable act in connection with a consumer residential mortgage. An unconscionable act includes:

> [f]ailing to disclose to the consumer at the closing of the consumer transaction that a consumer is not required to complete a consumer transaction merely because the consumer has received prior estimates of closing costs or has signed an application and should not [**23] close a transaction that contains different terms and conditions than those the consumer was promised.

*Id.* at *(B)(8)*.

[*P41] *Ohio Adm.Code 109:4-3-23(A)* provides that no suppliers shall fail to disclose to the consumer at the closing of the consumer transaction the above mentioned disclosures. To comply with *R.C. 1345.031*, "a supplier must provide the notice attached to this rule as addendum A * * *." *Id.* at (B).

[*P42] In support of its motion for summary judgment, AmeriFirst and Hamminga submitted Mark Jones' affidavit and Greg Hamminga's deposition. In Hamminga's deposition, he explained that the company utilizes a computer system to insure AmeriFirst complies with each state's mortgage and consumer protection laws. Under this system, the loan processor enters a state name which in turn generates the application and all the required closing documents for that state. He used this system to ensure he complied with Ohio's laws in closing a mortgage. In Jones' affidavit, he stated:

> 15. AmeriFirst provided a form for Evelyn Mae Smith to sign at her closing on January 25, 2008. This form was computer generated and complied with *R.C. 1345.031(8)*. [sic]
>
> 16. To the best of my knowledge, Evelyn Mae Smith [**24] returned the form referenced in paragraph 15, executed and dated. * * *

[*P43] The evidence established that AmeriFirst utilized a form that complied with *R.C. 1345.031(B)(8)* and this was given to Mrs. Smith. Hamminga explained that AmeriFirst

closes mortgages in many states and utilizes a system to ensure compliance with each state's laws. Jones' affidavit clearly stated that the R.C. 1345.031(B)(8) form was utilized in Mrs. Smith's mortgage closing. Therefore, AmeriFirst pointed to evidentiary materials that showed there was no genuine issue as to any material fact and that they were entitled to judgment as a matter of law. Executor's response to appellee's evidence was that Jones stated that his company provided a form in compliance with "R.C. 1345.031(B)(8)" instead of R.C. 1345.031(B)(8). In light of the fact that there is no subsection 8 in R.C. 1345.031 and there was no doubt that the specific provision, R.C. 1345.031(B)(8) was at issue during the summary judgment motions, we find executor's argument unpersuasive. As discussed above, the evidence established that there was no genuine fact that AmeriFirst complied with R.C. 1345.031(B)(8). Therefore, the court did not err in granting summary [**25] judgment for this claim.

R.C. 1349.41

[*P44] Executor contends that AmeriFirst and Hamminga violated R.C. 1349.41 when they engaged in a transaction that was fraudulent and not in good faith and fair dealing. In particular, executor argues that the transaction was unfair because AmeriFirst and Hamminga failed to comply with R.C. 1345.031(B)(8) and provide Mrs. Smith a disclosure form. Additionally, executor asserts that there were genuine issues of material fact regarding whether AmeriFirst and Hamminga acted in good faith because they knew and specifically intended for Mrs. Smith to invest in a highly questionable investment that was ultimately fraudulent.

[*P45] R.C. 1349.41(B) provides, "[a] lender shall not engage in a transaction, practice, or course of business that is not in good faith or fair dealing, or that operates a fraud upon any person, in connection with the attempted or actual making, purchase, or sale of any mortgage loan." This statute was enacted in 2007 and the parties have not cited any Ohio case law interpreting this statute. Based upon our research, the interpretation of this statute appears to be one of first impression in Ohio.

[*P46] Good faith has been defined generally as "'honesty [**26] in fact in the conduct or transaction concerned.'" DiPasquale v. Costas, 186 Ohio App.3d 121, 2010 Ohio 832 (2nd Dist.), ¶ 126-127, 926 N.E.2d 682, quoting Cassertlie v. Shell Oil Co., 121 Ohio St.3d 55, 57, 2009 Ohio 3, ¶ 10, 902 N.E.2d 1. The Supreme Court of Ohio has also defined the term as follows:

> A lack of good faith is the equivalent of bad faith, and bad faith, although not susceptible of concrete definition, embraces more than bad judgment or negligence. It imports a dishonest purpose, moral obliquity, conscious wrongdoing, breach of a known duty through some ulterior motive or ill will partaking of the nature of fraud. It also embraces actual intent to mislead or deceive another.

Hoskins v. Aetna Life Ins. Co., 6 Ohio St.3d 272, 276, 6 Ohio B. 337, 452 N.E.2d 1315 (1983).

[*P47] Fraud has been defined as "[a] knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment." *Black's Law Dictionary* (9th Ed.2009). *See* Williams v. Aetna Fin. Co., 83 Ohio St.3d 464, 475, 1998 Ohio 294, 700 N.E.2d 859 (1998).

[*P48] We find that the evidence established that AmeriFirst and Hamminga did not violate R.C. 1349.41 in participating in the closing of Mrs. Smith's mortgage loan. First, AmeriFirst and Hamminga did not act in bad faith [**27] or perpetrate a fraud on Mrs. Smith in regards to the disclosure form required by R.C. 1345.031(B)(8). As discussed in the previous issue, the evidence showed that AmeriFirst provided this form. Mark Jones' affidavit and Greg Hamminga's deposition explained AmeriFirst's actions in providing the disclosure form to Mrs. Smith and the general process AmeriFirst uses to provide consumers with the disclosure form. Thus, since the evidence established that the disclosure form was provided, this court refuses to find any bad faith associated with the alleged failure to provide this form.

[*P49] Additionally, there was no evidence that AmeriFirst and Hamminga did not act in good faith, fair dealing, or perpetrated a fraud on Mrs. Smith. In Hamminga's deposition, he explained that AmeriFirst engaged in normal banking procedures when it closed Mrs. Smith's loan. He did not solicit Mrs. Smith; he stopped contact with Mrs. Smith when she told him that she was not interested in obtaining a mortgage, and then reinitiated contact only when ABC informed Hamminga that Mrs. Smith was interested in acquiring a mortgage again. Additionally, after closing the loan, Hamminga gave Mrs. Smith the mortgage proceeds [**28] directly, as this was his usual custom after closing a mortgage. Hamminga also testified that Mrs. Smith understood the loan she was entering into and did not seem incompetent. The evidence also established that there was no legal relationship between ABC and AmeriFirst. AmeriFirst never received nor gave any referral fees to ABC, and neither AmeriFirst nor Hamminga solicited clients or promoted the DLG investment.

[*P50] Therefore, the trial court did not err in granting summary judgment to AmeriFirst and Hamminga on the

R.C. 1349.41 claim. There was no evidence that AmeriFirst or Hamminga did not act in good faith, fair dealing or operated a fraud upon Mrs. Smith.

**Civil Conspiracy**

[*P51] In his last issue, executor argues the court erred when it granted summary judgment on the civil conspiracy claim. Specifically, executor contends that the trial court erred when it *sua sponte* granted summary judgment as AmeriFirst and Hamminga did not move for summary judgment on this issue.

[*P52] It is well-settled that a trial court "may not *sua sponte* grant summary judgment premised on issues not raised by the parties." Safe Auto Ins. Co. v. Semenov, 12th Dist. No. CA2008-10-123, 2009 Ohio 2334, ¶ 10 quoting [**29] Ranallo v. First Energy Corp., 11th Dist. No. 2005-L-187, 2006 Ohio 6105, ¶ 26. When seeking summary judgment, a party must specifically delineate the basis upon which the motion is brought. Such specificity is necessary "in order to allow the opposing party a meaningful opportunity to respond." Patterson v. Alumed, 176 Ohio App.3d 596, 2008 Ohio 632, ¶ 13, 893 N.E.2d 198 (6th Dist.), quoting Mitseff v. Wheeler, 38 Ohio St.3d 112, 526 N.E.2d 798 (1988), syllabus. Contrary to executor's assertion, AmeriFirst and Hamminga did move for summary judgment on the civil conspiracy claim. AmeriFirst stated numerous times in its motion for summary judgment that it was seeking summary judgment "on all of Third Party Plaintiff's claims." Thus, the trial court's grant of summary judgment on the civil conspiracy claim was not *sua sponte* as AmeriFirst moved for this relief on the claim.

[*P53] Additionally we note that there was no genuine issue of material fact regarding whether AmeriFirst or Hamminga were liable for civil conspiracy. A civil conspiracy is a "malicious combination of two or more persons to injure another person or property, in a way not competent for one alone, resulting in actual damages." [**30] Mohme v. Deaton, 12th Dist. No. CA2005-12-133, 2006 Ohio 7042, ¶ 36, citing Kenty v. Transamerica Premium Ins. Co., 72 Ohio St.3d 415, 419, 1995 Ohio 61, 650 N.E.2d 863 (1995). An action for civil conspiracy cannot be maintained unless an underlying unlawful act is committed. Wilson v. Harvey, 164 Ohio App.3d 278, 2005 Ohio 5722 (8th Dist.), ¶ 41, 842 N.E.2d 83.

[*P54] We have held that the trial court correctly granted summary judgment in favor of AmeriFirst and Hamminga on all counts alleged against them. Without an underlying tort, executor cannot establish a claim for civil conspiracy. In addition, there is no evidence in the record to support a claim that AmeriFirst or Hamminga conspired with any other entity to harm Mrs. Smith. Consequently, the trial court did not err in granting summary judgment in favor of AmeriFirst and Hamminga on the civil conspiracy claim.

[*P55] Executor's second assignment of error is overruled.

[*P56] The trial court's judgment is affirmed. Executor's first assignment of error is sustained to the extent the court erred in admitting portions of Jason Juberg's affidavit. Executor's second assignment of error is overruled as the remaining admissible evidence established that AmeriFirst and Hamminga were entitled to judgment as a matter of law and that there were [**31] no genuine issues of material fact on all of executor's claims. Thus, the court did not err in granting summary judgment in favor of AmeriFirst and Hamminga against executor.

[*P57] Judgment Affirmed.

RINGLAND, P.J., and PIPER, J., concur.

*2010 Oh. Sec. LEXIS 90*

State of Ohio Department of Commerce, Division of Securities

October 15, 2010

Order No 10-084

**Reporter**
2010 Oh. Sec. LEXIS 90

# IN THE MATTER OF: JAMES K. WINKELMAN

## Core Terms

register, subject matter, exempt, revise, investor, license, dealer, sin, registration requirement, selling securities, qualification, coordination, diversify, desist, notice, lend, mail

**Opinion By:** [*1] Andrea L. Seidt, Commissioner of Securities

## Opinion

**DIVISION ORDER; CEASE AND DESIST ORDER**

WHEREAS, the Ohio Division of Securities ("the Division") is charged with the responsibility of protecting investors and finds that this Order is necessary or appropriate in the public interest or for the protection of investors, and is consistent with the purposes of the Ohio Securities Act, Chapter 1707 of the Ohio Revised Code ("R.C."); and

WHEREAS, the Division has conducted an investigation into the activities of James K. Winkelman ("Respondent"), Respondent's last known address is 43 Hummingbird Way, Amelia, Ohio 45102; and

WHEREAS, the Division issued a Notice of Opportunity for Hearing under Order No. 10-062 on July 29, 2010; and

WHEREAS, a copy of Order No. 10-062 was served on the Respondent via registered mail return receipt requested on August 26, 2010 in accordance with *Ohio Revised Code 119.07*; and

WHEREAS, Respondent has not requested a hearing and thirty days have passed since the mailing of the notice; and

WHEREAS, as a result of said investigation, the Division finds as follows:

(1) James K. Winkelman is a natural person and a resident [*2] of Ohio at all times relevant to this matter;

(2) Respondent has never been licensed to sell securities in Ohio;

(3) Respondent worked for American Benefits Concepts ("ABC"), of Portage, Michigan during 2008;

(4) Respondent was paid a commission by ABC to sell Secured Investment Notes/Investment Contracts ("SIN"s);

(5) The issuer of the aforementioned SIN's was Diversified Lending Group, Inc. of Sherman Oaks, California;

(6) Respondent sold a SIN in the amount of $ 90,176.63 to Evelyn Smith, Georgetown, Ohio on February 1, 2008;

(7) Respondent sold a SIN in the amount of $ 50,000 to Karen and Barry Maddox, Sidell, Illinois on February 24, 2008;

(8) The SIN's issued by Diversified Lending Group, Inc. were for a term of five years and paid 12% interest;

(9) The SIN's sold by Respondent were never registered for sale in Ohio;

(10) The SIN's described in Paragraphs (4) through (9) are "securities" as that term is defined in *R.C. 1707.01(B)*;

(11) The transactions described in Paragraphs (6) and (7) fall within the definition of a "sale", as that term is defined in *R.C. 1707.01(C)*;

(12) [*3] *R.C. 1707.44(C)(1)* prohibits the sale in Ohio of securities that are not exempt under *R.C. 1707.02* from the registration requirements of the Ohio Securities Act, not the subject matter of one of the transactions exempted in *R.C. 1707.03*, *1707.04* or *1707.34*, not registered by coordination or qualification, and not the subject matter of a transaction that has been registered by description;

(13) The SIN's described in Paragraphs (4) through (9) are not exempt under *R.C. 1707.02* from the registration requirements of the Ohio Securities Act, not the subject matter of one of the transactions exempted in *R.C. 1707.03*, *1707.04* or *1707.34*, not registered by coordination or qualification, and not the subject matter of a transaction that was registered by description, and, therefore, were sold in violation of *R.C. 1707.44(C)(1)* [*4] ;

(14) Respondent, based on the acts and practices described above in Paragraphs (4) through (8), falls within the definition of a "dealer" as defined in *R.C. 1707.01(E)*;

(15) *R.C. 1707.14(A)(1)* requires that every dealer of securities be licensed by the Division;

(16) *R.C. 1707.44(A)(1)* provides that no person shall engage in any act or practice that violates division (A), (B), or (C) of *R.C. 1707.14*; and

(17) Respondent, as described in Paragraphs (2) through (7), sold securities to Ohio investors and received commissions without having been licensed by the Division of Securities as a dealer, and therefore, in violation of *Ohio Revised Code section 1707.44(A)(1)*.

WHEREAS, based on Paragraphs (1) through (17), the Division finds that Respondent James K. Winkelman violated the provisions of *R.C. 1707.44(A)(1)* and *R.C. 1707.44(C)(1)*;

THEREFORE, IT IS ORDERED THAT, pursuant to *R.C. 1707.23(G)* [*5] , Respondent James K. Winkelman is hereby ordered to CEASE AND DESIST from the acts and practices as described above which constitute a violation of Chapter 1707 of the Ohio Revised Code.

WITNESS MY HAND AND THE OFFICIAL SEAL OF THIS DIVISION at Columbus, Ohio this 15th day of October, 2010.

*Andrea L. Seidt, Commissioner of Securities*

*2011 Oh. Sec. LEXIS 3*

State of Ohio Department of Commerce, Division of Securities

January 06, 2011

Order No. 11-004

**Reporter**
2011 Oh. Sec. LEXIS 3

# IN THE MATTER OF: AMERICAN BENEFITS CONCEPTS, INC., JASON E. JUBERG

## Core Terms

register

**Opinion By:** [*1] Andrea L. Seidt, Commissioner of Securities

## Opinion

**CEASE AND DESIST ORDER**

**DIVISION ORDER**

WHEREAS, the Ohio Division of Securities ("the Division") is charged with the responsibility of protecting investors and finds that this Order is necessary or appropriate in the public interest or for the protection of investors, and is consistent with the purposes of the Ohio Securities Act, Chapter 1707 of the Ohio Revised Code ("R.C."); and

WHEREAS, the Division has conducted an investigation into the activities of American Benefit Concepts, Inc. and Jason E. Juberg (collectively "Respondents"), Respondents' business address is 7708 Sprinkle Road, Portage, Michigan 49002; and

WHEREAS, the Division issued a Notice of Opportunity for Hearing under Order No. 10-064 on August 10, 2010; and

WHEREAS, the Respondents have agreed to waive their right to a hearing and have voluntarily entered a Consent Agreement attached hereto as Exhibit A ("Consent Agreement"); and

WHEREAS, as a result of said investigation and as a result of the admissions set forth in the Consent Agreement, the Division finds as follows:

[EDITOR'S NOTE: TEXT WITHIN THESE SYMBOLS [O> <O] IS OVERSTRUCK IN THE SOURCE.]

(1) American [*2] Benefit Concepts, Inc. is a company incorporated under the laws of the State of Michigan;

(2) Jason E. Juberg is a natural person and a resident of the State of Michigan;

(3) Jason E. Juberg is the President of American Benefit Concepts, Inc.;

(4) Respondents are in the business of raising funds through the sale of insurance products and through the sale of Secured Investment Notes/Investment Contracts ("SIN's), notes through agents located in Michigan and Ohio;

(5) Neither Respondents nor their agents have ever been licensed to sell securities in Ohio;

(6) The SIN's sold by Respondents were issued by Diversified Lending Group, Inc. of Sherman Oaks, California ("DLG SIN's");

(7) Respondents sold DLG SIN's in Ohio through a network of agents, including but not limited to: James K. Winkelman, Amelia, Ohio; [O>Mickey L. Day<O], Findlay, Ohio; John T. Miller, Rossford, Ohio; Robert E. Peters, Jr., Brookpark, Ohio; Justin T. Storer, Batavia, Ohio; Anthony Von Pongracz; Newark, Ohio; Kyle R. Dincler, Cincinnati, Ohio;

(8) During the time period beginning April 4, 2007 and ending March 25, 2008, Respondents sold at least 29 DLG SIN's in the State of Ohio for an aggregate value [*3] in excess of $ 1,900,000.00;

(9) Respondents received a commission from Diversified Lending Group, Inc. equal to five percent (5%) of the face value of the initial investment;

(10) The DLG SIN's were for a term of five years and paid 12% interest;

(11) The DLG SIN's sold by Respondents were never registered for sale in Ohio;

(12) The DLG SIN's described in Paragraphs (2) through (11) are "securities" as that term is defined in *R.C. 1707.01(B)*;

(13) The transactions described in Paragraphs (2) through (12) fall within the definition of a "sale", as that term is defined in *R.C. 1707.01(C)*;

(14) *R.C. 1707.44(C)(1)* prohibits the sale in Ohio of securities that are not exempt under *R.C. 1707.02* from the registration requirements of the Ohio Securities Act, not the subject matter of one of the transactions exempted in *R.C. 1707.03*, *1707.04* or *1707.34*, not registered by coordination or qualification, [*4] and not the subject matter of a transaction that has been registered by description;

(15) The DLG SIN's described in Paragraphs (2) through (12) are not exempt under *R.C. 1707.02* from the registration requirements of the Ohio Securities Act, not the subject matter of one of the transactions exempted in *R.C. 1707.03*, *1707.04* or *1707.34*, not registered by coordination or qualification, and not the subject matter of a transaction that was registered by description, and, therefore, were sold in violation of *R.C. 1707.44(C)(1)*;

(16) Respondents, based on the acts and practices described above in Paragraphs (2) through (13), fall within the definition of a "dealer" as defined in *R.C. 1707.01(E)*;

(17) *R.C. 1707.14(A)(1)* requires that every dealer of securities be licensed by the Division;

(18) *R.C. 1707.44(A)(1)* provides that no person shall engage in any act or practice [*5] that violates division (A), (B), or (C) of *R.C. 1707.14*; and

(19) Respondents, as described in Paragraphs (2) through (13), sold securities to Ohio investors and received commissions without having been licensed by the Division of Securities as dealers, and therefore, in violation of *Ohio Revised Code section 1707.44(A)(1)*.

WHEREAS, based on Paragraphs (1) through (19), the Division finds that Respondents American Benefit Concepts, Inc. and Jason E. Juberg violated the provisions of *R.C. 1707.44(A)(1)* and *R.C. 1707.44(C)(1)*;

THEREFORE, IT IS ORDERED THAT, pursuant to *R.C. 1707.23(G)*, Respondents American Benefit Concepts, Inc. and Jason E. Juberg are hereby ordered to **CEASE AND DESIST** from the acts and practices as described above which constitute a violation of Chapter 1707 of the Ohio Revised Code;

WITNESS MY HAND AND THE OFFICIAL SEAL OF THIS DIVISION at Columbus, Ohio this 6th day of January, 2011.

*Andrea L. Seidt, Commissioner of Securities*

## Attachment

**EXHIBIT A**

STATE OF OHIO

[*6] DEPARTMENT OF COMMERCE
**DIVISION OF SECURITIES**
COLUMBUS, OHIO 43215-6131

**IN THE MATTER OF: AMERICAN BENEFITS CONCEPTS, INC.**
**JASON E. JUBERG**

**CONSENT AGREEMENT**

Based upon discussions between representatives of the Ohio Division of Securities ("the Division") and American Benefits Concepts, Inc. and Jason E. Juberg (collectively "Respondents"), by and through their respective counsel, the Division and Respondents stipulate and agree to the following:

(1) Respondents waive the issuance, lawful service and receipt of a Notice of Opportunity for Hearing in this matter, and stipulates to the jurisdiction of the Division.

(2) Respondents, with full knowledge of their rights, voluntarily waive the right to an adjudicative hearing in accordance with R.C. Chapter 119, as well as any other appeal rights found therein.

(3) The Division and Respondents consent, stipulate, and agree to the findings, conclusions, and order set forth in the attached Suspension Order ("Order"), and to the issuance of the same.

(4) After being fully and adequately apprised of the right to appeal the attached Order, as set forth in *R.C. 119.12*, Respondents [*7] knowingly and voluntarily waive such right.

(5) The undersigned have read this Consent Agreement, understand all of its terms, have authority to sign this Consent Agreement, and have executed this Consent Agreement voluntarily.

**SO AGREED**:

Date

Jason E. Juberg, Respondent
c/o American Benefit Concepts, Inc.
7708 Sprinkle Road
Portage, MI 49002

Date
Christopher Tracy, Esq.
Honigman, Miller, Schwartz and Cohn LLP
350 East Michigan Avenue, Suite 300
Kalamazoo, MI 49007-3714
Counsel for Respondent,
Jason E. Juberg

Date
Jaso E. Juberg, President
American Benefit Concepts, Inc.,
Respondent
7708 Sprinkle Road
Portage, MI 49002

Date
Christopher Tracy, Esq.
Honigman, Miller, Schwartz and Cohn LLP

350 East Michigan Avenue, Suite 300
Kalamazoo, MI 49007-3714
Counsel for Respondent,
American Benefit Concepts, Inc.

Date

Andrea L. Seidt, Commissioner

Division of Securities

Ohio Department of Commerce

77 S. High St., 22nd Floor

Columbus, OH 43215-6131

IN THE COMMON PLEAS COURT OF ERIE COUNTY, OHIO

| | | |
|---|---|---|
| ARTHUR J. PIERETTI, et al., | : | Case No. 2011-CV-0051 |
| Plaintiffs | : | Judge Tygh M. Tone |
| Vs. | : | **OPINION AND JUDGMENT ENTRY** |
| ROSENTHAL COLLINS GROUP, LLC et al. | : | |
| Defendants | : | |

**********

This matter comes before the Court on Defendant's, Rosenthal Collins Group L.L.C.'s Notice of Supplemental Authority and Motion for Reconsideration. After a thorough review of the pleadings and relevant caselaw, this Court finds said motion is not well taken and hereby **DENIED.**

**FACTS**

Enrique Villalba Jr., a non-party to this lawsuit, was an investment advisor who claimed to have developed a proprietary method of investing known as the Money Market Plus Method. Mr. Villalba solicited Plaintiffs as prospective investors via oral and written representations and utilized momentum filters to predict the momentum of the equity markets. The funds were to be invested in either treasury bills or interest bearing money market accounts.

Plaintiffs invested over 13 million dollars in the fund held in the name of Money Market Alternative, LP, (hereinafter MMA), the entity owned by Villalba. By May 2009 the funds were gone.

Mr. Villalba provided his clients with account statements showing the performance of the client's investment in the MMA. The quarterly statements generally reflected that Plaintiffs' investment had earned profits. Therefore the clients invested more money in the Fund.

The Defendant Rosenthal Collins Group L.L.C. (hereinafter known as the Defendant/RCG) reaped high commissions from the trading in the Money Market Alternative LP account. Patrick McDonnell was appointed as its authorized agent.

## ARGUMENTS

*Defendant's Argument*
Whether RCG Aided or Participated in the Sale of Securities

RCG moves this Court to reconsider its April 16, 2013 Opinion and Judgment Entry denying RCG's Supplemental Motion for Summary Judgment on Plaintiff's Ohio Securities Act claims in light of a recent decision by the Twelfth District Court of Appeals, *Wells Fargo Bank v. Smith*, 12th Dist. No. CA2012-04-006, 2013-Ohio-855. RCG argues that *Wells Fargo Bank* makes it clear that RCG cannot be liable pursuant to R.C. 1707.43(A) on the alleged undisputed facts in this matter. RCG argues that *Wells Fargo Bank* clarifies the relevant legal standard and dictates that a financial institution cannot be liable pursuant to R.C. 1707.43(A) for merely "making the sale possible." *In Wells Fargo Bank*, the Twelfth District concluded that the mortgage bank did not "aid" or "participate" since it was not involved in the sale, such as soliciting, encouraging, planning, marketing or underwriting the investment. Thus, the Twelfth District focused

on the type of services provided by the Defendant and if such services related to the sales transaction; the Court did not focus on whether the Defendant's actions made the sale possible or if the Defendant was negligent or reckless in failing to discover the Ponzi scheme.

RCG argues that it did not participate in or aid Villalba in any way in making the sale of a security. RCG argues that there is no evidence that RCG played a role in the process where Villalba solicited or sold the securities. At most, RCG provided administrative or operation services necessary for MMA to trade commodities. However, such conduct was separate and removed from the actual making of the sale. There is no evidence that RCG met with the Plaintiffs, created or sent out offering materials, sale literature or statements used in the sale process. Instead, RCG's role involved actions after the sale. After Villalba received money from the Plaintiffs in his MMA bank accounts, Villalba wired at least some of the money to a nondiscretionary, future trading account held in the name of MMA at RCG. Plaintiffs did not receive documents from RCG; never spoke with any at RCG. Instead, MMA's relationship with RCG was limited to providing professional services related to MMA's commodity trading. There can be no liability pursuant to R.C. 1707.43(A) for opening futures account and executing and clearing future trades.

In response to Plaintiffs' Argument, RCG argues that the defendants in *Wells Fargo Bank* provided aid to the seller as the mortgage bank and seller had a close ongoing business relationship. The mortgage bank was an essential part of the Ponzi Scheme as investors would mortgage their home and then invest the proceeds into the

illegal investment. The mortgage bank provided the seller with relevant information about the loan.

*Plaintiffs' Argument*

Whether RCG Aided or Participated in the Sale of Securities

Plaintiffs argue that the role the defendants played in *Wells Fargo Bank* is materially distinguishable from the present matter. In *Wells Fargo Bank*, the mortgage bank and loan officer aided the investor instead of the seller. Further, such aid was financing aid and not aid in making a security sale. R.C. 1707.43(A) states in pertinent part "every person that has participated in or aided the seller in any way in making such sale or contract for sale." Further, *Wells Fargo Bank* did not set forth a universal rule regarding R.C. 1707.43(A) and did not define "participated in" or "aided. Also, *Wells Fargo Bank* did not develop a multi-factored test but instead cited examples of fact patterns from prior cases that have resulted in liability. In fact, RCG's own expert stated that what conduct constitutes aid or participation is a question of fact.

Plaintiffs still maintain that there is little caselaw interpreting the relevant statutory language and the precise limits of liability. According to Plaintiffs, the cases cited by RCG do not provide universal limits. Plaintiffs assert that the secondary actor does not need to induce a purchaser; instead the secondary actor only needs to participate in the sale or aid the seller in any way.

## ANALYSIS

Ohio Rules of Civil Procedure 56(C) authorizes a court to grant summary judgment when the moving party has demonstrated "(1) that there is no genuine issue as

to any material fact; (2) that the moving party is entitled to judgment as a matter of law; and (3) that reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor." *Harless v. Willis Day Warehousing Co.*, 54 Ohio St.2d 64, 66-67, 375 N.E.2d 46 (1978); Civ.R. 56(C). Once the moving party has satisfied its initial burden, the nonmoving party bears a reciprocal burden under Civ.R. 56 (E):

> When a motion for summary judgment is made *and supported as provided in this rule*, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavit or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him. *Dresher v. Burt*, 75 Ohio St.3d 280, 293, 662 N.E.2d 264 (1996).

Whether Defendant Participated or Aided Villalba in Any Way in Making A Sale of Securities to Plaintiffs

The Ohio Securities Act, otherwise called Ohio Blue Sky Law, was adopted on July 22, 1929 "to prevent the fraudulent exploitation of the investing public through the sale of securities." *In re Columbus Skyline Securities, Inc.*, 74 Ohio St.3d 495, 498, 660 N.E.2d 427 (1996). Further, "many of the enacted statutes are remedial in nature, and have been drafted broadly to protect the investing public from its own imprudence as well as the chicanery of unscrupulous securities dealers...in order to further the intended purpose of the Act, its securities anti-fraud provisions must be liberally construed." *Id.*

As set forth in R.C. 1707.43(A):

> Subject to divisions (B) and (C) of this section, every sale or contract for sale made in violation of Chapter 1707. of the Revised Code, is voidable at the election of the purchaser. The person making such sale or contract for sale, *and every person that has participated in or aided the seller in any way in making such sale or contract for sale*, are jointly and severally liable to the purchaser, in

> an action at law in any court of competent jurisdiction, upon tender to the seller in person or in open court of the securities sold or of the contract made, for the full amount paid by the purchaser and for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision. (emphasis added).

This Court is not satisfied that the *Wells Fargo Bank* decision provides clear guidance in this matter. First, as noted by Plaintiffs, *Wells Fargo Bank* is currently on appeal and not controlling in Erie County. Further, in *Wells Fargo Bank*, the Ponzi scheme involved investors mortgaging their homes and applying the proceeds to purchase the fraudulent unregistered securities. *Id.* at ¶2. The mortgage bank, AmeriFirst, who had been in contact with the security seller through the mortgage bank's loan officer, provided investors with the financing to purchase the fraudulent unregistered securities. *Id.* at ¶3. Neither the mortgage bank nor its loan officer received compensation from the security seller. *Id.* at ¶30. Further, the loan proceeds were given directly to the investor without any direction to invest with the security seller. *Id.* at ¶7. Thus, as the mortgage bank and its loan officer's actions primarily aided the investor and not the seller, such case is materially distinguishable from the present matter.

Therefore, in making all inferences in favor of the nonmoving party, Plaintiffs have presented sufficient evidence of RCG's participation and aid in the sale of the securities in order to survive a motion for summary judgment. Villalba may not have been able to sell the securities to Plaintiffs unless RCG agreed to be MMA's future commission merchant. RCG played an indispensable role when it opened, maintained, and serviced the futures trading account for MMA. Further, RCG conducted two separate high-level reviews of MMA's Circular when it opened a futures trading account for MMA in 1998. The Circular stated that MMA commenced a $100 million

"securities" offering in February 1998, MMA was extending the offering for as long as five years, and MMA was reserving the right to extend or reopen the offering at any time. Further, in construing the evidence most strongly in Plaintiffs' favor, a jury could reasonably conclude that the Circular contained several material misrepresentations that RCG should have detected during its review of the Circular such as:

(1) The Circular stated that "[t]he fund is not governed or regulated by any federal or state agency." However, the offering was in fact subject to anti-fraud statutes and licensing requirements.
(2) The Circular stated that MMA would purchase "S & P 500 Index futures contracts with little or no leverage." However, future contracts typically have the leverage of 10:1.
(3) The Circular stated "[a]pproximately 90% of the year, the asset value of the portfolio will not fluctuate on a daily basis as the dollars in the portfolio will remain in non-fluctuating Treasury Bills or short term commercial paper." However, treasurer bills fluctuate in value with interest rates.
(4) The Circular stated that "underlying asset risk is minimal." However, RCG's own Risk Disclosure Statement states that "[t]transactions in futures carry a high degree of risk."

Therefore, reasonable minds can come to different conclusions regarding whether such activities by RCG qualify as "aid" or "participation" pursuant to R.C. 1707.43(A). Thus, in making all reasonable inferences in favor of the nonmoving party, based upon the foregoing a jury could reasonably conclude that RCG knowingly undertook an indispensable role in aiding and/or participating in the fraudulent offering of securities.

JUDGMENT ENTRY

It is therefore **ORDERED, ADJUDGED AND DECREED** that Defendant's, Rosenthal Collins Group L.L.C.'s Notice of Supplemental Authority and Motion for Reconsideration is **DENIED.**

**IT IS SO ORDERED.**

5/22/13
Date

Judge Tygh M. Tone

cc: D. Meyer
J. Landskroner
C. Kemnitz
M. Conti
J. Murray