

No. 43018-5-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

VIEWPOINT-NORTH STAFFORD LLC, a Delaware limited liability company, VIEWPOINT AT SHOREWOOD LLP, a Washington limited liability partnership, ROBERT S. ROBERTS and ANNE G. ROBERTS

Plaintiffs/Appellants,

v.

CB RICHARD ELLIS, INC., a Delaware corporation, ARIA ASSOCIATES
MANAGEMENT LLC, MICHELLE E. BROCK, JAMES N. DONNERSTAG,
MERRIAH J. HARKINS, JULIE BROCK HERZOG
and DANIEL W. BROCK,

Defendants/Respondents.

**BRIEF OF RESPONDENTS
CB RICHARD ELLIS, INC. and
JAMES N. DONNERSTAG**

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Defendants/Respondents CB Richard Ellis, Inc. and James N. Donnerstag (together, the “Real Estate Respondents”) respectfully submit that the Pierce County Superior Court properly entered summary judgment and final judgment in favor of the Real Estate Respondents on the Complaint for Violations of Washington Securities Act filed by Plaintiffs/Appellants Viewpoint-North Stafford LLC, Viewpoint at Shorewood LLP, Robert S. Roberts, and Anne G. Roberts (collectively, “Appellants”). The trial court’s rulings should be affirmed.

I. INTRODUCTION

Respondent James Donnerstag has worked as a real estate agent for Respondent CB Richard Ellis (“CBRE”), a real estate services company, for 47 years. Mr. Donnerstag is not, and has never been, a seller of securities. This litigation is a misplaced attempt to shift responsibility for Appellants’ own actions and the actions of other judgment-proof defendants onto the Real Estate Respondents.

Appellants are sophisticated investors with decades of experience in the real estate business.¹ Appellants unambiguously admitted in their pleadings and deposition testimony that the Real Estate Respondents had nothing to do with the creation, issuance or sale of the tenancy-in-common (“TIC”) interest in Virginia real estate that is the subject of this litigation. This property is referred to as DBSI North Stafford. Appellants purchased

¹ Appellants Viewpoint at Shorewood LLP and Viewpoint – North Stafford LLP are legal entities controlled solely by Appellants Robert S. Roberts and Anne Roberts.

their interest in DBSI North Stafford in April 2008, just before the real estate market crashed.

Appellants also admitted that they did not consider their investment in DBSI North Stafford to be a security, they did not consider the Real Estate Respondents to be the sellers of the TIC interest, and they signed extensive transactional documents expressly warranting that they were relying solely on information provided by DBSI. Appellants further conceded that they did not consult with the Real Estate Respondents about the DBSI North Stafford property. In fact, the factual record is clear that Appellants' decision to invest in DBSI North Stafford was based solely on information provided by DBSI, not the Real Estate Respondents, and that Appellants conducted their own due diligence and knew of and assumed the risks of their investment in DBSI North Stafford.

Given these undisputed facts and Washington law, the trial court properly concluded that the Real Estate Respondents cannot be held liable for Appellants' decision to purchase their TIC interest in DBSI North Stafford.

Appellants filed this action in July 2010 and alleged claims against the Real Estate Respondents under the Washington State Securities Act ("WSSA") for "misrepresentations and omissions," "sale of unregistered security," and "unregistered broker-dealers and salespersons." The trial court gave Appellants an extensive opportunity to conduct discovery to support their alleged claims. At the outset of the case, the trial court

denied the Real Estate Respondents' motion to dismiss and allowed discovery to go forward. Discovery was conducted for a year.

Discovery, however, did not support Appellants' claims. To the contrary, the documents and testimony provided by Appellants established that their claims against the Real Estate Respondents are based on no more than two undisputed facts concerning their investment in DBSI North Stafford: (1) Mr. Donnerstag informed Appellants about DBSI **generally** (but not as to any specific property), and (2) CBRE received a fee paid by Appellants, of which Mr. Donnerstag received a portion, after their investment in DBSI North Stafford closed. These facts cannot support claims under the WSSA, and the Real Estate Respondents moved for summary judgment on the following bases:

1. The Real Estate Respondents were not "sellers" or "control persons" with regard to Appellants' investment in DBSI North Stafford, nor did they participate in a "sale" of securities.

2. Appellants' claim for "misrepresentation and omission" fails because (a) the Real Estate Respondents cannot be liable for statements or omissions made by third parties, such as DBSI, (b) the transactional documents signed by Appellants preclude a finding of "reasonable reliance"; and (c) any prior appraisal of the North Stafford property by an East Coast office of CBRE (of which Mr. Donnerstag had no knowledge) cannot be imputed to Mr. Donnerstag and is immaterial because the appraised value was clearly disclosed to Appellants in DBSI's transactional documents.

3. The “sale of unregistered security” claim fails because the DBSI North Stafford offering was exempted under Regulation D of the Federal Securities Act, and the Real Estate Respondents’ role in Appellants’ investment, *if any*, was an “isolated transaction” that was also exempt from the registration requirement under the WSSA.²

On December 9, 2011, the trial court heard oral argument and granted the Real Estate Respondents’ motion for summary judgment, dismissing Appellants’ claims against the Real Estate Respondents. The order was entered on December 12, 2011. In its ruling from the bench, the trial court correctly observed that Appellants’ claims should be dismissed based on an unambiguous record:

I don’t think that Mr. Donnerstag is a seller of securities. [...] I think he was working with the Roberts to find an investment for them to avoid the tax liability. He had offered a couple of different options. They were not taken. [Donnerstag] had gone to the seminar, heard about this DBSI, contacted the Roberts, let them know, contacted DBSI. The two came together. He got a fee out of it, a pretty substantial fee. I think that everything that was done, all the decisions that were made by the Roberts, were made based upon the information provided to them by DBSI. I don’t find that Mr. Donnerstag or CBRE were security sellers.

Final judgment was entered in favor of the Real Estate Respondents on January 13, 2012.

² The Real Estate Respondents also moved for summary judgment on Appellants’ third cause of action for “unregistered broker-dealers and salespersons,” but Appellants voluntarily withdrew this claim in their summary judgment opposition brief. Appellants’ third claim for “unregistered broker-dealers and salespersons” is not subject to this appeal.

Appellants have voluntarily dismissed all their claims against all the other defendants at the trial court level. Nevertheless, Appellants now seek to overturn the final judgment entered for the Real Estate Respondents on a single basis, namely that the trial court erred by ruling that the Real Estate Respondents were not “sellers” of Appellants’ investment in DBSI North Stafford. The trial court’s order granting summary judgment and its entry of final judgment should be affirmed. The undisputed facts, when applied to Washington law, leave no question that the Real Estate Respondents do not qualify as “sellers” under the WSSA. Moreover, the other deficiencies in Appellants’ claims for “misrepresentation and omission” and “sale of unregistered securities” that were presented to the trial court, *none of which have been appealed by Appellants*, are independent grounds to affirm the trial court.

II. ISSUE ON APPEAL

1. Whether Appellants’ claims under the Washington State Securities Act fail because the Real Estate Respondents were neither “sellers” nor “control persons” relating to Appellants’ investment in DBSI North Stafford?

2. Whether Appellants’ claim for “misrepresentation and omission” fails because (a) the Real Estate Respondents cannot be liable for misrepresentations or omissions attributable to third parties; and (b) Appellants cannot prove “reasonable reliance?”

3. Whether Appellants’ claim for “sale of unregistered security” fails because the transaction was exempted as a public offering

pursuant to Regulation D of the federal Securities Act and as an isolated transaction?

III. STATEMENT OF THE CASE

In April 2008, Appellants purchased a 15% undivided interest in an office complex in Stafford, Virginia (“DBSI North Stafford”) for about \$4 million – about \$2 million in cash and \$2 million in non-recourse debt. To consummate the sale by DBSI, Appellants signed, consented to, and confirmed in several written agreements and disclosures that their investment was based solely on information provided by the property seller, DBSI. Appellants did not ask Mr. Donnerstag to conduct due diligence on the DBSI property, determine if the property had been appraised or priced correctly, review DBSI’s offering prospectus or the Confidential Private Placement Memorandum, or advise on the transactional documents. Appellants unambiguously testified that all of the information they needed to invest in DBSI North Stafford came directly from DBSI, and that Mr. Donnerstag was out of the loop. The factual record before for the trial court can be summarized as follows:

A. Appellant Robert Roberts Has 50 Years Of Experience In The Real Estate Industry.

Appellant Robert Roberts is an experienced purchaser of real estate with the ability, expertise, and initiative to investigate and understand his investments. He has worked in the real estate industry for over 50 years, including in residential and commercial sales, property appraisals, and

commercial property development.³ Mr. Roberts also has worked as a licensed real estate salesman and broker and he held an executive position on a local realty board.⁴ Appellants Viewpoint at Shorewood LLP and Viewpoint – North Stafford LLP are legal entities controlled solely by Appellants Robert Roberts and his spouse, Anne Roberts.

B. Appellants Asked Mr. Donnerstag To Help Identify Properties For A 1031 Exchange.

In 2007, Appellants sold an apartment complex for approximately \$6.6 million.⁵ Appellants had a profit (or gain) from the sale that they sought to shield from capital gains taxes under Section 1031 of the United States Tax Code by purchasing another property with the proceeds.⁶ Appellants approached Mr. Donnerstag for help identifying potential replacement properties to accomplish their “1031 exchange”.⁷ Starting in June 2007, and at Appellants’ request, Mr. Donnerstag identified several properties for Appellants to consider for their 1031 exchange, which Appellants rejected.⁸ Mr. Donnerstag also communicated with Appellants’ son, Brad Roberts, who was assisting his parents with their 1031 exchange.⁹ Appellants conducted their own due diligence and

³ Clerk’s Papers [“CP”] at 109-111 and 114 [Emch Dec., Ex. A at 21:6-13, 31:1-32:10, 49:1-7].

⁴ CP at 112-113 [Emch Dec., Ex. A at 45:3-8, 45:24-46:5].

⁵ CP at 122-123 [Emch Dec., Ex. A at 85:15-86:5].

⁶ CP at 127-128 [Emch Dec., Ex. A at 95:24-96:8].

⁷ CP at 127-128 [Emch Dec., Ex. A at 95:24-96:8].

⁸ CP at 99 [Donnerstag Dec., ¶¶ 3-4].

⁹ CP at 99 [Donnerstag Dec., ¶ 3].

determined that none of the properties identified by Mr. Donnerstag satisfied their needs.¹⁰

C. Mr. Donnerstag Informed Appellants About A DBSI Seminar On TIC Investments.

Mr. Donnerstag has worked for CB Richard Ellis since 1965 as a real estate broker in commercial sales and leasing.¹¹ Mr. Donnerstag's business has never involved the sale of securities or other financial products.¹² Mr. Donnerstag has never worked as a securities broker or dealer, salesperson, or financial planner.¹³ Mr. Roberts confirmed at his deposition that he has never known Mr. Donnerstag to work in the financial or securities industries.¹⁴

On March 20, 2008, Mr. Donnerstag attended a breakfast seminar for real estate professionals hosted by DBSI at the Hyatt Regency Century Plaza Hotel in Century City, California.¹⁵ The purpose of the seminar was to provide some background information about DBSI to real estate professionals, such as Mr. Donnerstag.¹⁶ Mr. Donnerstag had never done business with DBSI nor had he ever sold a TIC interest in real estate to any of his clients.¹⁷ Appellants' deadline to identify a replacement property for their 1031 exchange was approaching, so Mr. Donnerstag

¹⁰ CP at 133-138 [Emch Dec., Ex. A at 103:2-110:15].

¹¹ CP at 98 [Donnerstag Dec., ¶ 2].

¹² CP at 100 [Donnerstag Dec., ¶ 10].

¹³ CP at 100 [Donnerstag Dec., ¶ 10].

¹⁴ CP at 125-126 [Emch Dec., Ex. A at 91:14-92:22].

¹⁵ CP at 99 [Donnerstag Dec., ¶ 5].

¹⁶ CP at 99 [Donnerstag Dec., ¶ 5].

¹⁷ CP at 99 [Donnerstag Dec., ¶ 5].

relayed to Mr. Roberts the information he had received at the seminar.¹⁸ Appellants were fully aware of their deadlines to identify a replacement property by April 12, 2008 and close on their purchase by April 27, 2008 in order to accomplish their 1031 exchange. Mr. Roberts wanted to learn more from DBSI, so at Mr. Roberts' request, Mr. Donnerstag sent an email on March 31, 2008 to George Brock, a client representative for DBSI, stating that Appellants "are in [a Section 1031] exchange *and are open to talking to you about your programs.*"¹⁹

Mr. Donnerstag did not know the names or locations of any DBSI properties that were offered to Mr. Roberts by DBSI, nor was he required to have such information. Mr. Donnerstag did not hear again from Appellants, DBSI, Aria Asset Management, or Michelle Brock (the registered representative for Aria Asset Management), until after Appellants had committed to their investment in DBSI North Stafford.²⁰ Mr. Roberts confirmed at his deposition that Mr. Donnerstag was completely out of the loop.²¹

¹⁸ CP at 99 [Donnerstag Dec., ¶ 6]. Mr. Donnerstag was actually required to inform Appellants about DBSI's TIC program. Under Washington real estate law, a buyer's agent has a non-waivable duty "to make a good faith and continuous effort to find a property for the buyer." RCW 18.86.050(1)(e). Mr. Donnerstag's non-waivable statutory duty to find a property for Appellants obligated Mr. Donnerstag to inform Appellants about the opportunity to purchase a TIC from DBSI. *See id.*

¹⁹ CP at 99, 103 [Donnerstag Dec., ¶ 7, Ex. A].

²⁰ CP at 99-100 [Donnerstag Dec., ¶ 8].

²¹ CP at 161 [Emch Dec., Ex. A at 168:1-6].

D. The Real Estate Respondents Were Not Consulted About DBSI North Stafford.

After Mr. Donnerstag sent his introductory email, a sales executive from DBSI named David Rottman contacted Appellants with information about DBSI and its current TIC offerings.²² DBSI's Mr. Rottman described DBSI to Appellants as a "great company" that was "safe [and] conservative," which had "been in business 27, 28 years."²³ DBSI's Mr. Rottman directly informed Appellants that "there are a number of properties [they] could consider investing in," including a commercial office building in Stafford, Virginia (DBSI North Stafford) and a shopping center in St. Louis.²⁴ This information was not provided to the Real Estate Respondents.²⁵

Without consulting the Real Estate Respondents, Appellants decided not to invest in the St. Louis offering due to their concern that retail properties were high risk because "the economy was starting to slow down."²⁶ As for DBSI North Stafford, Appellant Robert Roberts testified that a property prospectus provided to him by DBSI's Mr. Rottman piqued Appellants' interest because Mr. Roberts like the property's fundamentals:

It said right on there, it said that it was a *conservative investment* because the loan on the property, existing loan was like 52 percent and it was a new building, it had been built in 2006, *and there were going to be distributions of 7 percent*. The other thing was that the makeup of the tenants

²² CP at 118-119 [Emch Dec., Ex. A at 77:17-78:10].

²³ CP at 118 [Emch Dec., Ex. A at 78:1-10].

²⁴ CP at 119 [Emch Dec., Ex. A at 78:1-10].

²⁵ CP at 99-100 [Donnerstag Dec., ¶ 8].

²⁶ CP at 119 [Emch Dec., Ex. A at 78:11-20].

in the building was in the brochure, the small brochure, the five-page brochure, were businesses that were defense contractors. *That was a good argument, and also that it was very close to Quantico, the Quantico base, which is a – it was not going anyplace. It had been there for years.*²⁷

Appellants did not consult the Real Estate Respondents about DBSI North Stafford.²⁸ Rather, Mr. Roberts received enough information from DBSI to make an informed decision about Appellants' investment.²⁹ Mr. Roberts unequivocally testified that Appellants' decision to invest in DBSI North Stafford was based solely on information provided by DBSI – not the Real Estate Respondents:

Q. [D]id Mr. Donnerstag identify for you any specific DBSI property for your investment in a 1031 exchange?

A. *No.*

Q. Did anyone at CBRE identify [for] you a specific DBSI property or your investment and 1031 exchange?

A. *No.*

Q. So, neither Mr. Donnerstag nor CBRE specifically identified the DBSI North Stafford property as a replacement property for your 1031 exchange, correct?

A. *Yes, correct.*

Q. Did Mr. Donnerstag encourage you to purchase an interest in the DBSI North Stafford property specifically?

²⁷ CP at 120 [Emch Dec., Ex. A at 79:3-19].

²⁸ CP at 99-100 [Donnerstag Dec., ¶ 8].

²⁹ CP at 120-121 [Emch Dec., Ex. A at 79:24-80:2].

A. *No.*

Q. Did anyone at CBRE encourage you to purchase an interest in the DBSI North Stafford property?

A. *No.*

Q. You did not request any opinion or information about DBSI North Stafford from Mr. Donnerstag, correct?

A. *Correct, yes.*

Q. You did not request any opinion or information about DBSI North Stafford from anyone at CBRE, correct?

A. *Yes.*

Q. Mr. Rottman at DBSI, not Mr. Donnerstag, identified specific TIC investments for your consideration; is that right?

A. *Yes.*

Q. And you made the decision to invest in the DBSI North Stafford property after considering those possible investments on your own, correct?

A. *Yes.*

[...]

Q. So, Mr. Donnerstag made the introduction of DBSI and then he got out of the way and you communicated directly with DBSI, right?

A. *Yes.*³⁰

Moreover, Appellants did not even consider Mr. Donnerstag to be a “seller” of their interest in DBSI North Stafford:

Q. Mr. Donnerstag wasn’t the seller of the interest, he didn’t create, issue and sell the interest; is that right?

A. *No, he wasn't the seller.*

³⁰ CP at 158-159, 160 [Emch Dec., Ex. A at 165:4-166:14; 167:22-25].

[...]

Q. Mr. Donnerstag was not the actual seller, right? DBSI was the seller, correct?

A. So there's two questions there. *DBSI was the seller, yes, correct.*

Q. And Mr. Donnerstag was not the seller?

A. *No, Mr. Donnerstag was not the seller.*³¹

Nor did Appellants look to Mr. Donnerstag for help with evaluating their investment in DBSI North Stafford. As testified by Appellants, they did not ask the Real Estate Respondents to provide any information or conduct due diligence regarding DBSI North Stafford:

Q. You did not request any opinion or information about DBSI North Stafford from Mr. Donnerstag, correct?

A. *Correct, yes.*

Q. You did not request any opinion or information about DBSI North Stafford from anyone at CBRE, correct?

A. *Yes.*³²

In short, Mr. Roberts' testimony confirmed that the Real Estate Respondents played no role in the selection of DBSI North Stafford by Appellants or Appellants' decision to sign the transactional documents and invest in that property.³³

³¹ CP at 171 [Emch Dec., Ex. A at 180:8-22].

³² CP at 120 [Emch Dec., Ex. A at 79:3-19].

³³ Appellant Anne Roberts testified that she never spoke to Mr. Donnerstag about DBSI or DBSI North Stafford. (CP at 202, 203 [Emch Dec., Ex. B at 10:23-11:3, 12:19-23].) Mrs. Roberts' knowledge about DBSI and DBSI North Stafford came solely from the brochure provided by David Rottman or recounted by her husband. (CP at 202 [Emch Dec., Ex. B at 11:5-19]).

E. Appellants Did Not Consider Their TIC Investment A Security.

Neither Appellants nor Mr. Donnerstag believed that Appellants' purchase of a TIC interest from DBSI was a transaction in "securities."

Mr. Roberts testified:

Q: Your investment in North Stafford was not a security, correct?

A: *I didn't think of it as a security.*

Q: Because it was an investment in real estate?

A: *Yes.*³⁴

Similarly, Mrs. Roberts testified that Appellants' purchase of a TIC interest was an "investment in real estate," and that she did not consider it to be a securities investment.³⁵ Finally, Mr. Donnerstag did not believe that the sale of a TIC interest in real estate was a securities transaction, but rather a traditional real estate purchase.³⁶ Thus, only in the context of this lawsuit have Appellants turned to securities law to try to manufacture a theory of liability against the Real Estate Respondents for matters that were beyond their knowledge, control, and responsibility.

F. DBSI Provided Appellants A Comprehensive Private Placement Memorandum For DBSI North Stafford.

DBSI provided Appellants with a Confidential Private Placement Memorandum ("PPM") for DBSI North Stafford.³⁷ Mr. Roberts testified that he reviewed DBSI's PPM; that he had ample opportunity to review

³⁴ CP at 116 [Emch Dec., Ex. A at 58:17-25].

³⁵ CP at 112 [Emch Dec., Ex. B at 45:1-10].

³⁶ CP at 100 [Donnerstag Dec., ¶ 10].

³⁷ CP at 181, 261-348 [Emch Dec., Ex. A at 197:1-17; Ex. D].

the PPM; that he did not discuss the PPM with the Real Estate Respondents; and that he was not prevented from asking any questions about the terms of his investment.³⁸ DBSI's PPM explains the terms of the offering as follows:

- DBSI would acquire a Class "A" office building in Stafford County, Virginia for \$22,800,000.
- DBSI would convey the property to investors for a purchase price of \$28,040,000.
- The property would be encumbered by a \$14,820,000 bank loan, for which the investors would be jointly and severally liable.
- DBSI Leaseco, a wholly-owned subsidiary of DBSI, would lease the property from the investors on a triple-net basis for a term of 20 years.
- Base rent payable from DBSI Leaseco to the investors for the first 10 years would be \$925,400 per year and would increase to \$1,057,600 in year 11.
- DBSI Leaseco would be responsible for all costs of operating, managing, leasing and maintaining the Property, excluding Capital Expenses.³⁹

The PPM also disclosed 16 pages of "Risk Factors" that Appellants acknowledged in writing before investing in DBSI North Stafford.⁴⁰ These risks include, but are not limited to, the following:

- Leases representing 78% of the net rentable area of the Property *terminate within five years*.

³⁸ CP at 182 [Emch Dec., Ex. A at 198:5-19].

³⁹ CP at 262 [Emch Dec., Ex. D at p. 1; emphasis added].

⁴⁰ CP at 277-293 [Emch Dec., Ex. D at p. 16-32; emphasis added].

- The Seller will provide a rent guarantee for a period of *one year*.
- DBSI Housing Inc. and Douglas L. Swenson have provided a guaranty of the recourse obligations under the Loan.
- The *availability of financing and market conditions* may affect the ability of the Tenants in Common to refinance the Property.
- The Property will be *leveraged*, which increases the *risk of foreclosure*.
- The financial resources of DBSI Leaseco could be *insufficient* to satisfy its obligations under the Master Lease.
- The Tenants in Common will be *obligated to fund Capital Expenses*.
- Interests are *illiquid* and have limited *transferability*.
- The Price of the Interests was determined *arbitrarily*.
- There is *no public market* for the Interests.
- The Property is *not a diversified investment*.
- Each Tenant in Common will be dependent upon the other Tenants in Common to perform their contractual obligations under the Tenants in Common Agreement.

Mr. Roberts conducted his own due diligence and unequivocally testified that he knew of and assumed the risks of his purchase of the TIC interest.⁴¹

⁴¹ CP at 150-153, 181 [Emch Dec., Ex. A at 140:14-143:2, 197:1-17].

G. Appellants Signed Several Transactional Documents For Their Investment In DBSI North Stafford Without Consulting Real Estate Respondents.

Appellants signed several transactional documents that disclosed the specific terms, conditions, and risks of their investment in DBSI North Stafford, which Appellants conceded in their depositions that they read and understood.⁴² Appellants had the opportunity and ability to evaluate these documents with the assistance of legal, securities, and tax experts, if they so chose. The Real Estate Respondents did not receive these transactional documents and were not consulted by Appellants about them.

1. Letter of Intent.

On April 9, 2008, Appellants signed a Letter of Intent (“LOI”) for their investment in DBSI North Stafford.⁴³ Aria Asset Management was identified as the broker-dealer for the transaction and Michelle Brock was listed as the Registered Representative.⁴⁴ The LOI states that Appellants were entitled to a five-day “Due Diligence Period” during which time they could abandon their investment by not delivering the transactional documents or deposit to DBSI.⁴⁵ Michelle Brock signed the third page of the LOI, titled “Broker/Dealer Representations and Warranties,” wherein she confirmed that Appellants (1) met the standards established by DBSI, (2) have sufficient net worth and income to sustain the risks of their investment, and (3) that DBSI North Stafford was a suitable investment

⁴² CP at 193-195, 224 [Emch Dec., Ex. A at 221:20-223:16; Ex. B. at 74:2-18].

⁴³ CP at 350-352 [Emch Dec., Ex. E].

⁴⁴ CP at 350-352 [Emch Dec., Ex. E].

⁴⁵ CP at 350-352 [Emch Dec., Ex. E].

for Appellants.⁴⁶ The Real Estate Respondents were not consulted about the LOI.⁴⁷

2. Purchase Agreement and Escrow Instructions.

On April 10, 2008, Appellants signed a Purchase Agreement and Escrow Instructions for DBSI North Stafford.⁴⁸ Appellants read and understood the agreement and they had the opportunity to ask questions before signing it.⁴⁹ The Real Estate Respondents were not consulted about the Purchase Agreement⁵⁰, which contains the following risk disclosures and acknowledgments:

- “Buyer represents and warrants that it is relying solely upon its own inspections, investigations and analyses of the property in entering into this Agreement[.]” (§6.2.)
- “Buyer is a sophisticated and experienced real estate investor and will rely entirely upon its own independent investigation and review of the Property.” (§6.2.)
- “Buyer acknowledges that it has received, read and fully understands the [PPM] and all attachments and exhibits thereto. Buyer acknowledges that it is basing its decision to invest in the Interest on the Memorandum all exhibits and attachments thereto and Buyer has relied only on the information contained in said materials and has not relied upon any representations made by any other person.” (§6.5.1.)
- “Buyer can bear and is willing to accept the economic risk of losing its entire investment in the Interest.” (§6.5.2.)

⁴⁶ CP at 350-352 [Emch Dec., Ex. E].

⁴⁷ CP at 99-100 [Donnerstag Dec., ¶ 8].

⁴⁸ CP at 187-188, 356-370 [Emch Dec., Ex. A at 215:12-216:18; Ex. G].

⁴⁹ CP at 187-188, 356-370 [Emch Dec., Ex. A at 215:12-216:18; Ex. G].

⁵⁰ CP at 99-100 [Donnerstag Dec., ¶ 8].

- “Buyer ... has no need for liquidity in this investment.” (§6.5.2.)
- “Buyer has had the opportunity to ask questions of, and received answers from, [DBSI and its affiliates] concerning the Property and the terms and conditions for the Offering of the Interest, and to obtain any additional information deemed necessary to verify the accuracy of the information contained in the [PPM].” (§6.5.5.)
- “Buyer’s investment in the Interest will be highly illiquid and may have to be held indefinitely.” (§6.5.6.)
- “Buyer is fully aware that the Interest has not been registered with Securities and Exchanges Commission in reliance on the exemptions specified in Regulation D ... pursuant to the Securities Act of 1933[.]” (§6.5.7.)⁵¹

Appellants were under no obligation, and certainly none imposed by the Real Estate Respondents, to accept the terms, risks, and conditions of an investment in DBSI North Stafford. They did so by their own accord. These risk disclosures, which Appellants acknowledged and accepted, are fatal to Appellants’ claim for securities fraud.

3. Loan Assumption Agreement.

On April 10, 2010, Mr. Roberts signed a Loan Assumption Agreement for Appellants’ investment in DBSI North Stafford.⁵² Appellants agreed to assume all obligations and agreements regarding the financing of DBSI North Stafford.⁵³ Appellants warranted that they had “personal knowledge of all terms and conditions of the Loan Documents

⁵¹ CP at 359-362 [Emch Dec., Ex. G at pp. 4-7.].

⁵² CP at 190, 385-390 [Emch Dec., Ex. A at 218:4-22; Ex. I].

⁵³ CP at 190, 385-390 [Emch Dec., Ex. A at 218:4-22; Ex. I].

[for DBSI North Stafford]” and that DBSI had “no obligation or duty to provide any information to [Appellants] regarding and terms and conditions of the Loan Documents.”⁵⁴ The Real Estate Respondents were not asked to review the Loan Assumption Agreement or comment on the consequences of a possible default by DBSI.⁵⁵ As with each of the transactional documents for DBSI North Stafford, Appellants were not obligated to accept the terms and risks of their investment. Appellants chose to do so voluntarily.

4. Tenants In Common Agreement.

On April 14, 2008, Appellants signed a Tenants in Common (“TIC”) Agreement, wherein they consented to purchase their interest in DBSI North Stafford as tenants-in-common.⁵⁶ Appellants consented to the management of DBSI North Stafford by a DBSI affiliate, DBSI Leaseco, pursuant to a Master Lease agreement.⁵⁷ All operating authority for DBSI North Stafford was entrusted to DBSI Leaseco, but the agreement also obligated the TIC owners, including Appellants, to remain financially liable for DBSI North Stafford: *“Each Tenant in Common will be responsible for a pro rata share ... of any amounts due from the Landlord under the Master Lease, and, following termination of the Master Lease, any future costs needed in connection with the ownership, operation and maintenance of the Property, as determined by all of the Tenants in*

⁵⁴ CP at 190, 385-390 [Emch Dec., Ex. A at 218:4-22; Ex. I].

⁵⁵ CP at 191 [Emch Dec., Ex. A at 219:18-20].

⁵⁶ CP at 372-383 [Emch Dec., Ex. A at 216:21-217:16; Ex. H].

⁵⁷ CP at 372-383 [Emch Dec., Ex. A at 216:21-217:16; Ex. H].

*Common or as required by current or future mortgage lenders.*⁵⁸ Appellants could have had the TIC Agreement reviewed by their attorneys and anyone else, if they so chose.⁵⁹ The Real Estate Respondents were not asked to review or comment on the TIC Agreement.⁶⁰

5. Due Diligence Completion Acknowledgment.

On April 22, 2008, Mr. Roberts signed a Due Diligence Completion Acknowledgment on behalf of Appellants for DBSI North Stafford.⁶¹ The Acknowledgment states in relevant part:

Buyer hereby represents and warrants to Seller that Buyer has had the opportunity to ask questions of and receive answers from the Seller and from DBSI Housing Inc., the Lessee under the Master Lease, and all of their officers, employees, affiliates, advisors, legal counsel and accountants concerning the Project ... and the terms and conditions of the Property. Buyer has been provided with all materials and information requested by either Buyer or other representing Buyer, including any information requested to verify any information furnished by Seller, and is completely satisfied with the results of this real estate due diligence activity.

Mr. Roberts never discussed the Due Diligence Completion Acknowledgment with the Real Estate Respondents.⁶²

⁵⁸ CP at 193-195 [Emch Dec., Ex. A at 221:21-223:16].

⁵⁹ CP at 188-189, 372-383 [Emch Dec., Ex. A at 216:21-217:16; Ex. H].

⁶⁰ CP at 99-100, 195 [Emch Dec., Ex. A at 223:4-16; Donnerstag Dec., ¶ 8].

⁶¹ CP at 191-194, 392 [Emch Dec., Ex. A at 219:22-222:20; Ex. J].

⁶² CP at 195 [Emch Dec., Ex. A at 223:1-16].

H. There Was Nothing Inevitable Or Even Anticipatable About Appellants' Investment In DBSI North Stafford.

There was nothing inevitable or even anticipatable about Appellants' purchase of an interest in DBSI North Stafford after Mr. Donnerstag put Appellants in contact with DBSI. There were multiple factors beyond the control and outside the knowledge of the Real Estate Respondents that led to Appellants' investment in DBSI North Stafford. Each of the factors discussed below represented a "fork in the road," where Appellants had sole control to decide whether to proceed with their investment in DBSI North Stafford.

1. Appellants Engaged An Attorney About Their Investment in DBSI North Stafford.

Appellants engaged an attorney from K&L Gates about their investment in DBSI North Stafford before making their investment.⁶³ The attorney-client privilege prevented testimony about these communications, but the undisputed fact is that Appellants had access to, and actually received, legal advice about DBSI North Stafford before committing to the investment.⁶⁴ If Appellants' attorney had not resolved their concerns about DBSI North Stafford, the investment likely would not have occurred. Appellants' attorney was not named in this lawsuit.

⁶³ CP at 142-144, 152-153, 194 [Emch Dec., Ex. A at 118:8-120:11; 142:10-143:2; 222:22-25].

⁶⁴ CP at 142-144, 152-153, 194 [Emch Dec., Ex. A at 118:8-120:11; 142:10-143:2; 222:22-25].

2. Only “Accredited Investors” Could Invest In DBSI North Stafford.

Investments in DBSI North Stafford were limited to “accredited investors,” *i.e.*, those meeting a wealth threshold.⁶⁵ Appellants presented a financial statement to Michelle Brock of Aria Asset Management, who signed an acknowledgment stating that Appellants met the wealth criteria for investing in DBSI North Stafford.⁶⁶ Appellants’ ability to satisfy the “accredited investors” requirement was beyond the control or influence of the Real Estate Respondents.

3. Appellants’ Investment in DBSI North Stafford Required Lender Approval.

To invest in DBSI North Stafford, Appellants were required to assume a pro rata share of the non-recourse debt encumbering the property.⁶⁷ Assumption of the DBSI debt required lender approval, about which the Real Estate Respondents were unaware and powerless to control.⁶⁸ In reality, lender approval was almost denied for Appellants due to outstanding collection reflected on their credit report.⁶⁹ Thus, there was nothing certain about whether Appellants would receive lender approval.

⁶⁵ CP at 268-269 [Emch Dec., Ex. D at pp. 7-8].

⁶⁶ CP at 186-187, 352, 354 [Emch Dec., Ex. A at 205:22-206:13; Exs. F and E at p. 3].

⁶⁷ CP at 225, 385 [Emch Dec., Ex. B at 77:13-24; Exs. I at p. 1].

⁶⁸ CP at 225, 385 [Emch Dec., Ex. B at 77:13-24; Exs. I at p. 1].

⁶⁹ CP at 196-197 [Emch Dec., Ex. A at 229:11-230:25].

4. Appellants Had Access To Securities Professionals To Conduct Due Diligence On DBSI North Stafford.

Appellants had access to securities professionals to consult about DBSI North Stafford, including brokers at Merrill Lynch.⁷⁰ Nothing prevented Appellants from using these resources to conduct due diligence about their investment. Appellants discussed their 1031 exchange with their tax accountant, but declined to conduct further due diligence about DBSI or DBSI North Stafford.⁷¹

5. Brad Roberts Would Have Prevented Appellants From Investing In DBSI North Stafford If He Had Read The Private Placement Memorandum.

Appellants' son, Brad Roberts, is an experienced professional and insurance broker who played a key role in Appellants' investment in DBSI North Stafford.⁷² Brad Roberts received and was present at the signing of the transactional documents by his parents, and Appellants relied on their son's opinions in evaluating their investment options.⁷³ Brad Roberts had the ability and opportunity to ask any questions about DBSI or DBSI North Stafford.⁷⁴

Appellants' securities fraud claim involves an alleged misrepresentation about the price paid for DBSI North Stafford by the investors (\$28 million) versus the acquisition price paid by DBSI (\$22

⁷⁰ CP at 180 [Emch Dec., Ex. A at 191:5-15].

⁷¹ CP at 164-165 [Emch Dec., Ex. A at 171:24-172:6].

⁷² CP at 233 [Emch Dec., Ex. C at 23:8-17].

⁷³ CP at 234-235, 239-241, 249-250 [Emch Dec., Ex. C at 29:15-30:14, 55:9-21; 56:10-57:10; 109:18-110:14].

⁷⁴ CP at 237-238 [Emch Dec., Ex. C at 48:20-49:12].

million).⁷⁵ Brad Roberts testified that he would have prevented his parents from investing in DBSI North Stafford had he known that DBSI was selling the property at a mark-up of \$6 million.⁷⁶ In reality, the first page of the PPM for DBSI North Stafford – which was provided to Appellants by DBSI and was available to Brad Roberts – prominently disclosed to Appellants this very fact, stating that “[t]he Company intends to acquire the Property from an unrelated third-party seller in the first quarter of 2008 for total consideration of \$22,800,000, and will convey it to the Purchasers for \$28,040,000.”⁷⁷ In other words, Brad Roberts could have, and would have, prevented his parents from investing in DBSI North Stafford had he reviewed the first page of the PPM.⁷⁸

I. Appellants Paid A Fee To Mr. Donnerstag and CBRE.

At the conclusion of Appellants’ investment in DBSI North Stafford, Respondent CBRE was paid a fee by Appellants of \$72,856, which was deducted from Appellants’ purchase price for DBSI North Stafford and which represents about 1.7% of Appellants’ \$4,175,019 investment in DBSI North Stafford, and a portion of the fee was paid to Mr. Donnerstag.⁷⁹ At the request of Appellants, it was classified as a consulting fee.⁸⁰

⁷⁵ CP at 8 [Amended Complaint at p. 8.]

⁷⁶ CP at 252-256 [Emch Dec., Ex. C at 130:10-134:10].

⁷⁷ CP at 262 [Emch Dec., Ex. D at p. 1].

⁷⁸ CP at 252-256 [Emch Dec., Ex. C at 130:10-134:10].

⁷⁹ CP at 100 [Donnerstag Dec., ¶ 11].

⁸⁰ CP at 100 [Donnerstag Dec., ¶ 11].

IV. PROCEDURAL HISTORY

A. Appellants Sued Real Estate Respondents For Alleged Violations Of The Washington State Securities Act.

On July 2, 2010, Appellants filed their Complaint for Violations of Washington Securities Act in the Pierce County Superior Court. Appellants filed their Amended Complaint for Violations of Washington Securities Act (“Amended Complaint”) on July 12, 2010.⁸¹

B. The Real Estate Respondents Moved To Dismiss Appellants’ Amended Complaint.

On September 17, 2010, the Real Estate Respondents moved to dismiss Appellants’ Amended Complaint.⁸² On December 9, 2010, the trial court declined to grant the pleading motion, noting that the Court had to presume all facts alleged in the complaint to be true and could even consider hypothetical facts supporting Appellants’ claims.⁸³ The trial court was required to and gave Appellants the benefit of the doubt and allowed the case to proceed to discovery. Nonetheless, at the hearing on the Real Estate Respondents’ motion the trial court appropriately framed Appellants’ case against Mr. Donnerstag as follows: “*Wouldn’t this scenario be more like the neighbor telling you [that] you should go buy this rug at Macy’s, it is a really good place to buy rugs, they have great*

⁸¹ CP at 1-13.

⁸² CP at 14-42.

⁸³ Respondents’ Supplemental Report of Proceedings, Filed May 8, 2012 [December 3, 2010 hearing transcript on Respondents’ Motion to Dismiss].

*rugs. Wouldn't that be what [the Real Estate Respondents'] role would be in this?"*⁸⁴

C. The Trial Court Entered Summary Judgment After A Year Of Discovery.

On November 14, 2012, the Real Estate Respondents moved for summary judgment on Appellants' claims under the Washington State Securities Act for (1) "misrepresentations and omissions," (2) "sale of unregistered security," and (3) "unregistered broker-dealers and salespersons."⁸⁵ In their opposition brief, Appellants withdrew their third cause of action, and the trial court heard oral argument on the remaining two claims on December 9, 2011.⁸⁶ Having considered the parties' submissions, the trial court orally granted the Real Estate Respondents' motion in its entirety, as follows:

Discovery has taken place, and there has been quite a bit of materials that have been provided to the Court. *I don't think that Mr. Donnerstag is a seller of securities.* I am going to grant the motion for summary judgment. I think he was working with the Roberts to find an investment for them to avoid the tax liability. He had offered a couple of different options. They were not taken. They had gone to the seminar, heard about this DBSI, contacted the Roberts, let them know, contacted DBSI. The two came together. He got a fee out of it, a pretty substantial fee. *I think that everything that was done, all the decisions that were made by the Roberts, were made based upon the information*

⁸⁴ Respondents' Supplemental Report of Proceedings, Filed May 8, 2012 [December 3, 2010 hearing transcript on Respondents' Motion to Dismiss].

⁸⁵ CP at 393-426.

⁸⁶ CP at 427-499.

*provided to them by DBSI. I don't find that Mr. Donnerstag or CBRE were security sellers.*⁸⁷

Final judgment was entered in favor of the Real Estate Respondents on January 13, 2012.⁸⁸

D. Appellants Dismissed Their Claims Against The Remaining Defendants.

Appellants never pursued their claims against any of the other defendants in the trial court.⁸⁹ In fact, Appellants dismissed their claims against Aria Asset Management, Michelle E. Brock, Julie Brock Herzog and Daniel W. Brock on April 25, 2012.⁹⁰ Appellants moved to dismiss defendant Merriah Harkins on October 24, 2011, for which the court entered an Order of Dismissal on May 24, 2012.⁹¹

V. ARGUMENT

A. Legal Standard Governing Review Of Summary Judgment.

This Court reviews a motion for summary judgment *de novo*, construing all facts and reasonable inferences from those facts in the light

⁸⁷ CP at 529-531. The trial court also denied a motion to compel that was filed by Appellants in conjunction with their opposition to Respondents' motion for summary judgment. The denial of Appellants' motion to compel has not been appealed. *See also* Report of Proceedings [Verbatim Report of Proceedings, December 9, 2011 at 22:21-23:11].

⁸⁸ CP at 545-547.

⁸⁹ CP at 510.

⁹⁰ Respondents' Supplemental Designation of Clerk's Papers, Filed June 1, 2012 [Appellants' April 3, 2012 Motion to Dismiss Defendants Aria Asset Management, Michelle E. Brock, Julie Brock Herzog and Daniel W. Brock; April 25, 2012 Order Granting Motion to Dismiss Defendants Aria Asset Management, Michelle E. Brock, Julie Brock Herzog and Daniel W. Brock].

⁹¹ Respondents Supplemental Designation of Clerk's Papers, Filed June 1, 2012 [October 25, 2011 Motion for Dismissal of Merriah J. Harkins Pursuant to CR 41(a)(1)(B); May 24, 2012 Order of Dismissal of Merriah J. Harkins Pursuant to CR 41(a)(1)(B)].

most favorable to the non-moving party. *See Simpson Tacoma Kraft Co. v. Dep't of Ecology*, 119 Wn.2d 640, 646, 835 P.2d 1030 (1992); *Michak v. Transnation Title Ins. Co.*, 148 Wn.2d 788, 794, 64 P.3d 22 (2003). Summary judgment will be affirmed if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. CR 56(c); *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). The Court may affirm summary judgment on any grounds supported by the record. *See Allstot v. Edwards*, 116 Wn. App. 424, 430, 65 P.3d 696 (2003).

B. Appellants' Securities Claims Fail Because The Real Estate Respondents Were Neither "Sellers" Nor "Control Persons" For Appellants' Investment In DBSI North Stafford.

The parties are in agreement that Appellants' two claims under the Washington State Securities Act ("WSSA") fail unless Appellants can prove that the Real Estate Respondents acted as "sellers" or "control persons" for the sale of securities. *See* RCW 21.20.430 (imposing civil liability when (1) a person sells or offers to sell a security and (2) when a person controls a seller or buyer). This is the sole issue presented to this Court for review: did the Real Estate Respondents act as "sellers" or "control persons"? The undisputed facts presented to the trial court firmly establish that the Real Estate Respondents did not play the role of a "seller" or "control person" for Appellants' investment. For this reason, the trial court's entry of summary judgment and final judgment should be affirmed.

1. The Real Estate Respondents Were Not “Sellers” Of DBSI North Stafford.

The Real Estate Respondents could only be liable as “sellers” of Appellants’ investment in DBSI North Stafford if their acts were proven to be a “substantial contributive factor” in the sales transaction. *See Haberman v. Wash. Pub. Power Supply Sys.*, 109 Wn.2d 107, 131, 750 P.2d 254 (1987); *Hines v. Data Line Systems, Inc.*, 114 Wn.2d 127, 148, 787 P.2d 8 (1990). The *Haberman* court identified three factors for determining whether a defendant’s conduct was a substantial contributive factor in the sales transaction:

- (1) the number of other factors which contribute to the sale and the extent of the effect which they have in producing it;
- (2) whether the defendant's conduct has created a force or series of forces which are in continuous and active operation up to the time of the sale, or has created a situation harmless unless acted upon by other forces for which the actor is not responsible; and
- (3) lapse of time.⁹²

⁹² A defendant’s status as a “seller” is generally a question of fact. *Haberman*, 109 Wn.2d at 131-132, 750 P.2d 254 (1987). Here, however, there is no dispute as to what actions were taken by Mr. Donnerstag in relation to Appellants’ investment in DBSI North Stafford: he simply informed Appellants about DBSI and, at most, he received a fee from Appellants. The legal consequences of these actions, *i.e.*, whether such remote, limited and tangential conduct can give rise to “seller” liability, is an appropriate question for summary judgment.

Id., 109 Wn.2d at 131-32, 744 P.2d 1032.⁹³ The Real Estate Respondents do not remotely satisfy the criteria for a “seller.”

First, numerous factors contributed to Appellants’ investment in DBSI North Stafford that were created or existed independent of the Real Estate Respondents. These factors indicate that there was nothing inevitable or even anticipatable about Appellants’ investment in DBSI North Stafford following Appellants’ introduction to DBSI. These other factors are summarized below:

- DBSI presented multiple offerings to Appellants to select for their 1031 exchange which were not discussed with Mr. Donnerstag until after Appellants had committed to their investment.⁹⁴
- Appellants had to qualify as “accredited” investors and receive lender-approval before being permitted to invest in DBSI North Stafford.⁹⁵
- Appellants had an ample opportunity to conduct due diligence on DBSI North Stafford and Appellants signed a Due Diligence Completion Acknowledgment as part of their investment.⁹⁶
- Appellants engaged legal counsel from K&L Gates about DBSI North Stafford, who apparently approved

⁹³ “[C]ourts applying the substantial contributing factor test find liability almost exclusively where actual title passes from the ‘seller’ or where the ‘seller’ is directly involved in the sale process.” *Brin v. Stutzman*, 89 Wn. App. 809, 830, 951 P.2d 291 (1998) (paraphrasing Barbara L. Schmidt, Note, Expanding Seller Liability Under the Securities Act of Washington, 63 Wash. L Rev. 769, 783 (1988)).

⁹⁴ CP at 118-119 [Emch Dec., Ex. A at 77:17-78:10].

⁹⁵ CP at 262 [Emch Dec., Ex. Ex. D at p. 1].

⁹⁶ CP at 165, 191-194, 392 [Emch Dec., Ex. A at 172:3-9; 219:22-222:20; Ex. J].

of Appellants' investment or, at a minimum, found nothing objectionable.⁹⁷

- Brad Roberts assisted Appellants in selecting and evaluating DBSI North Stafford for their 1031 exchange, and Brad Roberts testified that he would have prevented the investment had he read the PPM.⁹⁸
- Appellants signed multiple transactional documents for their investment in DBSI North Stafford that disclosed the risks of their investment – the same risks that Appellants now claim would have prevented their investment had they been disclosed.⁹⁹
- Tax law dictated the deadline for Appellants to identify a replacement property for their 1031 exchange, not the Real Estate Respondents. (*See* 26 U.S.C. § 1031.)

Second, the “substantial contributive factor test only applies to persons ‘who have the attributes of a seller.’” *Brin*, 89 Wn. App. at 829, 951 P.2d 291. The “absence of any real promotional conduct on the part of [the defendant] supports ... [the] conclusion” that the defendant was not a substantial contributive factor. *Shinn v. Thrust IV, Inc.*, 56 Wn. App. 827, 785 P.2d 285, 299 (1990). Under this standard, Respondent Donnerstag cannot be deemed a seller because he was not aware of the specific DBSI offerings being evaluated or selected by Appellants until they had already committed to their investment.¹⁰⁰ Appellants’ Amended Complaint expressly states that DBSI “created, issued and sold” the TIC

⁹⁷ CP at 142-144, 152-153, 194 [Emch Dec., Ex. A at 118:8-120:11; 142:10-143:2; 222:22-25].

⁹⁸ CP at 234-235, 249-250, 252-256 [Emch Dec., Ex. C at 29:25-30:14, 109:18-110:14, 130:10-134:10].

⁹⁹ CP at 193-194 [Emch Dec., Ex. A at 221:22-222:25].

¹⁰⁰ CP at 158-162 [Emch Dec., Ex. A at 165:4-169:13].

interest purchased by Appellants.¹⁰¹ Further, Appellants cannot argue that Mr. Donnerstag had the attributes of a seller when Bob Roberts, himself, did not believe that Mr. Donnerstag sold Appellants' their interest DBSI North Stafford.

Q: Mr. Donnerstag wasn't the seller of the interest, he didn't create, issue and sell the interest; is that right?

A: *No, he wasn't the seller.*

[...]

Q: Mr. Donnerstag was not the actual seller, right? DBSI was the seller, correct?

A: *So there's two questions there. DBSI was the seller, yes, correct.*

Q: And Mr. Donnerstag was not the seller?

A: *No, Mr. Donnerstag was not the seller.*¹⁰²

In sum, the Real Estate Respondents were not “sellers” of Appellants’ interest in DBSI North Stafford. Mr. Donnerstag was not a seller, and because CBRE is only alleged to have liability derivative of the actions of Mr. Donnerstag or under the doctrine of respondeat superior, there is no basis for claims against CBRE. *See Stewart v. Estate of Steiner* (“*Steiner*”), 122 Wn. App. 258, 264, 93 P.3d 922 (2004), *review denied* 153 Wn.2d 1022, 108 P.3d 1229 (2005) (finding no employer liability under theory of respondeat superior where employee was cleared of liability for securities fraud).¹⁰³

¹⁰¹ CP at 3[Amended Complaint, ¶ 8].

¹⁰² CP at 171 [Emch Dec., Ex. A at 180:8-22; objections omitted].

¹⁰³ Appellants’ “seller” argument also defies common sense. To recover on their securities claims, Appellants must tender back the securities to the “seller.” RCW 21.20.430(1). In other words, to recover the consideration paid to DBSI, Appellants must tender their TIC interest back to DBSI, a bankrupt entity, not to Respondents.

2. The Real Estate Respondents Were Not “Control Persons” For The Sale Of DBSI North Stafford.

Appellants’ WSSA claims also fail under a theory of “control person” liability, which requires proof: (1) that the defendant “actually participated in (*i.e.*, exercised control over) the operations of the [selling] corporation in general”; and (2) “that the defendant possessed the power to control the specific transaction or activity upon which the primary violation is predicated, but [the plaintiff] need not prove that this later power was exercised.” *Herrington v. Hawthorne*, 111 Wn. App. 824, 835-36, 47 P.3d 567, 573 (2002) (quoting *Metge v. Baehler*, 762 F.2d 621, 631 (8th Cir. 1985)); *see also Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000) (a plaintiff must adequately allege a primary violation of securities laws).

Mr. Roberts testified that the Real Estate Respondents exercised no control or authority over DBSI, Aria Asset Management, Michelle Brock, or any other persons involved with Appellants’ investment in DBSI North Stafford.¹⁰⁴ In the absence of such evidence there can be no control

Respondents cannot rescind or accept tender of Appellants’ TIC interest that they did not create, issue or sell. *See Windswept Corp. v. Fisher*, 683 F.Supp. 233, 239 (W.D.Wash. 1988) (dismissing WSSA claims because plaintiffs failed to allege “the tender of the securities back to the seller”) (emphasis added); *Garretson v. Red-Co, Inc.*, 9 Wn. App. 923, 929, 516 P.2d 1039 (1973) (plaintiff must tender security “to those responsible for selling it to him”) (emphasis added). In fact, Appellant Roberts testified that “there’s no plan[]” to transfer Appellants’ TIC to anyone and that Appellants would “wait and see” whether the market improves before deciding whether to sell their interest. (CP at 155-157 [Emch Dec., Ex. A at 155:5-157:3]).

¹⁰⁴ CP at 166-170 [Emch Dec., Ex. A at 175:10-179:9]. Neither of the Real Estate Respondents has “seller” liability for Appellants’ investment in DBSI North Stafford, and, as consequence, there can be no control person liability for either of the Respondents with regard to the other’s conduct. *Herrington*, 111 Wn. App. at 835-36, 47 P.3d 567.

person liability. *See Howard v. Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000) (a plaintiff must adequately allege a primary violation of securities laws.)

3. The Real Estate Respondents Were Not Involved In The “Sale” Of DBSI North Stafford.

Finally, the Real Estate Respondents must have participated in the “sale” of Appellants’ interest in DBSI North Stafford for the WSSA to apply. The “sale” of a security must include “a mutual agreement to exchange a security,” while an “offer to sell” requires “a unilateral intent to exchange a security.” *Kinney v. Cook*, 159 Wn.2d 837, 844, 154 P.3d 206 (2007) (plaintiffs’ payment on a note that they were legally obligated to pay did not implicate a sale, offer to sell, or disposition of a security, and the WSSA did not apply). The Real Estate Respondents had no agreement to exchange an interest in DBSI North Stafford to Appellants, nor did the Real Estate Respondents have a unilateral intention to enter into such a transaction. Appellants’ testimony is clear that DBSI was the seller of interests in DBSI North Stafford, and that the Real Estate Respondents did not participate in that transaction.¹⁰⁵

4. The Real Estate Respondents’ Receipt Of A Fee Does Not Give Rise To Seller Liability.

Appellants devote much of their opening brief to discussing the Real Estate Respondents’ receipt of a referral fee (valued at 1.7% of Appellants’ investment) at the closing of DBSI’s sale of DBSI North

¹⁰⁵ CP at 166-171 [Emch Dec., Ex. A at 180:8-22; 175:10-179:9].

Stafford to Appellants. However, Appellants supplied no authority to the trial court, and none in their opening brief, linking the receipt of a referral fee to “seller” or “control person” liability. This is because the receipt of a fee is not one of the considerations for seller liability identified by the *Haberman* Court and its progeny, where the conduct of the defendant *leading and contributing to* the sale was the critical consideration – not the post-sale receipt of a fee. *Haberman, supra*, 109 Wn.2d at 131-32.¹⁰⁶

Similarly, Appellants’ focus on whether the sharing of a referral fee is permitted under applicable *real estate* law is a red herring. The only claims asserted by Appellants are for violations of the Washington State Securities Act, and Appellants have offered no authority (and none is known to exist) for the proposition that the sharing of a referral fee by a real estate agent has any bearing on liability under the WSSA.

¹⁰⁶ Respondents’ receipt of a post-sale referral fee, standing alone, also does not make them “broker-dealers” or “salespersons.” *See, e.g., Salamon v. Teleplus Enterprises, Inc.*, 2008 WL 2277094, *8 (D.N.J.2008) (quoting *Cornhusker Energy Lexington, LLC v. Prospect St. Ventures*, 2006 WL 2620985, *6 (D.Neb.2006)); *Salamon v. CirTran Corp.*, 2005 WL 3132343, *2–3 (D.Utah 2005) This is because the act of “[m]erely bringing together the parties to transactions, even those involving the purchase and sale of securities, is not enough” to warrant broker registration under federal securities laws. *See Apex Global Partners, Inc. v. Kaye/Bassman Intern. Corp.*, 2009 WL 2777869, *3 (N.D.Tex.2009). Rather, the evidence must demonstrate involvement at “key points in the chain of distribution,” such as participating in the negotiation, analyzing the issuer’s financial needs, discussing the details of the transaction, and recommending an investment. *Cornhusker*, 2006 WL 2620985 at *6. Indeed, even if a defendant receives a fee “in proportion to the amount of the sale” – *i.e.*, a percentage of the total payment rather than a flat fee, the SEC “has been willing to find that there was no need for registration[.]” *See* DAVID A. LIPTON, 15 BROKER–DEALER REGULATION § 1:18 (2011).

C. Appellants' Misrepresentation And Omissions Claim Fails As A Matter Of Law.

The Real Estate Respondents presented evidence in their briefing and at oral argument that Appellants' claim for misrepresentation and omission (RCW 21.20.010) fails as a matter of law. Appellants did not appeal the trial court's entry of judgment on this basis, but this Court may affirm the trial court's ruling on any grounds supported by the record. *See Allstot, supra*, 116 Wn. App. at 430.

RCW 21.20.010 states:

It is unlawful for any person, in connection with the offer, sale or purchase of any security, directly or indirectly: (1) [t]o employ any device, scheme, or artifice to defraud; (2) [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading; or (3) [t]o engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

RCW 21.20.010. Appellants' misrepresentation and omission claim fails because (1) the Real Estate Respondents cannot be liable for statements made by third parties over which they exercised no control, such as DBSI; and (2) the Appellants signing of the transactional documents for their investment precludes a finding of "reliance." These are additional and independent grounds for affirming the trial court's final judgment.

1. Liability Does Not Extend To Misrepresentations By Third Parties.

RCW 21.20.010 imposes liability only when a person makes a material statement or a statement that is misleading absent a material fact. *See* RCW 21.20.010. The statute does not impose liability for false or misleading statements made by *someone else*. Washington cases clearly require that the party sought to be held liable must make a misrepresentation or omission. *See, e.g., Shinn*, 56 Wn. App. at 851 (to prevail, “the Shinns had to show that Thrust ... made an untrue statement of material fact or omitted a material fact in connection with the transaction.”); *Hines*, 114 Wn.2d at 134-35 (“RCW 21.20.010 makes it unlawful for a seller to make a material misrepresentation or omission in connection with the sale of a security.”); *Burgess v. Premier Corp.*, 727 F.2d 826, 833 (9th Cir.1984) (for liability under the WSSA for misrepresentation, “some liability-producing action by [defendants] themselves is required.”)

At their depositions, Appellants alleged that Mr. Donnerstag made one statement about DBSI, as the TIC promoter, that was a misrepresentation: “[A] DBSI investment [is] safe, conservative.”¹⁰⁷ All other alleged misrepresentations and omissions listed in Appellants’ Amended Complaint and discovery responses originated with, and are solely attributable to, DBSI and its prospectus for DBSI North Stafford.¹⁰⁸

¹⁰⁷ CP at 118-119, 121 [Emch Dec., Ex. A at 77:2-6, 78:3-10, 80:5-9].

¹⁰⁸ CP at 173-174, 202, 205 [Emch Dec., Ex. A at 182:23-184:1, Ex. B at 11:2-19, 14:1-3].

Even if Mr. Donnerstag described DBSI to Appellants as “safe” or “conservative,” which is denied, such a statement is not actionable for the reasons discussed below. The Real Estate Respondents simply cannot be held liable for DBSI’s statements, for which the Real Estate Respondents had no control or responsibility.¹⁰⁹

2. Appellants’ Signing Of The Transactional Documents For DBSI North Stafford Preclude A Finding Of Reasonable Reliance.

To establish a claim under RCW 21.20.010 for securities fraud, Appellants were required to prove that they reasonably relied on the misrepresentations at issue. *See, e.g., Hines, supra*, 114 Wn.2d at 134, 787 P.2d 8; *In re Metropolitan Sec. Litig.*, 532 F.Supp.2d 1260, 1301-1302 (E.D. Wash. 2007); *Steiner, supra*, 122 Wn. App. at 264. In *Steiner*, the Court affirmed the dismissal of WSSA claims on summary judgment, holding that that the plaintiff did not reasonably rely on oral misrepresentations made to the defendant because the plaintiff had executed a written “non-reliance” agreement warranting that he “relied solely on a written offering memorandum and did not rely on any oral representations in making his investment decision.” *Steiner*, 122 Wn. App.

¹⁰⁹ Appellants may point to another red herring, a prior appraisal of the Virginia property performed by an East Coast office of CBRE. Appellants did not even allege Mr. Donnerstag knew of or had any involvement with that appraisal. Moreover, it is black letter real estate law that the existence or knowledge of such an appraisal, even if unfavorable, cannot be imputed to Mr. Donnerstag simply because he works for the same employer. RCW 18.86.100 (no knowledge is imputed between real estate licensees). To hold otherwise would create new case law contrary to statute, undermine the foundation of real estate brokerage law, and make the job of real estate brokers impossible. Moreover, the appraisal is immaterial and irrelevant because the appraised value of the property was clearly disclosed to Appellants in DBSI’s transactional documents. CP at 262.

at 261, 93 P.3d 919; *see also* *Feinman v. Schulman Berlin & Davis*, 677 F.Supp. 168, 170 (S.D.N.Y. 1988) (“Reliance on statements which are directly contradicted by the clear language of the offering memorandum ... cannot be a basis for a federal securities fraud claim.”); *Kennedy v. Josephthal & Co.*, 814 F.2d 798, 804-05 (1st Cir.1987) (court affirmed summary judgment for defendants where offering memorandum’s warnings made any reliance unjustified as a matter of law).

In their pleading and discovery responses, Appellants identified certain statements and omissions that they attribute to the Real Estate Respondents. The Real Estate Respondents deny those allegations, but in any event, they are legally deficient. At most, they are alleged oral statements or omissions that are directly contradicted by the extensive, written disclosures that Appellants received, reviewed, and acknowledged before purchasing an interest in DBSI North Stafford. *See Steiner*, 122 Wn. App. at 264 (affirming the summary judgment dismissal of WSSA claims).

Appellants concede that Mr. Donnerstag had no knowledge about the DBSI TIC offering that Appellants were purchasing until after the transactional documents had been executed.¹¹⁰ Thus, it is not possible that Mr. Donnerstag knew, or even could have known, about the risks involved in DBSI North Stafford. Appellants’ alleged statements or omissions are not actionable because Appellants could not have reasonably relied on

¹¹⁰ CP at 166-171, 173-175 [Emch Dec., Ex. A at 180:8-22; 175:10-179:9, 182:23-184:1].

them. Under the holding in *Steiner*, Appellants are precluded from establishing reasonable reliance for their misrepresentation and omission claim.

D. Appellants' Claim For Sale Of Unregistered Security Fails As A Matter Of Law.

Appellants do not assign error to the trial court's consideration of the exemption bases for dismissing their claim for sale of an "unregistered security" in violation of RCW 21.20.140, but the Court may consider the Real Estate Respondents' arguments on appeal. *See Allstot, supra*, 116 Wn. App. at 430.

RCW 21.20.140 prohibits the offer or sale of securities in Washington unless the security has been registered or is exempt. RCW 21.20.140 (the offer or sale of securities in Washington is not prohibited if the "security or transaction is exempted under RCW 21.20.310 or 21.20.320"). Appellants' unregistered security claim fails for reasons discussed above, as well as because the sale of DBSI North Stafford to Appellants, assuming that it occurred, was exempt from registration as both a "sale[] not involving a public offering" and an "isolated transaction."

First, Appellants purchased their interest in DBSI North Stafford through a private placement offering.¹¹¹ As stated in the PPM, the sale of such interests "is being made in reliance on an exemption from the registration requirements of the Securities," specifically Regulation D as

¹¹¹ CP at 261-348[Emch Dec., Ex. D].

promulgated under the federal Securities Act, which permits private placement offerings. *See* 17 C.F.R. §230.501 *et seq.* Even assuming *arguendo* that the Real Estate Respondents acted as a “seller” of a “security,” which they did not, the Real Estate Respondents cannot be liable for selling exempt securities.

Second, under RCW 21.20.320(1), “[a]ny isolated transaction ... whether effected through a broker-dealer or not” is exempt from RCW 21.20.140. *See Sherman v. Lunsford*, 44 Wn. App. 858, 865, 723 P.2d 1176 (1986) (an investment contract was an “isolated transaction” and thus exempt from WSSA); *Yeakel v. Ralls*, 9 Wn. App. 133, 134, 511 P.2d 65 (1973) (a person “who ‘brokers’ an isolated securities transaction ... [need not] plead and prove that he is a licensed securities salesman or licensed broker-dealer in order to sue for his commission”). The Real Estate Respondents did not sell Appellants their interest in DBSI North Stafford, but even if it were determined that a “sale” occurred, it was an isolated transaction. The Real Estate Respondents are not in the business of selling securities.¹¹² Nor did Mr. Donnerstag sell, or offer to sell, any interests in DBSI North Stafford (or any TIC offering) to any clients.¹¹³ Under RCW 21.20.320(1), any conduct attributed to the Real Estate Respondents must be construed as an isolated transaction for which there can be no liability under RCW 21.20.140.

¹¹² CP at 100 [Donnerstag Dec., ¶ 10].

¹¹³ CP at 99, 178 [Donnerstag Dec., ¶ 5; Emch Dec., Ex. A at 189:5-8].

VI. CONCLUSION

For the foregoing reasons, the trial court's entry of summary judgment and final judgment in favor of the Real Estate Respondents should be affirmed.

RESPECTFULLY SUBMITTED this 1st day of June, 2012.

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IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

CB RICHARD ELLIS, INC., a Delaware corporation, ARIA ASSET
MANAGEMENT, LLC, a Nevada limited liability company, MICHELLE
L. BROCK, JAMES N. DONNERSTAG, MERRIAH J. HARKINS,
JULIE HERZOG BROCK and DANIEL W. BROCK, Respondent,

v.

VIEWPOINT – NORTH STAFFORD LLC, a Delaware limited liability
company, VIEWPOINT AT SHOREWOOD LLP, a Washington limited
liability partnership, ROBERT S. ROBERTS and ANNE E. ROBERTS,
Appellants.

FILED
COURT OF APPEALS
DIVISION II
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STATE OF WASHINGTON
BY *[Signature]* SECURITY

APPEAL FROM THE SUPERIOR COURT
FOR PIERCE COUNTY COURT
The Honorable Edmund Murphy, Judge
Cause No. 10-2-10785-7

CERTIFICATE OF SERVICE

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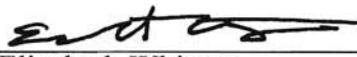
The undersigned declares that on June 1, 2012, I caused to be served:

1. Brief Of Real Estate Respondents CB Richard Ellis, Inc. and James N. Donnerstag;
2. CB Richard Ellis, Inc. and James Donnerstag's Supplemental Designation Of Clerk's Papers; and
3. Certificate of Service as follows:

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I declare under penalty of perjury under the laws of the State of Washington, that the foregoing is true and correct.

Executed in Seattle, Washington this 1st day of June, 2012.


Elizabeth Whitney