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COURT OF APPEALS  
DIVISION II

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COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

BY 

DEPUTY

OF THE STATE OF WASHINGTON

No. 43018-5-I

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,

Appellants

v.

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

Respondents.

APPELLANTS' REPLY BRIEF

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## I. INTRODUCTION

As pointed out in Respondents' Brief at pages at page 28, the sole stated reason for the trial court grant of summary judgment was:

I don't find that Mr. Donnerstag or CBRE were security sellers<sup>1</sup>.

Appellants will first address the "seller" issue.

In there motion for summary judgment, Respondents raised other issues – issues not mentioned by the trial court in granting summary judgment – but raised in Respondents' Motion for Summary Judgment. Appellants will address these alternative theories as well.

## II. ARGUMENT

### **A. Donnerstag was a "seller" under the Washington State Securities Act**

Respondent Donnerstag solicited the Roberts' purchase of a DBSI tenant-in-common ("TIC") security in exchange for a \$72,856.25 referral fee – an amount which was about 3.5% of the \$2,000,000 cash portion of the Roberts' purchase price. Donnerstag is liable to plaintiffs because he is a "seller" in an unlawful securities transaction to plaintiffs, that is,

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<sup>1</sup> Verbatim Report of Proceedings, December 9, 2011 at 22:9 - 22:10.

Donnerstag was a person who offered or sold that security to the Roberts.

Several Washington opinions hold that whether someone is a seller is “necessarily a question of fact.” *Haberman v. Washington Public Power Supply System*, 109 Wn2d 107, 132, 744 P2d 1032 (1987). *See also In re Metropolitan Securities Litigation*, 532 F Supp2d 1260 (ED Wash 2007).

In effect, the trial court held that a person who gets a \$72,856.25 referral fee for convincing an investor to listen to the issuer’s sales pitch cannot be a “seller” as a matter of law. As the court said in *Haberman*:

The hunter who seduces the prey and leads it to the trap he has set is no less guilty than the hunter whose hand springs the snare. We find that the activity of the corporate defendant's agent is tantamount to that of a "seller" within the liberal remedial spirit of the securities laws.

The *Haberman* court cast a broad net which can scoop within the definition of “seller” a wide range of actors in a securities sale: attorneys, accountants, investment advisors, engineers and other professionals. *Haberman, supra* at 118. *See also In re Metropolitan* (accountants and underwriters can be “sellers” under the Washington securities law).

“Whether a defendant’s conduct was a substantial contributive factor is necessarily a question of fact.” *Haberman, supra* at 132. *See also Simmonds v. Strauss*, 1999 Lexis 10863 (WD Wa 1999) (seller status question of fact where defendant had a substantial economic interest in

promoting the stock).

Even when the Washington Supreme Court later carved out from “seller” status those attorneys whose role was limited to “the usual drafting and filing services provided by counsel,” the Court made much of the fact “there is no evidence to indicate Perkins Coie had any personal contact with any of the investors or was in any way involved in the solicitation process” and that Perkins Coie “was not the catalyst in the sales transaction.” *Hines v. Data Line Systems, Inc.*, 114 Wn2d 127, 149-150, 787 P2d 8 (1990). Of course in the Roberts transaction, Donnerstag did have contact with the Roberts, was involved in the solicitation process and was the catalyst in the sales transaction. “But for” Donnerstag’s solicitation of the Roberts, no securities transaction would have taken place.

In soliciting the Roberts to purchase the DBSI securities in exchange for a \$72,856.25 fee, Donnerstag falls squarely within the definition of a “seller” under the WSSA. At the very least, it is a question of fact whether Donnerstag is a “seller.”

#### **B. Respondents’ brief contains several red herrings**

Respondents’ brief contain a number of red herrings.

**1. Sophistication.** For example, nearly half of Respondents’ brief is

devoted to argument that the Roberts are not entitled to protections under the WSSA from misrepresentations and omission because of their sophistication. But even sophisticated investors are entitled to the truth about the investments they are about to make. As one court has said:

The trial Judge found that Plaintiff's claim of misrepresentations by the Defendant was not supported by credible evidence and Plaintiff does not challenge this finding on appeal. The sins of the Defendant against Rule 10b-5 which are before the Court on appeal are ones of omission rather than commission. The trial Judge specifically found that there were 14 facts which the Defendant failed to disclose to the Plaintiff. However, in view of the sophistication and financial acumen of the Plaintiff, his knowledge of the fact that a registration statement had been filed and a prospectus was available upon his request, and his failure to look further into the matter all led the trial Court to conclude that Defendant was not in violation of 10b-5. We choose not to take issue with the finding that Appellant was a sophisticated investor. **We hold that Appellant was entitled to judgment as a matter of law because sophisticated investors, like all others, are entitled to the truth.** *Stier v. Smith*, 473 F2d 1205, 1207 (5th Cir 1973) (emphasis added).

**2. Experience in real estate.** Respondents exaggerate Bob Roberts' knowledge of the real estate industry.

For example, even though the DBSI North Stafford TIC property was a commercial office building, Respondents assert as a defense that Mr. Roberts has "worked in the real estate industry for over 50 years<sup>2</sup>."

Mr. Roberts testified that he had worked in the appraisal department for

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<sup>2</sup> Respondents' Brief, pg 6.

Union Bank for about 14 months prior to 1956<sup>3</sup>; and that he had been a residential real estate salesman and broker between approximately 1957 and 1980 when he allowed his licenses to lapse<sup>4</sup>. That employment terminated over 30 years ago. Mr. Roberts owned some lots in a mobile home park and was involved in Viewpoint LLP that built and operated a single apartment building which they sold in 2007<sup>5</sup>. Bob Roberts is the beneficiary of a trust established by his mother that owns a commercial property in Encino, California<sup>6</sup>.

That is the sum total of Mr. Roberts 50 years of experience in real estate. None of this experience involved interests of the sort sold in this managed tenant in common program. Experience in buying or selling real estate is not relevant to being able to evaluate a complex security in the form of an investment contract that just happens to involve real estate.

Mr. Roberts was 81 years old. Just because Roberts had sold residential

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<sup>3</sup> CP 110 - 111 ((Ex A to Defendants' Motion for Summary Judgment: Bob Roberts' depo 31:1 - 32:11)

<sup>4</sup> CP 112 - 113 (Ex A to Defendants' Motion for Summary Judgment: Bob Roberts' depo 45:4 - 46:24)

<sup>5</sup> CP 122 -123 (Ex A to Defendants' Motion for Summary Judgment: Bob Roberts' depo 85:4 - 86:7)

<sup>6</sup> CP 114 (Ex A to Defendants' Motion for Summary Judgment: Bob Roberts' depo 49:11 - 49:25)

real estate more than 30 years ago does not give Respondents and those on whose behalf they sold securities license to use material misrepresentations and omissions to sell securities to the Roberts.

**3. Advise.** Respondents also make much of the fact that Mr. Roberts talked to an attorney at K&L Gates about the DBSI investment. What Respondents leave out of the picture is that (1) Mr. Roberts offered to disclose the entire conversation if Respondents would not assert that to be a waiver of the attorney client privilege for all purposes<sup>7</sup>; and (2) that the conversation with the attorney at K&L Gates was limited to one subject<sup>8</sup>. Having chosen to know nothing about the actual content of the conversation, Respondents resort to speculation about what might have been discussed.

**4. Knowledge of specific property.** Respondents also make much of the fact that Donnerstag *claims* in his Declaration that he did not learn which specific property the Roberts were purchasing until after the Roberts/DBSI transaction closed, but do not explain why this fact is important to determining why he would not be a “seller” when he received a substantial

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<sup>7</sup> CP 141 - 143 (Ex A to Defendants’ Motion for Summary Judgment: Bob Roberts’ depo 117:2 - 119:25)

<sup>8</sup> CP 144 (Ex A to Defendants’ Motion for Summary Judgment: Bob Roberts’ depo 120: 7 - 120:11)

fee for the sale. It is also contradicted by Donnerstag's deposition testimony.

[MR. MCGAUGHEY] Okay. At some point prior to the time that the Roberts transaction closed, did you learn the identity of the property that they were buying an interest in?

[MR. DONNERSTAG] Yes.

Q. Who did you learn that from?

A. I believe David Rottman.

Q. And tell me, how did you learn it from him, telephone call, email?

A. Email<sup>9</sup>.

There is at least a factual issue as to when Mr. Donnerstag learned of the identity of the Roberts' investment.

Query: Would it make any difference if a Merrill Lynch salesperson bird-dogs one of his existing clients to invest in a class of securities (say a family of mutual funds), then passes that investor on to another salesperson to close the sale. If the first salesperson receives a share of the commission does it make any difference to the "seller" analysis *when* the first salesperson learns the identity of the specific mutual fund purchased?

**6. Knowledge that the DBSI TIC interest was a security.** At page 14 of Respondents' Brief, they say: "Neither Appellants nor Mr. Donnerstag believed that Appellants' purchase of a TIC interest from DBSI was a

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<sup>9</sup> CP 475 - 476 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 64:20 - 65:4).

transaction in 'securities.'”

So what? “Scienter is not required in an action for fraud or misrepresentation under The Securities Act of Washington.” *Aspelund v. Olerich*, 56 Wn App 477, 482, 784 P2d 179 (1990).

“The [securities] statute does not require the plaintiff to prove that the defendant "culpably participated" in the alleged violation.” *Hines v. Data Line Systems, Inc.*, 114 Wn2d 127, 137, 787 P2d 8 (1990). A salesman need not know a TIC interest is a security in order to be held liable for violating the securities law in connection with that sale.

Respondents’ argument is also undercut by the fact that Mr. Donnerstag testified that his contact at DBSI was David Rottman, who is identified as with DBSI Securities on the business card from Mr. Donnerstag’s files<sup>10</sup>. Donnerstag and Rottman discussed the referral fee that Donnerstag with receive.

[MR. MCGAUGHEY]: Did you discuss a referral fee with Mr. Rottman?

[MR. DONNERSTAG]: Just that there would be a referral fee.

Q. So you did discuss it with him; is that correct?

A. Yes<sup>11</sup>.

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<sup>10</sup> CP 505 (Ex 2D to Plaintiff’s Response to Defendants’ Motion for Summary Judgment: Donnerstag depo Ex 42).

<sup>11</sup> CP 466 (Ex 2A to Plaintiff’s Response to Defendants’ Motion for Summary Judgment: Donnerstag depo 44:7 - 12).

Donnerstag discussed getting a referral fee for the Roberts' transaction with Rothman, whose business card identified him as working for a securities broker.

**C. CBRE was a person who controlled a “seller”**

Although the trial court verbally stated that it was granting summary judgement on behalf of Donnerstag and CB Richard Ellis (“CBRE”) because they were not “sellers”, the Roberts actually sought to hold CBRE liable because it was a “control” person of a seller – a control person of Mr. Donnerstag. RCW 21.20.430(3) makes liable:

Every person who directly or indirectly controls a seller or buyer liable under subsection (1) or (2) above . . .

Mr. Donnerstag is a commercial real estate broker who works for defendant CB Richard Ellis<sup>12</sup>. The Roberts engaged Donnerstag and CBRE to find a replacement property for them that would qualify as a 26 USC §1031 exchange. Donnerstag recommended the DBSI property as that exchange property. Donnerstag and CBRE split the referral fee. CBRE is a person who controlled Donnerstag in connection with that sale.

**D. Respondents' assertion that the offering was exempt from registration is not supported by the record**

In their Motion for Summary Judgment, Respondents assert that the Roberts' transaction was exempt from registration because it was an

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<sup>12</sup> CP 98 (Declaration of James Donnerstag, attached to Defendants' Motion for Summary Judgment).

isolated transaction under RCW 21.20.320(1)<sup>13</sup>. In their appellate Response Brief, Respondents raise for the first time that the transaction was exempt from registration pursuant to under a *federal* exemption – Regulation D. Respondents offer no explanation why a *federal* exemption would have any relevancy to a non-registration claim under the Washington State Securities Act.

Respondents have the burden of proof on whether the transaction is exempt from registration. RCW 21.20.540 provides:

In any proceeding under this chapter, the burden of proving an exemption, an exception from a definition, or a preemption of a provision of this chapter is upon the person claiming it.

*See also State v. Mahmood*, 45 Wn App 200, 724 P2d 1021 (1986).

**1. Washington Isolated Transaction Exemption.** Respondents claim that the sale of the DBSI security to the Roberts was exempt from registration (but not the anti-fraud provisions of the securities act) based on the isolated transaction exemption is set forth in RCW 21.20.320:

(1) Any isolated transaction, or sales not involving a public offering, whether effected through a broker-dealer or not; or any transaction effected in accordance with any rule by the director establishing a nonpublic offering exemption pursuant to this subsection where registration is not necessary or appropriate in the public interest or for the protection of investors.

Respondents would have the court believe that the sale of a company's stock to 100 purchasers would be exempt from registration if the issuing company used 100 different sales people to make the 100 sales. The

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<sup>13</sup> CP 423 (Defendants Memorandum in Support of Their Motion for Summary Judgment, 25:9 - 25:21).

registration requirements of the securities laws are not so easily circumvented.

In an issuer transaction – a security sold on behalf of the issuer as opposed to resales in the after-market by persons unaffiliated with the issuer – the focus is on how many sales are made on behalf of the issuer, not on how many sales each individual salesperson causes to occur.

WAC 460-44A-050<sup>14</sup> sets out a guidelines for the isolated transaction

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<sup>14</sup> (1) An "isolated transaction" within the meaning of RCW 21.20.320(1) includes:

(a) Subject to the limitation of (b) of this subsection, any sale of an outstanding security by or on behalf of a person not in control of the issuer or controlled by the issuer or under common control with the issuer and not involving a distribution;

(b) Any sale satisfying the requirements of (a) of this subsection that is effected through a broker-dealer, provided that it is one of not more than three such transactions effected by or through the broker-dealer in this state during the prior twelve months;

(c) Any sale of an outstanding security by or on behalf of a person in control of the issuer or controlled by the issuer or under common control with the issuer if the sale is effected pursuant to:

(I) Brokers' transactions in accordance with section 4(4) of the Securities Act of 1933 and Rule 144 thereunder; or

(ii) Any other transaction not effected through a broker-dealer and not involving a distribution, if the sale, including any other sales of securities of the same class during the prior twelve months inside or outside this state by the person, does not exceed 1% of the outstanding shares or units of that class; or

(d) Any sale of a security by or on behalf of an issuer that is one of not

exemption. Subsection (1)(a), (1)(b) and (1)( c ) of that rule all deal with resale transactions after the original distribution. Only Subsection (1)(d) deals with original sales by the issuer itself – the situation present in this case. Subsection (1)(d) provides:

(d) Any sale of a security by or on behalf of an issuer that is one of not more than three such transactions inside or outside this state during the prior twenty-four months.

The focus of this exemption is on how many sales DBSI made of its TIC securities, not on how many securities were sold by each individual salesperson. To qualify for this exemption, DBSI cannot have sold more than 3 such TIC securities in the 24 month period which encompasses the Roberts' transaction.

The Respondents did not offer *any* evidence to the trial court – let alone uncontroverted evidence – of how many TIC securities were sold by DBSI during this period.

After the these securities transactions, there were at least 26 TIC owners

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more than three such transactions inside or outside this state during the prior twenty-four months.

An exemption provided by (a), (b), ( c ), or (d) of this subsection shall not be available for any offering made in a manner inconsistent with the limitations set forth in (a), (b), ( c ), or (d) of this subsection, respectively.

(2) "Sales not involving a public offering," within the meaning of RCW 21.20.320(1), is interpreted by the director in a manner consistent with section 4(2) of the federal Securities Act of 1933 and Securities and Exchange Commission Securities Act Release No. 4552.

in the DBSI North Stafford property<sup>15</sup>. Thus there were clearly more than three securities sales by DBSI (although the burden of proving the exact number falls on Respondents, not on the Roberts). There were also many more TIC securities in other DBSI properties sold contemporaneously by DBSI, which may also be counted in determining whether the isolated transaction exemption applies.

The Respondents have not met their burden of proving that the isolated transaction exemption applies to the Roberts' transaction.

**2. Federal Regulation D.** For the first time on appeal, Respondents' raise the issue that the Roberts transaction was exempt from Washington registration pursuant to federal Regulation D. This exemption was not raised in Respondents' Motion for Summary Judgment below. They cannot raise it now.

But even if Respondents could raise Regulation D for the first time now, they still have the burden of proving the availability of this exemption. They have offered no such proof other than the offering materials claim that the offering was exempt pursuant to Regulation D. The registration requirement cannot be so easily evaded.

Respondents have not offered any evidence that the many technical requirements necessary to qualify for the federal Regulation D exemption were met, nor any argument why a federal exemption would have any

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<sup>15</sup> CP 508 (Declaration of Mark Williams, attached as Ex 3 to Plaintiffs' Response to Defendants' Motion for Summary Judgment).

relevance to a non-registration claim under the WSSA.

**E. Liability under the securities law extends to non-speakers**

Respondents assert at page 38 of their Brief that “RCW 21.20.010 imposes liability only when a person makes a material statement or a statement that is misleading absent a material fact.” There is no support for that assertion.

More importantly, the Roberts are suing Respondents pursuant to RCW 20.21.430 – not RCW 21.20.010 (which is a criminal statute). RCW 20.21.430 provides in pertinent part:

Any person, who offers or sells a security in violation of any provisions of RCW 21.20.010, 21.20.140 (1) or (2), or 21.20.180 through 21.20.230, is liable to the person buying the security from him or her . . . .

There is no requirement that the person liable “offers or sells” the security because their own act causes the violation. For liability to exist, the sale must only have been sold in violation of one of the WSSA subsections.

Respondents’ argument ignores the real world where an issuer and its attorneys prepare the selling prospectus, the underwriters employ salespeople to ferret out potential securities purchasers who then receive the prospectus either from the issuer or a clerk at the underwriter. If Respondents are correct, the salesperson would never be liable because the salesperson did not write the prospectus. That is not the law.

Respondents’ argument also ignores the statutory language about omissions. The Roberts Second Amended Complaint alleges 15 material

omissions<sup>16</sup>. An omission is an omission. The Roberts would not have lost their savings if **any** seller of the DBSI securities, including Donnerstag, had told them the material facts that were omitted. But since no seller told the Roberts about these material facts, the Roberts invested and all sellers are liable for these omissions.

One of the cases relied upon by Respondents – *Stewart v. Estate of Steiner*, 122 Wn App 258, 93 P3d 919 (2004) – begins with these words:

A purchaser of securities establishes liability for violation of the Washington State Securities Act ("WSSA") by proving that **the seller and/or others made material misrepresentations or omissions** and the purchaser relied on those misrepresentations or omissions. (emphasis added) *Id* at 258 (citing *Hines v. Data Line Systems, Inc.*, 114 Wn2d 127, 787 P2d 8 (1990)).

This case acknowledges that the material misrepresentation may be made by “others.”

Sellers of securities have an obligation to exercise due diligence to verify the accuracy and completeness of statements being made by the issuer to solicit sales. *In re Metropolitan Securities Litigation*, 532 F Supp2d 1260 (ED Wash 2007).

Case law holds that sellers can be liable for the misrepresentations of others. In addition to the untruthful statements made by Donnerstag personally, the DBSI securities were sold by means of a prospectus containing other material misrepresentations. Donnerstag is liable for these misrepresentations as well.

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<sup>16</sup> CP 7 - 9 (Amended Complaint 7:24 - 9:7)

With respect to omissions, every seller who omits the disclosure of material facts is liable.

**F. The transactional documents do not preclude reliance**

Respondents' rely on the court's decision in *Stewart v. Estate of Steiner*, 122 Wn App 258, 108 P3d 1229 (2004), to argue the non-reliance clause in the transaction documents precludes Appellants as a matter of law from relying on the mis-representations and omissions alleged in this case. In *Stewart*, the court held that a purchaser of securities was unable to establish reasonable reliance based on a seller's oral misrepresentations or omissions because the subscription agreement provided that the purchaser has relied solely on the information contained in the Offering Memorandum and has not relied on any oral representation, warranty or information in connection with the offering.

The non-reliance clause in this case is as follows:

Buyer acknowledges that it is basing its decision to invest in the interest on the Memorandum and all exhibits and attachments thereto and Buyer has relied only on the information contained in said materials and has not relied on any representations made by any other person<sup>17</sup>.

Three points. Many of the allegations of misrepresentations set out in Paragraph 20 of the Amended Complaint<sup>18</sup> are misrepresentations contained in the Memorandum itself. The non-reliance clause would not preclude an action for these misrepresentations.

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<sup>17</sup> CP 360

<sup>18</sup> CP 6 - 7 (Amended Complaint 6:8 - 7:23)

Second, Paragraph 21 of the Amended Complain alleges 15 material omissions<sup>19</sup>. By its own terms, the non-reliance clause only applies to “representations”, not to omissions.

Third, the ruling of the court in the *Stewart* case does not create a hard and fast rule. In *Helenius v. Chelius*, 131 Wn App 421, 441-442, 120 P3d 954 (2005), the court made it clear that there was a balancing test and set forth the 8 factors to be considered.

In *Jackvony*<sup>20</sup>, the court set forth eight factors a court should consider to determine whether a party reasonably relies on a representation. These factors include:

(1) the sophistication and expertise of the plaintiff in financial and securities matters; (2) the existence of long standing business or personal relationships; (3) access to the relevant information; (4) the existence of a fiduciary relationship; (5) concealment of the fraud; (6) the opportunity to detect the fraud; (7) whether the plaintiff initiated the stock transaction or sought to expedite the transaction; and (8) the generality or specificity of the misrepresentations. *Jackvony*, 873 F.2d at 416.

The *Jackvony* court concluded the investor could not reasonably rely on alleged misrepresentations where the written agreement expressly stated it superseded all previous written and oral understandings.

In *Stewart*, this court adopted the *Jackvony* factors to decide whether reliance is reasonable and held that a non-reliance clause does not as a matter of law necessarily preclude reasonable reliance.

In this case at least four of the eight factors favor finding reasonable reliance on Respondents’ oral representations.

**(1) The sophistication and expertise of the plaintiff in financial and**

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<sup>19</sup> CP 7 - 9 (Amended Complaint 7:24 - 9:7)

<sup>20</sup> *Jackvony v. Riht Financial Corp.*, 873 F2d 411 (1<sup>st</sup> Cir 1989)

**securities matters.** In the *Stewart* case, Dr. Stewart was described as "... a sophisticated investor, one who has read both offering memoranda and subscription agreements of this general type in prior investments in which he has been involved." Mr. Roberts is not sophisticated in financial and securities matters. While he has some experience in real estate, there is no showing that he is sophisticated in financial and securities matters in the manner that Dr. Stewart was. These tenant in common investments were not simple real estate transactions. They were highly complex securities transactions with risks far different than a normal real estate deal.

**(2) The existence of long standing business or personal relationships.** Mr. Roberts had known Mr. Donnerstag since they were in college at UCLA in the early 1950's. He and Mr. Donnerstag saw each other at parties, funerals and various affairs after college and Mr. Donnerstag acted as exclusive leasing agent for Mr. Roberts' mother's trust or estate property in Encino, California<sup>21</sup>.

**(3) Access to the relevant information.** CBRE had access to the actual appraisal on the subject property.

**(4) The existence of a fiduciary relationship.** A real estate agent is a fiduciary and has the duty to exercise the utmost good faith and fidelity toward his principal in all matters falling within the scope of his **employment.**

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<sup>21</sup> CP 479 - 480 (Ex 2A to Plaintiff's Response to Defendants' Motion for Summary Judgment: Donnerstag depo 81:6 - 82:25)

**(5) Concealment of the fraud.** The existence of the appraisal was never disclosed to the purchaser.

**(6) The opportunity to detect the fraud.** CBRE performed the appraisal and had every opportunity to detect the fraudulent concealment.

**(7) Whether the plaintiff initiated the stock transaction or sought to expedite the transaction.** Mr. Donnerstag brought this investment to Appellants<sup>22</sup>. Donnerstag encouraged Bob Robert to purchase the DBSI tenant in common investment and told them “why would you want to pay the government anything in taxes when you can purchase an exchange property?”<sup>23</sup>

**(8) The generality or specificity of the misrepresentations.** Mr. Donnerstag knew that Appellants wanted a safe investment and he told Mr. Roberts that this was a safe, conservative investment<sup>24</sup>.

In this case the allegations of misrepresentations and omissions of material fact include both oral misrepresentations and misrepresentations and omissions in the offering materials. Of particular note is the fact that while the offering materials disclose the price at which the real estate is being sold to the investors, and the price at which DBSI purchased the

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<sup>22</sup> CP 482 - 484 (Ex 2A to Plaintiff’s Response to Defendants’ Motion for Summary Judgment: Donnerstag depo 112:24 - 114:4)

<sup>23</sup> CP 500 (Ex A to Defendants’ Motion for Summary Judgment: Bob Roberts’ depo 111:23 - 111:25)

<sup>24</sup> CP 118 (Ex A to Defendants’ Motion for Summary Judgment: Bob Roberts’ depo 77:2 - 77:9)

property, the offering materials did not disclose that CBRE appraised the property in question and that the appraised value was less than both the selling price to the investors and the price DBSI paid for the property.

The other material misrepresentations contained in the offering materials likewise are not obviated by the “non reliance” clause because Stewart looks only at misrepresentations outside the offering materials and does not apply to misrepresentations or omissions contained within the offering materials.

### **III. CONCLUSION**

The trial court did not address any issue except whether or not it believed that Mr. Donnerstag and CBRE would be a “Seller” under Washington case law as expressed in the Haberman decision. Once the court made up its mind on that issue there was no reason for it to consider anything else at all. The court should reverse the trial court and rule that people like Mr. Donnerstag who round up investors for a fee are subject to the WSSA as sellers.

Respectfully submitted this 29<sup>th</sup> day of June, 2012.

By:   
Richard M. Layne, WSBA #9325  
Of Attorneys for Appellants Viewpoint – North  
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Robert S. Roberts and Anne Roberts.

1 COURT OF APPEALS  
2 DIVISION II  
3 OF THE STATE OF WASHINGTON  
4 No. 43018-5-I

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

10 Appellants

11 v.

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

15 Respondents.  
16

17 \_\_\_\_\_  
18 **DECLARATION OF SERVICE OF APPELANT'S**  
19 **REPLY BRIEF**  
20 \_\_\_\_\_

21 I, the undersigned, declare that I am employed by the Law Office of Richard M. Layne, I  
22 am over the age of 18 years, am not a party to the above entitled litigation, and I am competent to  
23 be a witness herein.

24 On June 29, 2012, I served a true and correct copy of the following documents in the  
25 above captioned case:  
26

