

IN THE SUPREME COURT OF OHIO

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| CYNTHIA BOYD, et al. | : | |
| | : | On Order of Certification of Question of |
| Petitioner, | : | State Law from the Sixth Circuit Court of |
| | : | Appeals Case No. |
| v. | : | |
| | : | |
| KINGDOM TRUST, et al. | : | Case No. 2017-1336 |
| | : | |
| Respondent, | : | |

**MERIT BRIEF OF PETITIONERS ON CERTIFIED QUESTION FROM SIXTH
CIRCUIT COURT OF APPEALS**

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TABLE OF CONTENTS

| | Page |
|--|------|
| TABLE OF AUTHORITES | iii |
| STATEMENT OF FACTS | 1 |
| A. The Allegations Against PENSICO | 1 |
| B. The Allegations Against Kingdom Trust | 3 |
| ARGUMENT | 4 |
| <u>The Certified Question From The Sixth Circuit</u> Does Ohio Rev. Code Ann §1707.43 impose joint and several liability on a person who, acting as the custodian of a self-directed IRA, purchased – on behalf and at the direction of the owner of the self-directed IRA – illegal securities? | |
| | 4 |
| <u>Proposition of Law No. 1</u> Purchasing illegal securities on behalf of the owner of a self directed IRA is sufficient to create liability under ORC §1707.43 because the plain language of the statute provides liability for anyone who aids or participates <i>in any way</i> in the sale of illegal securities | |
| | 4 |
| <u>Proposition of Law No. 2</u> The procedural posture of this case and the additional allegations contained in the Complaint further underscore the appropriate response to the certified question is affirmative..... | |
| | 10 |
| CONCLUSION..... | 13 |
| CERTIFICATE OF SERVICE | 14 |
| APPENDIX | |
| <u>Appx. Page</u> | |
| Order Certifying Question of Law to The Supreme Court of Ohio (August 18, 2017) | 1 |
| Order Certifying Question of Law to The Supreme Court of Ohio (September 13, 2017) | 7 |
| Entry and Order Granting PENSICO’s Motion to Dismiss the Class Action Complaint For Violations of The Ohio Securities Act, O.R.C. §1707.01 <i>et seq.</i> (DOC. 10) | 13 |

| | |
|---|----|
| Entry and Order Granting Kingdom Trust’s Motion to Dismiss Plaintiffs’ Complaint (DOC. 13) | 21 |
|---|----|

| | |
|---|----|
| Judgment in a Civil Action (December 9, 2016) | 22 |
|---|----|

CONSTITUTIONAL PROVISIONS; STATUTES:

| | |
|----------------------------------|----|
| Ohio Revised Code §1707.43 | 23 |
|----------------------------------|----|

| | |
|-----------------------------------|----|
| Ohio Revised Code §1707.431 | 24 |
|-----------------------------------|----|

TABLE OF AUTHORITIES

Page(s)

CASES

| | |
|---|-------------|
| <i>Appleton v. First Nat'l Bank of Ohio</i> , 62 F.3d 791 (6 th Cir. 1995) | 7 |
| <i>Bell v. Beckwith</i> , 114 B.R. 475 (N.D. Ohio 1989)..... | 7 |
| <i>Boland v. Hammond</i> , 144 Ohio App.3d 89 (4 th Dist. 2001) | 6 |
| <i>Boomershine v. Lifetime Capital, Inc.</i> , 2 nd Dist. Montgomery No. 22179, 2008-Ohio-14..... | 11 |
| <i>Brilliance Audio, Inc. v. Haight's Cross Commc'n, Inc.</i> , 474 F.3d 365 (6 th Cir. 2007) | 7 |
| <i>Bronaugh v. R.&E. Dredging Co.</i> , 16 Ohio St. 2d 35 (1968)..... | 5 |
| <i>Callahan v. Class One, Inc.</i> 58 Ohio St. 3d 76 (1991)..... | 7 |
| <i>Cobb v. Contract Transport, Inc.</i> , 452 F.3d 543 (6 th Cir. 2006) | 6 |
| <i>Coley v. Lucas Cnty.</i> , 799 F.3d 530 (6 th Cir. 2015) | 10 |
| <i>DirecTV Inc. v. Treesh</i> , 487 F.3d 471 (6 th Cir. 2007) | 10 |
| <i>Federated Management Co. v. Cooper & Lybrand</i> , 137 Ohio App. 3d 366 (10 th Dist. 2000) | 5, 6, 8, 11 |
| <i>Gerlach v. Wergowski</i> , 65 Ohio App.3d 510(1 st Dist. 1989) | 6 |
| <i>Hardin v. Reliance Trust Co.</i> , N.D. Ohio No. 1:04-cv-02079, 2006 U.S. Dist. LEXIS 70822 (September 28, 2006) | 8, 9, 10 |
| <i>Hild v. Woodcrest Assoc.</i> , 59 Ohio Misc. 13, 391 N.E. 2d 1047 (C.P. 1977)..... | 11 |

| | |
|--|------|
| <i>In re Columbus Skyline Securities, Inc.,</i> 74 Ohio St. 3d 495 (1996)..... | 4, 5 |
| <i>In re Nat’l Century Fin. Enterprises, Inc. Inv.,</i> 755 F.Supp.2d 857 (S.D. Ohio 2010) | 5 |
| <i>Johnson v. Church of the Open Door,</i> 179 Ohio App.3d 532, 2008-Ohio-6054, 902 N.E.2d 1002 (9 th Dist.) | 6 |
| <i>Limited, Inc. v. C.I.R.,</i> 286 F.3d 324 (6 th Cir. 2002) | 7 |
| <i>Miller v. Franklin Cnty. Childrens Servs.,</i> S.D. Ohio No. 2:15-cv-179, 2016 U.S. Dist. LEXIS 7698 (Jan. 22, 2016)..... | 10 |
| <i>Nickels v. Koehler Mgmt. Corp.,</i> 541 F.2d 611 (6 th Cir. 1976) | 6 |
| <i>Passa v. City of Columbus,</i> S.D. Ohio No. 2:03-cv-81, 2007 U.S. Dist. LEXIS 78905 (Oct. 24, 2007) | 6 |
| <i>Perkowski v. Megas Corp.,</i> 55 Ohio App.3d 234 (9 th Dist. 1990) | 6 |
| <i>Pittsburgh & Conneaut Dock Co. v. Director, Office of Workers' Compensation Programs,</i> 473 F.3d 253 (6 th Cir. 2007) | 7 |
| <i>Ryan v. Ambrosio,</i> 8 th Dist. Cuyahoga No. 91036, 2008-Ohio-6646 | 6 |
| <i>Wells Fargo Bank v. Smith,</i> 12 th Dist. Brown No. CA 2012-04-006, 2013-Ohio-855 | 11 |
| <i>Wukelic v. United States,</i> 544 F.2d 285 (6 th Cir. 1976) | 6 |
| <u>RULES</u> | |
| Fed. R. Civ. P. 12 | 11 |

ACTS

ORC § 1707.43.....*passim*

ORC §1707.4316, 9, 10

I. STATEMENT OF FACTS

As set forth in the Complaint, the Defendants were inextricably involved in the sale of the illegal securities by Apostelos. While the certified question from the Sixth Circuit focuses on a single allegation, the Complaint is replete with a myriad of additional allegations that, if true, demonstrate the Defendants aided and participated in the sale of illegal securities. Plaintiffs have thus far been deprived of the opportunity to conduct discovery to develop the facts because the matter was dismissed for failure to state a claim. The certified question incorporates the single fact that PENSCO and Kingdom Trust actually purchased the illegal securities. However, for purposes of answering the certified question, it is imperative to consider *all* of the facts alleged in Plaintiffs' Complaint. What follows are the additional facts alleged in the Complaint that underscore the Defendants' aid and participation in Mr. Apostelos' sale of illegal securities.

A. The Allegations Against PENSCO

In order to perpetrate his Ponzi scheme, Apostelos had Plaintiff, Tom Flanders, transfer his individual retirement account ("IRA") to PENSCO, a self-directed investment retirement account custodian. (ECF No. 1, PageID #2-3, ¶4). PENSCO ignores much of the Complaint in claiming there is a single "operative allegation." More specifically, the Complaint states:

- Mr. Flanders had assets in a traditional, non self-directed IRA account. Custodians of traditional IRA accounts do not allow assets held in accounts over which they are custodians to be used for the purchase of the illegal securities. So Apostelos had to use the services of IRA custodians like PENSCO that would allow the use of IRA funds for the purchase of the illegal securities. (*Id.* at 9-10, ¶¶ 39, 41).
- PENSCO knew Apostelos was operating in Ohio and that he was soliciting investors in Ohio. PENSCO agreed to provide services to investors in Ohio, including Mr. Flanders, who would purchase securities from Apostelos with the aid and participation of PENSCO. (*Id.* at 4-5, ¶ 17).

- Apostelos, *acting on behalf of PENSCO*, assisted Mr. Flanders in executing the necessary documents to transfer his IRA to PENSCO. (*Id.* at 14, ¶ 61) (emphasis added).
- PENSCO opened an IRA account for Mr. Flanders, accepted his retirement funds, and transmitted account information for Mr. Flanders and/or persons or companies associated with Apostelos. (*Id.* at 11, ¶ 47).
- PENSCO took title, custody and possession of all of the assets in Mr. Flanders' accounts. (*Id.*).
- PENSCO acted as an intermediary for the sale of the securities to Mr. Flanders. Mr. Flanders transmitted money to PENSCO; PENSCO transmitted the money to Apostelos; in return, PENSCO received and took custody of the securities. (*Id.* at 4-5, 15, ¶¶ 17, 62).
- PENSCO's experts reviewed each new transaction, including the sale of illegal securities to Mr. Flanders. (*Id.* at 10-11, ¶ 44).
- The sale of the illegal securities to Mr. Flanders could not have happened without PENSCO's participation in and execution of the transaction. (*Id.* at 12, 18, ¶¶ 49, 81).
- PENSCO had specific requirements for the sale of the illegal securities to Mr. Flanders before PENSCO would consummate the sale. (*Id.* at 12, ¶ 50).
- PENSCO required it be listed as the lender on the securities sold to Mr. Flanders. (*Id.*, ¶ 51).
- PENSCO also required receipt of a copy of the executed promissory note, the original note, a subscription agreement completed and executed by the Account Owner, the Articles of Incorporation for the borrower, a certificate of good standing for the borrower, amortization schedule and the original notarized note. (*Id.* at 12-13, ¶ 52).
- PENSCO profited by charging fees to Mr. Flanders related to his account and the execution of the transaction involving the sale of the unregistered securities. (*Id.* at 4, 10, ¶¶ 16, 42).

In short, Mr. Flanders alleges PENSCO actively participated in or aided *in any way* the sale of the unregistered securities. These allegations are not limited to the single fact that PENSCO ultimately consummated the purchase of the illegal securities for Mr. Flanders.

B. The Allegations against Kingdom Trust

Likewise, Ms. Boyd made the following additional allegations regarding Kingdom Trust's aid and participation in the sale of illegal securities:

- Ms. Boyd had assets in a traditional, non self-directed IRA account. Custodians of traditional IRA accounts do not allow assets held in accounts over which they are custodians to be used for the purchase of the illegal securities. So Apostelos had to use the services of IRA custodians like Kingdom Trust that would allow the use of IRA funds for the purchase of the illegal securities. (ECF No. 1, PageID #9-10, ¶¶ 39, 41).
- Kingdom Trust knew Apostelos was operating in Ohio and that he was soliciting investors in Ohio. Kingdom Trust agreed to provide services to investors in Ohio, including Ms. Boyd, who would purchase securities from Apostelos with the aid and participation of Kingdom Trust. (*Id.* at 4-5, ¶ 17).
- Apostelos, acting on behalf of Kingdom Trust, assisted Ms. Boyd in executing the necessary documents to transfer his IRA to Kingdom Trust. (*Id.* at 13, ¶ 55).
- Kingdom Trust opened an IRA account for Ms. Boyd, accepted her retirement funds, and transmitted account information for Ms. Boyd and/or persons or companies associated with Apostelos. (*Id.* at 11, ¶ 47).
- Kingdom Trust took title, custody and possession of all of the assets in Ms. Boyd's accounts. (*Id.*).
- Kingdom Trust acted as an intermediary for the sale of the securities to Ms. Boyd. Ms. Boyd transmitted money to Kingdom Trust; Kingdom Trust transmitted the money to Apostelos; in return, Kingdom Trust received and took custody of the securities. (*Id.* at 4-5, 13-14, ¶¶ 17, 56).
- The sale of the illegal securities to Ms. Boyd could not have happened without Kingdom Trust's participation in and execution of the transaction. (*Id.* at 12, 18, ¶¶ 49, 80).
- Kingdom Trust had specific requirements for the sale of the illegal securities to Ms. Boyd before Kingdom Trust would consummate the sale. (*Id.* at 12, ¶ 50).
- Kingdom Trust required Apostelos to execute a Promissory Note Investment Representation letter and Private Debt Servicing Agent Agreement before purchasing the illegal securities for Ms. Boyd. (*Id.* at 14, ¶ 57).
- Kingdom Trust profited by charging fees to Ms. Boyd related to her account and the execution of the transaction involving the sale of the unregistered securities. (*Id.* at 4, 10, ¶¶ 16, 42).

In short, just as with the allegations against PENSCO, Ms. Boyd clearly alleges Kingdom Trust actively participated in or aided in any way the sale of the unregistered securities.

II. ARGUMENT

A. The certified question from the Sixth Circuit

Following Oral Argument on the Appeal, the Sixth Circuit Court of Appeals *sua sponte* certified the following question of law:

Does Ohio Rev. Code Ann §1707.43 impose joint and several liability on a person who, acting as the custodian of a self-directed IRA, purchased – on behalf and at the direction of the owner of the self-directed IRA – illegal securities?

Even in a vacuum, this Court should answer this question affirmatively based on the remedial nature of the statute and the General Legislature's broad intention to protect the investing public. Furthermore, the procedural posture and myriad of additional facts alleged against the Defendants requires an affirmative response.

B. Proposition of Law No. 1: Purchasing illegal securities on behalf of the owner of a self directed IRA is sufficient to create liability under ORC §1707.43 because the plain language of the statute provides liability for anyone who aids or participates *in any way* in the sale of illegal securities.

The statute at issue is part of the Ohio Securities Act. Time and again, this Court has reiterated the broad, remedial goals of the Ohio Securities Act. In addition to the Act generally identified as broad and remedial, the specific provision at issue here has been recognized as broad and remedial by both this Court and every court analyzing the statute. The goal of this statutory scheme is to protect the investing public and therefore, must be liberally construed.

Chapter 1707 of the Ohio Revised Code [aka 'Ohio's Securities Act' or 'Ohio's Blue Sky laws'] governs the sale and purchase of securities in Ohio. Its purpose is 'to prevent the fraudulent exploitation of the investing public through the sale of securities.' *In re Columbus Skyline Securities, Inc.*, 74 Ohio St.3d 495, 498, 1996 Ohio 151, 660 N.E.2d 427, 429 (Ohio 1996). The Ohio Securities Act requires securities to be registered and salespersons

and dealers to be licensed, and it proscribes fraudulent conduct. See O.R.C. §§ 1707.08 - 1707.13 (registration); §§ 1707.14 - 1707.19 (licensing); §§ 1707.41, 1707.44 (proscribing fraud). Courts have liberally construed the Act to effectuate its remedial purpose. See, e.g., *In re Columbus Skyline*, 74 Ohio St.3d at 498, 660 N.E.2d at 429; *Federated Mgmt. Co. v. Coopers & Lybrand*, 137 Ohio App.3d 366, 391, 738 N.E.2d 842, 860-61 (Ohio Ct. App. 2000).

In re Nat'l Century Fin. Enters., Inc., 755 F.Supp.2d 857, 873 (S.D.Ohio 2010).

Indeed, “[m]any of the enacted [securities] statutes are remedial in nature, and have been drafted broadly to protect the investing public...”, see *Bronaugh v. R. & E. Dredging Co.*, 16 Ohio St.2d 35, 242 N.E.2d 572 (1968), and, “[i]n order to further the intended purpose of the Act, its securities anti-fraud provisions must be liberally construed.” *In re Columbus Skyline*, 74 Ohio St.3d at 498.

Here, the Plaintiffs allege they were sold unregistered securities by Apostelos who was not licensed to sell securities. (ECF No. 1, PageID #17, ¶¶ 73-76). The sale of securities to the Plaintiffs violated the Ohio Securities Act. (*Id.* at 18, ¶ 77). Apostelos is, therefore, liable to the Plaintiffs for the illegal sale. But Ohio securities law does not limit liability for the illegal sale of securities to just the primary actor. Secondary liability can be extended to others. Section 1707.43(A) of the Ohio Securities Act, entitled “Remedies of purchaser for unlawful sale”, provides in pertinent part:

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

Like the scope of the Act generally, the broad scope of Section 1707.43 has been specifically recognized. In *In re Nat'l Century*, 755 F.Supp.2d at 884-885, Judge Graham held:

A secondary actor need not commit fraud to be liable; the secondary actor need only participate in or aid the sales transaction. Joint and several liability extends to “every person that has participated in or aided the seller in any way in making such sale or contract for sale.” O.R.C. § 1707.43(A). The statute does not require knowledge, intent, or any other mental state on the part of secondary actor, nor does it require reliance, inducement, or proximate cause as between the secondary actor and purchaser. *See Nickels v. Koehler Mgmt. Corp.*, 541 F.2d 611, 616 (6th Cir. 1976) (noting that rescission is available under § 1707.43 “without a showing of reliance”); *Federated*, 137 Ohio App.3d at 391, 738 N.E.2d at 861 (“R.C. 1707.43 does not require that a person induce a purchaser to invest in order to be held liable. Rather, the language is very broad, and participating in the sale or aiding the seller in any way is sufficient to form a basis for liability under R.C. 1707.43.”).

The statute simply requires an act of participation or assistance in the sale and some form of remuneration, either direct or indirect. *See* O.R.C. § 1707.431(B) (remuneration requirement, which is waived for investment advisers). Indeed, one Ohio court has referred to the statute as creating a strict liability standard. *Ryan v. Ambrosio*, 2008 Ohio 6646, 2008 WL 5258308, at *4 (Ohio Ct. App. 2008)...Courts have held that § 1707.43 imposes liability on persons who introduce investment opportunities, serve as conduits of information, act as intermediaries in the exchange of money and securities, and arrange meetings between buyers and sellers. *See, e.g., Johnson v. Church of the Open Door*, 179 Ohio App.3d 532, 541, 2008 Ohio 6054, 902 N.E. 2d 1002, 1009 (Ohio Ct. App. 2008); *Boland v. Hammond*, 144 Ohio App.3d 89, 94, 2001 Ohio 2680, 759 N.E.2d 789, 793 (Ohio Ct. App. 2001); *Perkowski v. Megas Corp.*, 55 Ohio App.3d 234, 235, 563 N.E.2d 378, 379 (Ohio Ct. App. 1990); *Gerlach v. Wergowski*, 65 Ohio App.3d 510, 514, 584 N.E.2d 1220, 1222 (Ohio Ct. App. 1989).

Further still, because Section 1707.43 is a remedial statute, as with other remedial statutes, “[f]ollowing traditional canons of statutory interpretation, [it] should be construed broadly to extend coverage and [its] exclusions or exceptions should be construed narrowly.” *Passa v. City of Columbus*, S.D. Ohio No. 2:03-CV-81, 2007 U.S. Dist. LEXIS 78905, at *18-21 (Oct. 24, 2007), citing *Cobb v. Contract Transport, Inc.*, 452 F.3d 543, 559 (6th Cir. 2006). *See also Wukelic v. United States*, 544 F.2d 285, 288 (6th Cir. 1976) (holding remedial statutes must

be “construed liberally” and “exceptions... should be construed narrowly.”). The application of Section 1707.43 begins and ends with its plain wording. *See, e.g., Brilliance Audio, Inc. v. Haight's Cross Commc'n, Inc.*, 474 F.3d 365, 371 (6th Cir. 2007) (“As with any question of statutory interpretation, we must first look to the language of the statute itself.”); *Pittsburgh & Conneaut Dock Co. v. Director, Office of Workers' Compensation Programs*, 473 F.3d 253, 266 (6th Cir. 2007) (“In all cases of statutory construction, the starting point is the language employed by [the legislature] . . . [and] where the statute's language is plain, the sole function of the courts is to enforce it according to its terms.”) (citing *Appleton v. First Nat'l Bank of Ohio*, 62 F.3d 791, 801 (6th Cir. 1995) (internal quotation marks omitted)); *Limited, Inc. v. C.I.R.*, 286 F.3d 324, 332 (6th Cir. 2002) (“[W]e look first to the plain language of the statute.”). Thus the particularly important language in ORC §1707.43 is the “in any way” that defines the parameters of liable conduct related to the sale of illegal securities. There is nothing that limits liability to merely the seller of the illegal security.

Participation liability attaches under ORC §1707.43 even if the defendant was not involved in and did not induce the particular sale at issue. Seemingly tangential participants have been found potentially liable under the statute. In *Bell v. Beckwith*, 114 B.R. 475 (N.D. Ohio 1989), the Court rejected the argument that the defendant had to actively participate in the sale for “aided and participated” liability to attach under ORC §1707.43. Likewise, this Court has rejected a blanket rule that ORC §1707.43 does not apply when the transaction was instigated by the purchaser – the person seeking rescission. *Callahan v. Class One, Inc.* 58 Ohio St. 3d 76 (1991).

Against this backdrop, one Court has already answered the certified question in the affirmative. The Defendants’ purchase of the illegal security is precisely the behavior at issue in

Hardin v. Reliance Trust Co., N.D. Ohio No. 1:04-cv-02079, 2006 U.S. Dist. LEXIS 70822 (Sep. 28, 2006). The defendant in *Hardin* was Reliance Trust Company (“RTC”), a self-directed IRA custodian exactly like Kingdom Trust. Like Plaintiffs here, the plaintiffs in *Hardin* opened self-directed IRA accounts making RTC the custodian holding their investments. And like the Plaintiffs here, with the aid of the IRA administrator, the plaintiffs in *Hardin* then purchased illegal securities that were then held by the administrator. Although the plaintiffs’ claim under Section 1704.43 was dismissed on summary judgment because it was ultimately barred by the statute of limitations, the *Hardin* court clearly stated that RTC’s actions as the IRA custodian were sufficient to support a claim:

As Plaintiffs point out in their motion for partial summary judgment, the term “participation” in O.R.C. §1707.43 is broad in scope given the “in any way” language. (Citation omitted) **RTC’s role in purchasing the [securities] for the [Plaintiffs’] accounts is sufficient to form a possible basis for liability under O.R.C. §1707.43.** See *Federated Mgmt. Co. v. Coopers & Lybrand*, 137 Ohio App. 3d, 366, 392, 738 N.E.2d 842 (Ohio Ct. App. 2000)(“participating in the sale or aiding the seller in any way is sufficient to form a basis for liability under R.C. 1707.43.”)(emphasis added)

Id. at *30. RTC’s role in *Hardin* is identical to the Defendants’ role here. In addition to all the allegations in the Complaint demonstrating their intertwining with Apostelos, the Defendants purchased the securities for the Plaintiffs’ accounts. That purchase was done after, as alleged in the Complaint, working with both the Plaintiffs *and* Apostelos to facilitate the transactions. One cannot escape the reality that this conduct alone – even without considering the extensive additional allegations in the Complaint – creates liability under section 1707.43.

The Defendants have taken issue with the comparison to *Hardin* throughout this litigation. Most recently in its Preliminary Memoranda, PENSCO states that “the dicta in *Hardin* states only that ‘RTC’s role in purchasing [securities] for the [Plaintiffs’] accounts is

sufficient to form a *possible* basis for liability under ORC §1707.43’ – not that Plaintiffs had stated a claim under the facts alleged.” (PENSCO Preliminary Memorandum at p. 11) citing *Hardin*, 2006 U.S. Dist. LEXIS 70822 at *3. PENSCO further argues the “closest [Plaintiffs] can get to a case on point is one where the defendant assumed, *arguendo*, that his position was correct”. (*Id.*).

Rather than distinguish *Hardin* from the instant matter, the quoted portions underscore Plaintiffs’ argument. That the Defendants ultimately purchased the securities on behalf of the Plaintiffs does not change the fact that their behavior aided and participated *in any way* with the sale of illegal securities. The *Hardin* court recognized the broad scope and liberal construction of ORC §1707.43 and concluded that there was no limitation to being on the “seller” side of the transaction as argued by the Defendants. Being involved in and facilitating the transaction by actually purchasing the illegal securities on behalf of the buyer qualifies as aiding or participating in the sale of the security *in any way*.

The Defendants have also argued throughout this litigation that theirs were “ministerial acts” and exempt from ORC §1707.43. This argument ignores the fact that the Securities Act provides specific exemptions. However, while there are specific acts and actors that are exempt from the statute, IRA administrators and/or custodians are not among them. Section 1707.431(A) states that an attorney, accountant, or engineer, whose performance in a transaction is incidental to the practice of their profession, will not be deemed to have ‘participated’ because of that activity for purposes of ORC §1707.43. ORC §1707.431 (A). Likewise, the statute exempts any individual, other than an investment advisor, who brings any issuer together with any potential investor without receiving remuneration. ORC §1707.431(B). Importantly, none of these exemptions are limited to the buyer or seller side of the transaction. Thus, an individual

who brings together a purchaser and seller and receives payment is liable regardless of whether they were acting on behalf of the purchaser or the seller. Likewise, an investment advisor is liable if they advise their client (the buyer) to purchase a particular investment that violates the Securities Act – regardless of whether they get paid. Finally, ORC §1707.431(C) allows the division of securities to exempt individuals by rule. There is no rule that exempts self-directed IRA custodians or any other limitation to only the “seller” side of the transaction. Thus, had the General Assembly wanted to exempt self-directed IRA custodians or limited liability to only the “seller” side of the transaction, it would have specifically stated any such exemption. It did not.

Accordingly, this Court should heed the conclusion in *Hardin* along with specific exemptions provide in ORC §1707.431, and answer the certified question in the affirmative. A negative answer would effectively narrow the statute – something the General Assembly has refused. Based on the existing case law and remedial nature of the statute, the answer to the certified question before the Court should be “yes”. The act of ultimately purchasing the illegal securities by a self-directed IRA on behalf of the Plaintiffs could render the self-directed IRA liable under ORC §1707.43.

C. Proposition of Law No. 2: The procedural posture of this case and the additional allegations contained in the Complaint further underscore the appropriate response to the certified question is affirmative.

It is important to consider that this case was dismissed at the pleading stage. Thus, for any consideration of legal issues in the case, all of the facts in the Complaint must be construed in the Plaintiffs’ favor. The allegations must be accepted as true and all reasonable inferences in Appellants’ favor. *DirecTV, Inc. v. Treesh*, 487 F.3d 471, 476 (6th Cir. 2007); *Coley v. Lucas Cnty.*, 799 F.3d 530, 537 (6th Cir. 2015); *Miller v. Franklin Cty. Children Servs.*, S.D. Ohio No. 2:15-cv-179, 2016 U.S. Dist. LEXIS 7698, at *14 (Jan. 22, 2016). And the allegations against

PENSCO and Kingdom Trust are much more than the single fact that they ultimately consummated the purchase of the securities.

The Complaint alleges Apostelos was working in concert with the Defendants and that the Defendants were necessary for him to accomplish the sale of illegal securities. Specifically, the Complaint alleges that Apostelos acted on behalf of the Defendants in helping the Plaintiffs complete the requisite paperwork and execution of the Defendants' required documents. (ECF No. 1, PageID #13). In other words, as alleged in the Complaint, the Defendants were absolutely necessary to and aided in the sale of illegal securities. (*Id.* at 12, ¶49).

Without exception, all existing case law recognizes that when determining what constitutes "aided or participated in any way" for purposes of liability under ORC §1707.43 is a fact intensive inquiry. *See gen. Wells Fargo v. Smith*, 12th Dist. Brown No. CA-2012-04-006, 2013-Ohio-855; *Hild v. Woodcrest Assoc.*, 59 Ohio Misc. 13, 391 N.E. 2d 1047 (C.P. 1977); and *Boomershine v. Lifetime Capital, Inc.*, 2nd Dist. Montgomery No. 22179, 2008-Ohio-14. The term "participation" in ORC §1707.43 is broad in scope given the "in any way" language. *Federated Mgmt. Co. v. Coopers & Lybrand*, 137 Ohio App. 3d 366 (Ohio Ct. App. 10th Dist. 2000). In the context of a Civil Rule 12 motion, the facts to be evaluated are those alleged in the Complaint – all of which must be presumed to be true.

Here, the certified question concerns only a single allegation from the Complaint – that the Defendants ultimately executed the purchase of the illegal securities. Even standing alone, the purchases qualify as aiding or participating in any way in the sale of the illegal security. But the context of this particular case further underscores why the answer to the certified question must be "yes". As stated in the Complaint, the Defendants were so involved in the sale of the illegal securities that the transactions could not have happened without their aid.

Apostelos had the Plaintiffs transfer their IRAs to the Defendants' self-directed investment retirement account custodians. (ECF No. 1, PageID #2-3, ¶4). Then Apostelos and/or his associates, *on behalf of the Defendants*, assisted the Plaintiffs in executing the documents necessary to transfer custodial responsibility for their IRA to the Defendants. (*Id.* at 14, ¶61). Then, the Defendants, on behalf of the Plaintiffs, bought the illegal securities from Apostelos and collected fees from the Plaintiffs for the execution of the sale. (*Id.* at 3, ¶5).

Prior to executing this transaction, the Defendants had a litany of requirements that had to be met. (*Id.* at 12). These pre-sale dictates included mandating the execution of an Unsecured Note Investment Authorization Form; mandating the execution of a Loan Servicing Agreement; requiring the lender's name on the promissory note to be the Defendants' name; requiring the lender's address be listed as the Defendants' address; any promissory note had to have a maturity date no longer than 10 years from the date of the note; a copy of the executed promissory note had to be provided to the Defendants before the Defendants would fund the sale; the original note had to be provided to Defendants; Articles of Incorporation or Operating Agreement/Private Placement Memorandum for borrower (*e.g.* one of Apostelos' companies) had to be given to the Defendants; Certificate of Good Standing for borrower (*e.g.* one of Apostelos' companies) had to be provided from Apostelos; and the original note with a notarized signature by the borrower (*e.g.* Apostelos) had to be satisfied before the Defendants would fund and execute the sale. (*Id.* at 12-13). Only after all of the Defendants' prerequisites were met by both Apostelos and the Plaintiffs, would the Defendants fund the sale and take title, custody and possession of the illegal securities. (*Id.* at 13).

In short, as stated in the Complaint, the Defendants were inextricably involved in the sale of the illegal securities by Apostelos. Even the District Court recognized the Defendants'

involvement. (ECF No. 23, PageID #268). That they actually purchased the securities is itself sufficient but given the balance of the allegations in the Complaint, there can be no doubt of the Defendants' potential liability pursuant to ORC §1707.43.

III. CONCLUSION

Because it is a broad, remedial statute, the act of purchasing the illegal securities is itself sufficient to trigger liability for aiding or participating in the sale pursuant to ORC §1707.43. But given the balance of allegations in the Complaint, there is no doubt the Plaintiffs should be allowed to proceed with their claims pursuant to ORC §1707.43.

Respectfully submitted,

/s/ Toby K. Henderson

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CERTIFICATE OF SERVICE

My office filed the foregoing Merit Brief of Petitioner on February 5, 2018, and served a true and accurate copy of the foregoing upon the following via e-mail:

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APPENDIX

| | |
|--|----|
| Order Certifying Question of Law to The Supreme Court of Ohio (August 18, 2017) | 1 |
| Order Certifying Question of Law to The Supreme Court of Ohio (September 13, 2017) | 7 |
| Entry and Order Granting Pensco’s Motion to Dismiss the Class Action Complaint For Violations of The Ohio Securities Act, O.R.C. §1707.01 <i>et seq.</i> (DOC. 10) | 13 |
| Entry and Order Granting Kingdom Trust’s Motion to Dismiss Plaintiffs’ Complaint (DOC. 13) | 21 |
| Judgment in a Civil Action (December 9, 2016) | 22 |
| <u>CONSTITUTIONAL PROVISIONS; STATUTES:</u> | |
| Ohio Revised Code §1707.43 | 23 |
| Ohio Revised Code §1707.431 | 24 |

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NOT RECOMMENDED FOR PUBLICATION

No. 17-3026

**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

FILED
Aug 18, 2017
DEBORAH S. HUNT, Clerk

CYNTHIA H. BOYD; THOMAS E. FLANDERS,)
)
Plaintiffs-Appellants,)
)
v.)
)
KINGDOM TRUST COMPANY; PENSICO TRUST)
COMPANY; JOHN DOES 1-25,)
)
Defendants-Appellees.)

ON APPEAL FROM THE
UNITED STATES DISTRICT
COURT FOR THE
SOUTHERN DISTRICT OF
OHIO

**ORDER CERTIFYING
QUESTION OF LAW TO
THE SUPREME COURT OF
OHIO**

BEFORE: COLE, Chief Judge; BATCHELDER and MOORE, Circuit Judges.

PER CURIAM. Plaintiffs Cynthia Boyd and Thomas Flanders are the alleged victims of a Ponzi scheme operated by William Apostelos and his associates. As alleged in the complaint, Apostelos persuaded the plaintiffs and other purported class members to open self-directed individual retirement accounts (IRAs) with one or more of the trust-company defendants. Once the accounts were established, Apostelos would either have the plaintiffs request that the defendants purchase his illegal securities, or he would have the plaintiffs execute powers-of-attorney giving him the ability to request that the defendants purchase the illegal securities. Outside of the defendants' purchase of the illegal securities on behalf of the plaintiffs, the complaint does not allege that the defendants knew or had reason to know that Apostelos was perpetrating a fraud or that they were otherwise involved in Apostelos's Ponzi scheme.

Upon the inevitable collapse of Apostelos's Ponzi scheme, the plaintiffs filed suit against the defendants, alleging that the Ohio Securities Act (the Act) imposed secondary liability on the

No. 17-3026

Cynthia Boyd, et al. v. Kingdom Trust Co., et al.

trust companies for having “participated in or aided the seller in any way” in selling the fraudulent securities. *See* Ohio Rev. Code Ann. § 1707.43. The defendants brought a motion to dismiss for failure to state a claim. The district court granted the motion, finding that Ohio courts have read into the Act an exception of liability for financial institutions engaged in “normal commercial banking activities.” *Boyd v. Kingdom Trust Co.*, 221 F. Supp. 3d 975, 979–80 (S.D. Ohio 2016). Because the plaintiffs did not plead that the defendants acted outside the confines of normal commercial banking activity, the district court found that they had failed to state a claim upon which relief may be granted and accordingly dismissed their case. *Id.* at 980.

On appeal, the plaintiffs argue that the plain language of the Act forecloses the district court’s analysis and, furthermore, that Ohio courts have not created an implied exception to liability for trust companies engaged in normal commercial banking activities. In response, the defendants argue that the plaintiffs lack standing under the Act, and that—even if the plaintiffs do have standing to sue—the district court did not err by finding that they were not liable for engaging only in normal commercial banking activities.

As we see the case, however, the issue at the heart of this appeal is whether Ohio Rev. Code Ann. § 1707.43 extends joint and several liability to persons who aided in the *purchase* of illegal securities. Although neither party sought certification of this issue, we find that certification is warranted in this case because “the question is new and state law is unsettled.” *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974)). Federal courts are routinely called upon to “predict how [a state’s highest court] would rule by looking at all the available data.” *Antioch Co. Litig. Tr. v. Morgan*, 633 F. App’x 296, 304 (6th Cir. 2015) (quoting *Allstate Ins. Co. v. Thrifty Rent-A-Car Sys., Inc.*, 249 F.3d 450, 454 (6th Cir. 2011)). However, there is no clear

No. 17-3026

Cynthia Boyd, et al. v. Kingdom Trust Co., et al.

indication here how the Ohio Supreme Court would interpret Ohio Rev. Code Ann. § 1707.43 with respect to self-directed IRA custodians who aided in the purchase of illegal securities. “[I]nterests of comity and cooperative judicial federalism weigh in favor of providing the Supreme Court of Ohio with an opportunity to decide” whether a custodian of a self-directed IRA who purchases illegal securities at the direction of the accountholder may be held liable as a “person that has participated in or aided the seller in any way in making such sale or contract for sale” under Ohio Rev. Code Ann. § 1707.43. *See Antioch Co. Litig. Tr.*, 633 F. App’x at 305.

The following information is provided in accordance with Rule 9.02(A)–(E) of the Supreme Court of Ohio’s Rules of Practice.

A. Name of the Case. *Cynthia Boyd, et al. v. Kingdom Trust Co., et al.*, No. 17-3026.

B. Facts and Question of Law. The facts showing the nature of the claim, the circumstances from which the question of law arises, and other information relevant to the certification of the question of law are set forth above in the record. The certified question of law is: “Does Ohio Rev. Code Ann. § 1707.43 impose joint and several liability on a person who, acting as the custodian of a self-directed IRA, purchased—on behalf and at the direction of the owner of the self-directed IRA—illegal securities?”

C. Names of Each of the Parties Remaining in the Pending Appeal.

The Plaintiffs-Appellants are Cynthia Boyd and Thomas Flanders. The Defendants-Appellees are The Kingdom Trust Company and Pensco Trust Company LLC.

D. Names, Addresses, Telephone Numbers, and Attorney Information.

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No. 17-3026

Cynthia Boyd, et al. v. Kingdom Trust Co., et al.

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E. Designation of Moving Party.

The Panel of Chief Judge Cole, Judge Batchelder, and Judge Moore, Judges of the United States Court of Appeals for the Sixth Circuit, certify the question of law sua sponte.

Accordingly, the above question of law is CERTIFIED to the Supreme Court of Ohio. As required by Rule 9.03(A), Ms. Deborah S. Hunt, Clerk of the United States Court of Appeals for the Sixth Circuit, is instructed to serve copies of this certification order upon counsel of record for the parties and to file this certification order under the seal of this court with the Clerk of the Ohio Supreme Court. Further, as required by Rule 9.03(A), this Order of Certification is signed by Chief Judge Cole, as the Judge presiding over the appeal heard by the panel of Chief Judge Cole, Judge Batchelder, and Judge Moore on July 26, 2017.

No. 17-3026

Cynthia Boyd, et al. v. Kingdom Trust Co., et al.

FOR THE COURT:

A handwritten signature in black ink, appearing to read "R. Guy Cole, Jr.", with a stylized flourish at the end.

R. Guy Cole, Jr., Chief Judge
United States court of Appeals for the Sixth Circuit

No. 17-3026

Cynthia Boyd, et al. v. Kingdom Trust Co., et al.

PROOF OF SERVICE

True copies of the foregoing Certification Order were sent this 10th day of August, 2017, by ordinary United States Mail to Toby K. Henderson and Scott S. Davies, SEBALY, SHILLITO & DYER, 40 N. Main Street, 1900 Kettering Tower, Dayton, Ohio 45423, counsel for the plaintiffs-appellants; to Frances Floriano Goins and Daniela Pacz, ULMER & BERNE LLP, 1660 West 2nd Street, Suite 1100, Cleveland, Ohio 44113-1448, counsel for defendant-appellee The Kingdom Trust Company; and to Jahan P. Raissi and Roey Z. Rahmil, SHARTSIS FRIESE LLP, One Maritime Plaza, Floor 18, San Francisco, California 94111-3598 and Caroline H. Gentry, PORTER WRIGHT MORRIS & ARTHUR LLP, One South Main Street, Suite 1600, Dayton, Ohio 45402, counsel for defendant-appellee Pensco Trust Company LLC.



Deborah S. Hunt, Clerk

NOT RECOMMENDED FOR PUBLICATION

FILED

No. 17-3026

SEP 13 2017

UNITED STATES COURT OF APPEALS DEBORAH S. HUNT, Clerk
FOR THE SIXTH CIRCUIT

CYNTHIA H. BOYD; THOMAS E. FLANDERS,)

Plaintiffs-Appellants,)

v.)

KINGDOM TRUST COMPANY; PENSICO TRUST)
COMPANY; JOHN DOES 1-25,)

Defendants-Appellees.)

ON APPEAL FROM THE
 UNITED STATES DISTRICT
 COURT FOR THE
 SOUTHERN DISTRICT OF
 OHIO

**ORDER CERTIFYING
 QUESTION OF LAW TO
 THE SUPREME COURT OF
 OHIO**

BEFORE: COLE, Chief Judge; BATCHELDER and MOORE, Circuit Judges.

PER CURIAM. Pursuant to Rule 9.02(E) of the Rules of Practice of the Supreme Court of Ohio we designate Plaintiffs Cynthia Boyd and Thomas Flanders as the moving party and certify a question of law to the Supreme Court of Ohio.

Plaintiffs Cynthia Boyd and Thomas Flanders are the alleged victims of a Ponzi scheme operated by William Apostelos and his associates. As alleged in the complaint, Apostelos persuaded the plaintiffs and other purported class members to open self-directed individual retirement accounts (IRAs) with one or more of the trust-company defendants. *R. 1, at 11.* Once the accounts were established, Apostelos would either have the plaintiffs request that the defendants purchase his illegal securities, or he would have the plaintiffs execute powers-of-attorney giving him the ability to request that the defendants purchase the illegal securities. *Id.* at 11-12. Outside of the defendants' purchase of the illegal securities on behalf of the plaintiffs,

No. 17-3026

Cynthia Boyd, et al. v. Kingdom Trust Co., et al.

the complaint does not allege that the defendants knew or had reason to know that Apostelos was perpetrating a fraud or that they were otherwise involved in Apostelos's Ponzi scheme.

Upon inevitable collapse of Apostelos's Ponzi scheme, the plaintiffs filed suit against the defendants, alleging that the Ohio Securities Act (the Act) imposed secondary liability on the trust companies for having "participated in or aided the seller in any way" in selling the fraudulent securities. *See* Ohio Rev. Code Ann. § 1707.43; R. 23 at 266. The defendants brought a motion to dismiss for failure to state a claim. R. 10, 13. The district court granted the motion, finding that Ohio courts have read into the Act an exception of liability for financial institutions engaged in "normal commercial banking activities." *Boyd v. Kingdom Trust Co.*, 221 F. Supp. 3d 975, 979–80 (S.D. Ohio 2016). Because the plaintiffs did not plead that the defendants acted outside the confines of normal commercial banking activity, the district court found that they had failed to state a claim upon which relief may be granted and accordingly dismissed their case. *Id.* at 980.

On appeal, the plaintiffs argue that the plain language of the Act forecloses the district court's analysis and, furthermore, that Ohio courts have not created an implied exception to liability for trust companies engaged in normal commercial banking activities. In response, the defendants argue that the plaintiffs lack standing under the Act, and that—even if the plaintiffs do have standing to sue—the district court did not err by finding that they were not liable for engaging only in normal commercial banking activities.

As we see the case, however, the issue at the heart of this appeal is whether Ohio Rev. Code Ann. § 1707.43 extends joint and several liability to persons who aided in the *purchase* of illegal securities. Although neither party sought certification of this issue, we find that certification is warranted in this case because "the question is new and state law is unsettled."

No. 17-3026

Cynthia Boyd, et al. v. Kingdom Trust Co., et al.

Transamerica Ins. Co. v. Duro Bag Mfg. Co., 50 F.3d 370, 372 (6th Cir. 1995) (citing *Lehman Bros. v. Schein*, 416 U.S. 386, 390–91 (1974)). Federal courts are routinely called upon to “predict how [a state’s highest court] would rule by looking at all the available data.” *Antioch Co. Litig. Tr. v. Morgan*, 633 F. App’x 296, 304 (6th Cir. 2015) (quoting *Allstate Ins. Co. v. Thrifty Rent-A-Car Sys., Inc.*, 249 F.3d 450, 454 (6th Cir. 2011)). However, there is no clear indication here how the Ohio Supreme Court would interpret Ohio Rev. Code Ann. § 1707.43 with respect to self-directed IRA custodians who aided in the purchase of illegal securities. “[I]nterests of comity and cooperative judicial federalism weigh in favor of providing the Supreme Court of Ohio with an opportunity to decide” whether a custodian of a self-directed IRA who purchases illegal securities at the direction of the accountholder may be held liable as a “person that has participated in or aided the seller in any way in making such sale or contract for sale” under Ohio Rev. Code Ann. § 1707.43. See *Antioch Co. Litig. Tr.*, 633 F. App’x at 305.

The following information is provided in accordance with Rule 9.02(A)–(E) of the Supreme Court of Ohio’s Rules of Practice.

A. Name of the Case. *Cynthia Boyd, et al. v. Kingdom Trust Co., et al.*, No. 17-3026.

B. Facts and Question of Law. The facts showing the nature of the claim, the circumstances from which the question of law arises, and other information relevant to the certification of the question of law are set forth above in the record. The certified question of law is: “Does Ohio Rev. Code Ann. § 1707.43 impose joint and several liability on a person who, acting as the custodian of a self-directed IRA, purchased—on behalf and at the direction of the owner of the self-directed IRA—illegal securities?”

C. Names of Each of the Parties Remaining in the Pending Appeal.

No. 17-3026

Cynthia Boyd, et al. v. Kingdom Trust Co., et al.

The Plaintiffs-Appellants are Cynthia Boyd and Thomas Flanders. The Defendants-Appellees are The Kingdom Trust Company and Pensco Trust Company LLC.

D. Names, Addresses, Telephone Numbers, and Attorney Information.

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E. Designation of Moving Party.

The Panel of Chief Judge Cole, Judge Batchelder, and Judge Moore, Judges of the United States Court of Appeals for the Sixth Circuit, designate Plaintiffs-Appellants Cynthia Boyd and Thomas Flanders as the moving party.

Accordingly, the above question of law is CERTIFIED to the Supreme Court of Ohio. As required by Rule 9.03(A), Ms. Deborah S. Hunt, Clerk of the United States Court of Appeals for the Sixth Circuit, is instructed to serve copies of this certification order upon

No. 17-3026

Cynthia Boyd, et al. v. Kingdom Trust Co., et al.

counsel of record for the parties and to file this certification order under the seal of this court with the Clerk of the Ohio Supreme Court. Further, as required by Rule 9.03(A), this Order of Certification is signed by Chief Judge Cole, as the Judge presiding over the appeal heard by the panel of Chief Judge Cole, Judge Batchelder, and Judge Moore on July 26, 2017.

FOR THE COURT:

A handwritten signature in black ink, appearing to read "R. Guy Cole, Jr.", is written over a horizontal line.

R. Guy Cole, Jr., Chief Judge
United States court of Appeals for the Sixth Circuit

No. 17-3026

Cynthia Boyd, et al. v. Kingdom Trust Co., et al.

PROOF OF SERVICE

True copies of the foregoing Certification Order were sent this 7th day of September, 2017, by ordinary United States Mail to Toby K. Henderson and Scott S. Davies, SEBALY, SHILLITO & DYER, 40 N. Main Street, 1900 Kettering Tower, Dayton, Ohio 45423, counsel for the Plaintiffs-Appellants; to Frances Floriano Goins and Daniela Paez, ULMER & BERNE LLP, 1660 West 2nd Street, Suite 1100, Cleveland, Ohio 44113-1448, counsel for Defendant-Appellee The Kingdom Trust Company; and to Jahan P. Raissi and Roey Z. Rahmil, SHARTSIS FRIESE LLP, One Maritime Plaza, Floor 18, San Francisco, California 94111-3598 and Caroline H. Gentry, PORTER WRIGHT MORRIS & ARTHUR LLP, One South Main Street, Suite 1600, Dayton, Ohio 45402, counsel for defendant-appellee Pensco Trust Company LLC.



Deborah S. Hunt, Clerk

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON**

CYNTHIA BOYD, et al.,

Plaintiffs,

v.

**Case No. 3:16-CV-009
Judge Thomas M. Rose**

THE KINGDOM TRUST COMPANY, *et al.*,

Defendants.

**ENTRY AND ORDER GRANTING PENSCO'S MOTION TO DISMISS THE
CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE OHIO
SECURITIES ACT, O.R.C. § 1707.01 *et seq.* (DOC. 10)**

Plaintiffs Cynthia H. Boyd and Thomas E. Flanders, individually and on behalf of all others similarly situated filed a lawsuit against The Kingdom Trust Company, PENSCO Trust Company, and John Doe, 1-25 (collectively "Defendants") for violation of the Ohio Securities Act, O.R.C. § 1707.01 *et seq.* (Doc. 1). Pending before the Court is Defendant PENSCO's Motion to Dismiss the Class Action Complaint for Violations of the Ohio Securities Act, O.R.C. § 1707.01 *et seq.* (Doc. 10). Therein the Defendant PENSCO requests the Court dismiss Plaintiffs' asserted claim against it for violation of Ohio Securities Act for failure to state a claim upon which relief can be granted pursuant to Federal Rule of Civil Procedure 12(b)(6). Because Plaintiffs have not presented sufficient allegations to support their claims for a violation of the

Ohio Securities Act against PENSICO, the Court will grant the Motion to Dismiss the Class Action Complaint for Violations of the Ohio Securities Act.

I. Background

When considering a motion to dismiss pursuant to Rule 12(b)(6), a court must construe the complaint in the light most favorable to the plaintiff and accept all well-pleaded material allegations as true. *Tackett v. M&G Polymers, USA, LLC*, 561 F.3d, 478, 488 (2009). The complaint includes the following factual allegations.

On or about the time of January 2010 through October 2014, William Apostelos and his associates allegedly perpetrated a fraudulent scheme against investors, which Plaintiffs assert is what is otherwise known as a Ponzi scheme. (Doc. 1, ¶ 32). During that time period, Apostelos allegedly raised \$66.7 million from at least 350 investors. (*Id.*). In purporting his scheme, Apostelos allegedly did not use investor funds for the purpose he described when soliciting new investors or when trying to retain investors. (*Id.* at ¶ 33). Apostelos allegedly did not maintain separate “funds” for different investment services, rather nearly all of the investor funds generated from the sales of Unregistered Securities were allegedly funneled into bank accounts, often within hours or days of being initially deposited. (*Id.*) In turn, the majority of the \$66.7 million allegedly raised from investors through the sale of Unregistered Securities was allegedly used to pay approximately \$52.8 million to investors and at least \$6.3 million to promoters. (*Id.* at ¶ 34). Plaintiffs allege Apostelos did not use legitimate business revenue or investment returns to fund the approximately \$52.8 million paid out to investors between January 2010 and October 2014, rather he used investor funds to pay purported returns and principal to the other investors. (*Id.* at ¶ 35). On October 15, 2014, a group of investors filed a petition for

involuntary bankruptcy against Apostelos under Chapter 7; the bankruptcy action is pending. (*Id.* at ¶ 36). On October 29, 2015, Apostelos and his wife were indicted on twenty-seven federal charges, including conspiracy to defraud investors through the above-referenced Ponzi scheme. (*Id.* at ¶ 37).

In the case at bar, Plaintiffs allege Defendant PENSCO Trust Company, The Kingdom Trust Company, and/or John Does, 1-25 aided or participated in the sale of Unregistered Securities, and thereby assisted Apostelos in the furtherance of the alleged Ponzi scheme. (*Id.* at ¶ 78). Specifically, Apostelos had Plaintiff, Tom Flanders, transfer his individual retirement account (hereinafter “IRA”) to Defendant PENSCO, a self-directed investment retirement account custodian (hereinafter “SDIRA”). (*Id.* at ¶ 4). Apostelos and/or his associates, on behalf of PENSCO, assisted Flanders in executing the documents necessary to transfer custodial responsibility for his IRA to PENSCO. (*Id.* at ¶ 61). On February 25, 2011, PENSCO, on behalf of Flanders, allegedly bought illegal securities from Apostelos, paying \$497,000 for the securities and collecting fees from Flanders relating to the execution of the sale. (*Id.* at ¶¶ 62, 42). Plaintiffs allege the culmination of the sale of securities with Flanders’ IRA assets could not have occurred without PENSCO’s participation and execution of the sale. (*Id.* at ¶ 49). Ultimately, Plaintiffs allege that, without PENSCO’s assistance with and participation in the sale of illegal securities, Apostelos would not have been able to complete the sale of securities to Plaintiff. (*Id.* at ¶ 49).

Flanders, personally and on behalf of those similarly situated who had PENSCO accounts, filed this action seeking to hold PENSCO liable for its alleged role in the sale of illegal securities. (*Id.* at ¶ 65).

II. Failure to State a Claim – 12(b)(6)

A. Legal Standard

To conclude that a plaintiff has failed to state a claim upon which relief can be granted pursuant to Rule 12(b)(6), “a district court must (1) view the complaint in the light most favorable to the plaintiff and (2) take all well-pleaded factual allegations as true.” *Tackett v. M&G Polymers, USA, LLC*, 561 F.3d 478, 488 (6th Cir. 2009). Though, a court need not accept as true the legal assertions of the plaintiff. *Id.* Instead, in order “to survive a motion to dismiss a complaint must contain (1) ‘enough facts to state a claim to relief that is plausible,’ (2) more than ‘a formulaic recitation of a cause of action’s elements,’ and (3) allegations that suggest a ‘right to relief above a speculative level.’” *Id.* (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 569, 545, 555 (2007)). In addition to the complaint, a court “must consider . . . other sources . . . in particular, documents incorporated into the complaint by reference....” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007).

B. Analysis

A claim will be dismissed when it does not “contain either direct or inferential allegations respecting all the material elements necessary to sustain recovery under some viable legal theory.” *Twombly*, 550 U.S. at 562 (citation omitted). Still, a court is not required to accept “legal conclusions” or “conclusory statements” as true. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Therefore, a complaint “should be dismissed for failure to state a claim only where ‘it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which

would entitle him to relief.” *Monette v. Electronic Data Sys. Corp.*, 90 F.3d 1173, 1189 (6th Cir. 1996) quoting *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Plaintiffs’ claim in this case is brought pursuant to Ohio law and issues interpreted under Ohio law. (Doc. 1, ¶ 72–85). In reviewing an action or issue under Ohio law, this Court must apply the law of Ohio, as interpreted by the Supreme Court of Ohio. *Pullins v. Klimley*, S.D. Ohio No. 3:05-CV-082, 2008 U.S. Dist. LEXIS 3467, at *21-22 (Jan. 7, 2008) (citing *Northland Ins. Co. v. Guardsman Prods. Inc.*, 141 F. 3d 612, 617 (6th Cir. 1998). This court is required to apply the substantive law of Ohio, “in accordance with the then-controlling decision of the highest court of the state.” *Pullins*, 2008 U.S. Dist. LEXIS at *22 (quoting *Imperial Hotels Corp. v. Dore*, 257 F.3d 615, 620 (6th Cir. 2001) (quoting *Pedigo v. UNUM Life Ins. Co.*, 145 F.3d 804, 808 (6th Cir. 1998) (internal quotations omitted)).

Chapter 1707 of the Ohio Revised Code governs the sale and purchase of securities in Ohio, wherein its purpose is “to prevent the fraudulent exploitation of the investing public through the sale of the securities.” *In re Columbus Skyline Securities, Inc.* 660 N.E.2d 427, 429 (Ohio 1996). The Ohio Securities Act functions in three capacities, it requires securities to be registered, it requires sales persons and dealers be licensed, and it proscribes fraudulent conduct. *See* Ohio Rev. Code 1707.01 *et seq.* Courts have liberally construed the Act to effectuate its remedial purpose. *In re Nat’l Century Fin. Enters. Inc.*, 755 F. Supp.2d 857, 873 (2010). Pursuant to Ohio Rev. Code § 1707.43, “every person that has participated or aided the seller in any way in making such sale or contract for sale, are jointly and severally liable to the purchaser, in an action at law in any court of competent jurisdiction, upon tender to the seller in person or in open court of the securities sold or of the contract made, for the full amount paid by the

purchaser and for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision.” Ohio Rev. Code § 1707.43(a).

Here, Plaintiffs allege that but for PENSCO’s services, it would not have been possible for Apostelos to sell the Securities to Plaintiffs. (Doc. 1, ¶ 49). Plaintiffs further contend that by way of these actions, PENSCO is liable under the Ohio Securities Act because it “participated or aided” Apostelos in making the sale. Ohio courts, however, have held § 1707.43 does not extend liability to financial institutions engaged in “normal commercial banking activities.” *Wells Fargo Bank v. Smith*, No. LEXIS 751 at *29 (Ohio Ct. App. Mar. 11, 2013). In *Wells Fargo*, a mortgage firm and its employees participated in closing a mortgage. *Id.* at *3. Thereafter, the mortgagor used the proceeds to buy fraudulent, unregistered securities, which were part of a multi-million dollar Ponzi scheme. *Id.* at *2. The mortgage company’s liability as to the sale of unregistered securities was evaluated under Ohio Rev. Code § 1707.43. *Id.* at *28. The court held in favor of the mortgage company, and stated it did not go beyond “normal banking procedures” and its actions in processing the mortgage did not amount to “participating or aiding” an illegal sale of securities. *Id.* at *30-31.

Conversely, where a bank directly participates in the underwriting of unregistered securities, it is considered to have aided the seller in making the sales, in violation of Ohio Rev. Code § 1707.43. *Federated Mgmt. Co. v. Coopers & Lybrand*, 738 N.E.2d 842, 862 (10th Dist. 2000). In *Federated Management*, plaintiffs claimed the underwriter was jointly and severally liable for the sale of illegal securities because it “participated in or aided the seller” in violation of § 1707.43. *Id.* Plaintiffs further alleged the underwriter acted as the sellers’ financial advisor

and that he “conceived, organized and directly participated in the underwriting of the [illegal securities].” *Id.* The court held the underwriters conduct went far beyond “normal banking activities,” in turn creating liability under § 1707.43. *Id.*

Here, Plaintiffs have failed to make an allegation that PENSCO acted outside the scope of routine banking activities. Specifically, Plaintiffs only allege PENSCO “took title, custody, and possession, of all assets in Plaintiffs’ IRA accounts[,]” executed transactions on behalf of Plaintiffs, and required Plaintiffs to provide certain information to open accounts—all of which are traditional duties of a bank. Because Plaintiffs have failed to make any allegations outside of routine banking activities, PENSCO’s mere involvement in the sale of illegal securities does not amount to liability under § 1707.43.

In viewing the complaint in the light most favorable to Plaintiffs, and by taking all well-pleaded factual allegations as true, the complaint does not contain either direct or inferential allegations that could support an inference that PENSCO’s conduct went outside the scope of “normal banking activities.” Instead, the complaint merely alleges that PENSCO was involved in transactions with Apostelos of unregistered securities. Indeed, Plaintiffs fail to allege communication of any sort between PENSCO and Apostelos. This mere involvement is insufficient to extend liability to PENSCO. Therefore, based on the foregoing, PENSCO’s 12(b)(6) motion is granted.

III. Conclusion

Because Plaintiffs’ claim does not allege PENSCO participated in anything more than routine banking activities, it therefore does not contain sufficient factual allegations that state a claim for relief that is plausible on its face. PENSCO’s Motion to Dismiss the Class Action

Complaint for Violations of the Ohio Securities Act, O.R.C. § 1707.01 *et seq.* for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) is **GRANTED**.¹

DONE and **ORDERED** in Dayton, Ohio, this Tuesday, November 1, 2016.

s/Thomas M. Rose

THOMAS M. ROSE
UNITED STATES DISTRICT JUDGE

¹ The Court acknowledges the valuable contribution and assistance of judicial extern Samantha M. D'Anna in drafting this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION AT DAYTON

CYNTHIA BOYD, et al.,

Plaintiffs,

v.

Case No. 3:16-CV-00009
Judge Thomas M. Rose

THE KINGDOM TRUST COMPANY, et al.,

Defendants.

ENTRY AND ORDER GRANTING KINGDOM TRUST'S MOTION
TO DISMISS PLAINTIFFS' COMPLAINT (DOC. 13)

Defendant The Kingdom Trust Company's ("Kingdom Trust) Motion to Dismiss Plaintiffs' Complaint (Doc. 13) incorporates PENSICO Trust Company's Motion to Dismiss (Doc. 10) and Memorandum in Support (Doc. 18), and adopts the legal arguments raised therein. For the reasons stated in the Court's prior order (Doc. 23), Kingdom Trust's Motion to Dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted pursuant to Rule 12(b)(6) is **GRANTED**.

DONE and **ORDERED** in Dayton, Ohio, this

9th Day of December 2016



THOMAS M. ROSE

UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT

for the
Southern District of Ohio

CYNTHIA BOYD, et al.,

Plaintiff

v.

THE KINGDOM TRUST COMPANY, et al.,

Defendant

Civil Action No. 3:16-CV-00009

JUDGMENT IN A CIVIL ACTION

The court has ordered that (check one):

☐ the plaintiff (name) _____ recover from the
defendant (name) _____ the amount of
_____ dollars (\$ _____), which includes prejudgment
interest at the rate of _____ %, plus post judgment interest at the rate of _____ % per annum, along with costs.

☐ the plaintiff recover nothing, the action be dismissed on the merits, and the defendant (name) _____
recover costs from the plaintiff (name) _____

☒ other: Motion to Dismiss Plaintiffs' Complaint for failure to state a claim upon which relief can be granted pursuant
to Rule 12(b)(6) is GRANTED

This action was (check one):

☐ tried by a jury with Judge _____ presiding, and the jury has
rendered a verdict.

☐ tried by Judge _____ without a jury and the above decision
was reached.

☒ decided by Judge Thomas M. Rose _____ on a motion for
Dismiss

Date: 12/9/2016

CLERK OF COURT

R. H. B.
Signature of Clerk or Deputy



1707.43 Remedies of purchaser in unlawful sale.

(A) Subject to divisions (B) and (C) of this section, every sale or contract for sale made in violation of Chapter 1707. of the Revised Code, is voidable at the election of the purchaser. The person making such sale or contract for sale, and every person that has participated in or aided the seller in any way in making such sale or contract for sale, are jointly and severally liable to the purchaser, in an action at law in any court of competent jurisdiction, upon tender to the seller in person or in open court of the securities sold or of the contract made, for the full amount paid by the purchaser and for all taxable court costs, unless the court determines that the violation did not materially affect the protection contemplated by the violated provision.

(B) No action for the recovery of the purchase price as provided for in this section, and no other action for any recovery based upon or arising out of a sale or contract for sale made in violation of Chapter 1707. of the Revised Code, shall be brought more than two years after the plaintiff knew, or had reason to know, of the facts by reason of which the actions of the person or director were unlawful, or more than five years from the date of such sale or contract for sale, whichever is the shorter period.

(C) No purchaser is entitled to the benefit of this section who has failed to accept, within thirty days from the date of such offer, an offer in writing made after two weeks from the date of the sale or contract of sale, by the seller or by any person that has participated in or aided the seller in any way in making the sale or contract of sale, to take back the security in question and to refund the full amount paid by the purchaser.

Effective Date: 09-16-2003 .

1707.431 Claiming exemption for publicly advertised meeting.

For purposes of this section, the following persons shall not be deemed to have effected, participated in, or aided the seller in any way in making, a sale or contract of sale in violation of sections 1707.01 to 1707.45 of the Revised Code:

- (A) Any attorney, accountant, or engineer whose performance is incidental to the practice of the person's profession;
- (B) Any person, other than an investment adviser, investment adviser representative, bureau of workers' compensation chief investment officer, or state retirement system investment officer, who brings any issuer together with any potential investor, without receiving, directly or indirectly, a commission, fee, or other remuneration based on the sale of any securities by the issuer to the investor. Remuneration received by the person solely for the purpose of offsetting the reasonable out-of-pocket costs incurred by the person shall not be deemed a commission, fee, or other remuneration.

Any person claiming exemption under this division for a publicly advertised meeting shall file a notice with the division of securities indicating an intent to cause or hold such a meeting at least twenty-one days prior to the meeting. The division may, upon receipt of such notice, issue an order denying the availability of an exemption under this division not more than fourteen days after receipt of the notice based on a finding that the applicant is not entitled to the exemption. Notwithstanding the notice described in this section, a failure to file the notice does not create a presumption that a person was participating in or aiding in the making of a sale or contract of sale in violation of this chapter.

- (C) Any person whom the division exempts from this provision by rule.

Effective Date: 03-18-1999; 09-15-2004; 09-29-2005 .