Supreme Court of Ohio Clerk of Court - Filed September 16, 2024 - Case No. 2024-1290

IN THE SUPREME COURT OF OHIO

CONSTANTINE BITOUNIS, et al.,	:	
	:	Case No. 2024-1290
Plaintiffs-Appellees,	:	
	:	On appeal from the
v.	:	Eighth District Court of Appeals
	:	Cuyahoga County, Ohio
INTERACTIVE BROKERS LLC, et al.,	:	
	:	Court of Appeals Case No. 113193
Defendants-Appellants.	:	

MEMORANDUM IN SUPPORT OF JURISDICTION OF AMICI CURIAE THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION IN SUPPORT OF APPELLANTS INTERACTIVE BROKERS LLC, ET AL.

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<u>INTRODUCTION AND EXPLANATION OF WHY THIS IS A CASE OF PUBLIC OR GREAT GENERAL INTEREST</u>

This case presents an important question regarding the culpability of an investment brokerage firm that merely provides its ordinary, customary business services that are ultimately used in a fraudulent securities scheme. The Ohio Securities Act, R.C. Chapter 1707, protects investors from bad actors that perpetuate fraudulent schemes through the sale of securities. It holds accountable any person that makes the sale or contract for sale and also those that participated in or otherwise aided the seller in that sale. This Court has made clear, however, that "mere participation in a transaction" is not sufficient to render a financial institution liable for purposes of R.C. Chapter 1707. If the Eighth District's decision below is permitted to stand, that holding will hang in the balance—exposing financial institutions across the State to widespread uncertainty and potential liability. This Court should accept jurisdiction in this case to clarify that the Ohio Securities Act was not intended to and does not make a financial institution liable for securities fraud simply because a bad actor uses its lawful financial services.

The securities law prohibits the knowing sale of fraudulent, illegal securities to buyers. *See generally* R.C. Chapter 1707; R.C. 1707.44. The law not only prohibits persons from knowingly and directly engaging in this fraudulent behavior, but it also holds jointly and severally liable every person that "has participated in or aided the seller" in such fraudulent actions. R.C. 1707.43 (the "Aiding-and-Abetting Statute"). The central issue in this case is whether a financial institution may be held liable under the Aiding-and-Abetting Statute where the plaintiff fails even to allege that the institute knowingly or affirmatively took any action connected to the *sale* of the illegal securities. Both a plain reading of the statute, which explicitly requires affirmative participation, and this Court's decisions suggest the answer is and must be no.

But the Eighth District Court of Appeals held the opposite. The court of appeals found that the plaintiff pled a viable cause of action under the Aiding-and-Abetting Statute against the Interactive Brokers Appellants—the brokerage firm that a fraudulent investor used to deceive members of the Northeast Ohio Greek Orthodox community—even though the allegations in the complaint established only that the firm had been where the fraudster made a series of bad trades that resulted in losing all of Appellees' money. The appellate court reversed the trial court's dismissal of the case and remanded it to the trial court for further proceedings. The Eighth District determined that it could not, as a matter of law, dismiss the case because the Interactive Brokers Appellants' compliance monitoring obligations should have put the firm on notice of various red flags associated with the fraudulent investor. In the court's view, that meant the Interactive Brokers Appellants participated in or aided the fraudulent investor in furthering his illegal scheme.

The lower court's expansive interpretation of the Aiding-and-Abetting Statute, if allowed to stand, will have wide-ranging and significant impacts on brokerage and investment institutions that operate in this State. The central purpose of the Ohio Securities Act is to "prevent the fraudulent exploitation of the investing public through the sale of securities." *Perrysburg Twp. v. Rossford*, 2004-Ohio-4362, ¶ 9, quoting *In re Columbus Skyline Secs., Inc.*, 74 Ohio St.3d 495, 498 (1996). The Aiding-and-Abetting Statute likewise prevents others involved in the fraudulent scheme from escaping liability. But the Aiding-and-Abetting Statute does not contemplate holding a bank, brokerage firm, or account manager firm jointly and severally liable for fraudulent securities sales when the investment or brokerage account was merely an unknowing tool used by a fraudulent investor.

There are two primary reasons that this Court should accept this case for jurisdiction.

First, the practical impact that this will have on banks, brokerage and investment firms, and asset managers across Ohio is significant. In the wake of the court's decision below, these financial institutions might be on the hook for millions of dollars of damages simply because a bad actor utilized an investment or brokerage account in or otherwise deposited funds into an institution's system. This potential liability would impose an unprecedented and impractical *duty* on financial institutions to monitor and investigate the transactions of every customer. And absent clarification from this Court, financial institutions will face significant uncertainty around when and how their normal business activities might expose them to liability through the Aiding-and-Abetting Statute. The Eighth District's decision will fundamentally expand the circumstances under which lawful institutions conducting their ordinary services can be held accountable for the wrongdoing of those who use their services, even beyond the circumstances of fraudulent securities sales.

Second, the plain language of the Aiding-and-Abetting Statute, and this Court's decisions applying it, establish that "mere participation" is not sufficient to satisfy its requirements. There must be affirmative participation in the illegal, fraudulent scheme.

The Court should take this opportunity to clarify that the Ohio Securities Act and the Aiding-and-Abetting Statute mean what they say. To be held jointly and severally liable, a financial institution (or any person, for that matter) must have actively participated in the *sale* of the fraudulent securities, and not merely served as an unknowing, passive tool in someone else's fraudulent scheme. The Securities Industry and Financial Markets Association urges the Court to accept this case to guide lower courts in the proper application of the Ohio Securities Act.

STATEMENT OF INTEREST OF AMICI CURIAE

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks, and asset managers operating in the United States

and global capital markets. On behalf of the industry's one million employees, SIFMA advocates on legislation, regulation, and business policy affecting retail and institutional investors, equity and fixed income markets, and related products and services. SIFMA serves as an industry coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the United States regional member of the Global Financial Markets Association (GFMA).

STATEMENT OF THE CASE AND FACTS

SIFMA adopts the Statement of the Case and Facts set forth in the memorandum in support of jurisdiction of the Interactive Brokers Appellants.

ARGUMENT IN SUPPORT OF PROPOSITION OF LAW

> **Proposition of Law:** A financial institution does not participate or aid in the sale of illegal securities under R.C. 1707.43(A) when it merely provides its ordinary and customary services that are unknowingly used to further a fraudulent scheme.

This case presents an important and fundamental question: should a financial institution be held jointly and severally liable for damages in a fraudulent securities scheme when it did not affirmatively participate in that sale? The Court should take this opportunity to reinforce that the answer is clearly no.

First, the Eighth District's decision creates significant confusion within an industry where certainty and predictability are paramount. If a brokerage or investment firm is now liable for, potentially, millions of dollars (or more) of damages simply because it performed its ordinary, business services to customers, how can it effectively manage its costs of doing business? The fundamental principal of due process requires that the Aiding-and-Abetting Statute provide brokerage and investment firms with fair notice of what level of conduct and scienter is required for aiding-and-abetting liability. The Eighth District's decision would effectively make banks and

other financial institutions strictly liable for the wrongful conduct of their customers—without the requisite proof of scienter or conduct showing knowing participation in the fraudulent scheme.

Second, the plain language of the Aiding-and-Abetting Statute must mean something when it says that only persons who have participated or aided in making a sale are liable—especially when the rest of the Ohio Securities Act requires that the sales be made *knowingly*. The Eighth District's decision renders that language meaningless.

I. Due process requires Ohio law to provide financial institutions with fair notice of the level of scienter and knowing participation required to impose liability for aiding and abetting.

Certainty, predictability, and clarity are critical to SIFMA's members' operation in the financial markets. Without knowing what activity is permitted and what activity is prohibited, financial institutions cannot effectively provide services to their customers. That is why federal and state law clearly outline for financial institutions what is allowed, what is not allowed, and the consequences for not following the rules. It is within this framework that SIFMA's members implement ordinary and customary services and processes for their customers.

The Eighth District's decision, however, unravels the well-known, consistent set of rules that are necessary to allow institutions, brokers, managers, investors, and customers to operate in harmony together. Under the Eighth District's analysis, an investment brokerage or a bank or asset manager (or really, anyone) may be held *jointly and severally liable* for damages to a victim of a fraudulent securities scheme when the financial institution simply followed the rules and provided its ordinary and customary services.

The impact could be devastating to financial institutions across the State.

First, the lower court essentially transforms a bank's or institution's "know your customer" standards into a legal presumption of knowledge that a particular customer's transactions are part of a fraudulent securities scheme. Such a standard inaccurately assumes that a financial institution

is able to monitor and investigate each transaction by each customer that uses its services to determine whether signs of potential securities fraud exist. Such an expectation is not only impractical (if not impossible), but would also turn the traditional relationship between a financial institution and its customers on its head. Simply knowing certain aspects of a customer's information and activity, whether required by a federal or state statute or by required monitoring activities, should not result in liability under the Aiding-and-Abetting Statute. Otherwise, a financial institution's normal, ordinary operations and processes would necessarily result in the financial institution's liability in every case involving a customer's fraudulent securities scheme.

Second, if liability attaches for simply providing ordinary and customary business services, the Eighth District's decision essentially forces financial institutions to do more than what is ordinary and customary (and required by existing state and federal law). In fact, banks, brokerage and investment firms, and brokers must now *investigate* any potential "red flags" prior to any account being opened. *See* Cynthia A. O'Neil & J. Anothny Penry, *Broker Dealer Liability*, 12 PIABA B.J. 73, 76 (2005) ("[A]iding and abetting liability does not apply to a broker dealer's 'negligent failure to inquire and disclose.' "). The problem is what these "red flags" now become: the age, home address, and investing credentials of the accountholder. *See Bitounis v. Interactive Brokers LLC*, 2024-Ohio-2905, ¶ 14 (8th Dist.). This is not what the Aiding-and-Abetting Statute requires.

Third, the financial industry is premised upon certainty and predictability. Imagine a financial institution that provides its ordinary and customary services to its customers. It complies with federal and state law and regulations. It complies with internal policies and controls. It complies with best practices within the industry. But a bad actor decides to use those services for fraudulent securities sales. The financial institution had no knowledge of that fraudulent scheme.

Yet, under the Eighth District's interpretation of the Aiding-and-Abetting Statute, that financial institution is liable for damages to the victims of the securities fraud. There was no notice to the financial institution of its potential liability. There was no opportunity to prevent the fraudulent scheme from occurring to prevent potential liability (bad actors will be bad actors regardless of the rules, regulations, and processes). This lack of notice and due process was not contemplated or intended by the Aiding-and-Abetting Statute. That is why *active* and *knowing* participation in the sale of fraudulent securities is at the heart of the Ohio Securities Act.

Fourth, overbroad aiding-and-abetting statutes can capture innocent, legitimate businesses and expose them to unnecessary litigation and damages. *See, e.g.*, *Twitter v. Taamneh*, 143 S. Ct. 1206, 1221 (2023) (noting that "if aiding-and-abetting liability were taken too far . . . then ordinary merchants could become liable for any misuse of their goods and services, no matter how attenuate their relationship with the wrongdoer"). Lawsuits like this are rarely brought against the individual that actually committed the fraudulent securities scheme—in this case, the now-deceased Constantine Antonas. Instead, these claims go after legitimate companies and rest upon far-fetched liability theories in hopes of securing a monetary award. The Eighth District's decision would only perpetuate these claims when no financial institution actually participated in a fraudulent securities scheme.

Fifth, the Eighth District's decision makes it easier for victims of securities fraud to recover against a financial institution that simply offers its ordinary and customary business than it does against the actual fraudster. A fraudulent actor must have knowingly sold illegal securities. *See generally* R.C. 1707.44. But the Eighth District's decision permits victims to proceed based solely upon a financial institution providing the services it provides to every single one of its customers. The lower court's decision does not require the financial institution to have knowingly or actively

participated in the fraud. Without attaching any sort of scienter to the Aiding-and-Abetting Statute and finding that ordinary, customary business services amounts to participation and aiding, the Eighth District created an easier standard against the financial institution than against the fraudster.

Sixth, legitimate companies—like SIFMA's members—do not participate or aid-and-abet in fraudulent securities schemes. To simply permit a bare, conclusory allegation to attach liability to a financial institution will force financial institutions to engage in extensive discovery and expensive defense of claims that simply do not exist.

II. The Aiding-and-Abetting Statute requires active participation or aid in the sale of an illegal security.

Finally, the plain language of the law—along with the Court's application of the law—requires active and knowing participation in the sale of a fraudulent security. The Ohio Securities Act prevents the "fraudulent exploitation of the investing public through the sale of securities." *Perrysburg Twp. v. Rossford*, 2004-Ohio-4362, ¶ 9, quoting *In re Columbus Skyline Secs., Inc.*, 74 Ohio St.3d 495, 498 (1996). Many activities are prohibited, but relevant here is the prohibition on knowingly making false representations in the sale of securities, R.C. 1707.44(B)(4), knowingly engaging in the practice of selling fraudulent securities, R.C. 1707.44(G), knowingly selling (or offering for sale) unexempt or unregistered securities, R.C. 1707.44(C)(1), or the sale of securities by an unlicensed person, R.C. 1707.44(A)(1).

If someone makes a purchase in an unlawful sale (including those described above), they can seek to rescind the purchase from the person who made the sale *or* "every person that has participated in or aided the seller in any way making such sale or contract for sale"—who are all jointly and severally liable to the purchaser. R.C. 1707.43(A). The plain language of this statute "requires a person to have some nexus with the sale of illegal securities." *Boyd v. Kingdom Trust Co.*, 2018-Ohio-3156, ¶ 10. This Court has noted that the Aiding-and-Abetting Statute does not

attach liability "absent some conduct that aided a seller in a sale of illegal securities." *Id.* at ¶ 11. The only time that liability attaches under the Aiding-and-Abetting Statute is when someone "played a role in the sale of unlawful securities, such as acting in concert with the seller of an unlawful investment." *Id.* at ¶ 12. For example, the deposit of funds by a bank does *not* amount to participation or aid in a sale and, therefore, is not allowed to proceed under the Aiding-and-Abetting Statute. *Wells Fargo Bank v. Smith*, 2013-Ohio-855, ¶ 29 (12th Dist.). Nor does serving as an escrow agent. *Boomershine v. Lifetime Capital, Inc.*, 2008-Ohio-14, ¶ 15 (2d Dist.).

Appellees have not—and cannot—sufficiently allege that the Interactive Brokers Appellants knowingly and actively participated or aided in the fraudulent sale of securities by Constantine Antonas. The actual *sale* at issue in this case is Antonas securing the monies from Appellees; the sale is *not* the (bad) trades that Antonas made through the investment fund that utilized the Interactive Brokers Appellants' platform. There are no adequate allegations—nor could there be—that the Interactive Brokers Appellants participated or aided in Antonas's sale of the initial investments. Thus, there is no sufficient nexus that the Interactive Brokers Appellants' conduct aided in the sale of the fraudulent securities. While it is unfortunate that Appellees lost their money because of Antonas's illegal scheme, it does not permit them to pursue relief against the Interactive Brokers Appellants.

The plain language of the Aiding-and-Abetting Statute, coupled with the broader language of the Ohio Securities Act, and this Court's decisions interpreting and applying the same, simply do not permit this case to proceed.

CONCLUSION

For all the foregoing reasons, amicus curiae SIFMA respectfully requests that the Court grant jurisdiction in this case and reverse the judgment of the Eighth District Court of Appeals.

Respectfully submitted,

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