Supreme Court of Ohio Clerk of Court - Filed February 03, 2025 - 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. 23-113193
Defendants-Appellants.	:	

BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION AND THE OHIO BANKERS LEAGUE AS AMICI CURIAE IN SUPPORT OF APPELLANTS INTERACTIVE BROKERS LLC, ET AL.

Brodi J. Conover (0092082)
**Counsel of Record*
BRICKER GRAYDON LLP
2 East Mulberry Street
Lebanon, Ohio 45036
Phone: (513) 870-6693
bconover@brickergraydon.com

Ryan L. Richardson (0090382)
BRICKER GRAYDON LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2348
rrichardson@brickergraydon.com

Counsel for Amici Curiae
The Securities Industry and Financial Markets Association and the Ohio Bankers League

Geoffrey J. Ritts (0062603)
James R. Saywell (0092174)
**Counsel of Record*
Samuel V. Lioi (No. 100464)
JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114
Phone: (216) 586-3939
gjritts@jonesday.com
jsaywell@jonesday.com
slioi@jonesday.com

Yvette McGee Brown (0030642)
H. Cole Hassay (0101116)
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215
Phone: (614) 281-3865
ymcgeebrown@jonesday.com
hhassay@jonesday.com

Counsel for Interactive Brokers Appellants

Jeffrey S. Dunlap (0067923)
UB GREENSFELDER LLP
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113-1406
Phone: (216) 583-7000
jdunlap@ubglaw.com

Trial Counsel for Interactive Brokers Appellants

David P. Meyer (0065205)
**Counsel of Record*
Courtney M. Werning (0089120)
Jared W. Connors (0101451)
MEYER WILSON CO., LPA
305 W. Nationwide Blvd.
Columbus, Ohio 43215
Phone: (614) 224-6000
dmeyer@meyerwilson.com
cwerning@meyerwilson.com
jconnors@meyerwilson.com

Rex H. Elliott (0054054)
Barton R. Keyes (0083979)
COOPER ELLIOTT
305 W. Nationwide Blvd.
Columbus, Ohio 43215
Phone: (614) 481-6000
rexe@cooperelliott.com
bartk@cooperelliott.com

Counsel for Plaintiffs-Appellees

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INTRODUCTION

This case presents a straightforward question: can an investment brokerage firm that provided its ordinary, customary business services to a customer that decided to conduct a fraudulent securities scheme without the brokerage firm's knowledge be held liable for securities fraud? The Ohio Securities Act, R.C. Chapter 1707, says no. The plain statutory language giving rise to joint-and-several securities fraud liability for those who "participated in or aided the seller" has been consistently construed to require knowing and affirmative misconduct as part of the wrongdoing and clearly excludes the type of customary brokerage services at issue here. This Court has said that "mere participation in a transaction" is not sufficient to hold a financial institution liable under R.C. Chapter 1707. By the plain terms of the law and this Court's prior interpretation of what the law says, the Eighth District should be reversed.

But even beyond that simple answer, this case stands to have significant implications on the brokerage and investment industry in Ohio. Certainty, predictability, and clarity are paramount to broker and investment firms' operation in the financial markets. The Eighth District's decision provides the exact opposite: chaos, imbalance, and uncertainty. How can a financial institution manage its costs of doing business—including what it passes along to its customers—when it could now be liable for, potentially, millions of dollars (or more) of damages simply because it provided its ordinary, customary business services to customers? In short, it can't. And that's the point. If the Court does not take the opportunity to reverse the Eighth District's decision, financial institutions in Ohio will struggle to operate and provide services to the millions of non-bad actor customers they serve.

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).

The Ohio Bankers League (the "OBL") is a non-profit trade association that represents the interests of state-chartered and federally-chartered FDIC-insured commercial banks, savings banks, thrifts and savings associations, and their holding companies and affiliated organizations, doing business in Ohio. Members include depository institutions that are headquartered in Ohio, as well as institutions that are headquartered elsewhere but conduct banking business in Ohio. OBL has over 170 member organizations, which represents most depository institutions doing business in the State of Ohio. OBL membership is diverse and includes the full spectrum of FDIC-insured depository institutions and their affiliates. OBL member institutions range from small savings associations that are organized as mutual thrifts owned by their depositors, to community banks that are the quintessential locally owned and operated business, to large, regional multistate and multinational financial institutions that have multiple bank and non-bank affiliates and conduct business from across the country and internationally. OBL member institutions directly employ more than 60,000 across the State of Ohio.

STATEMENT OF THE CASE AND FACTS

SIFMA and the OBL adopt the Statement of the Case and Facts set forth in the merit brief of the Interactive Brokers Appellants.

ARGUMENT

> **<u>Proposition of Law</u>:** A financial institution such as a brokerage firm is not liable for participating in an illegal sale of securities under R.C. 1707.43(A) when its only connection to the sale to the plaintiff was peripheral and as part of its normal business activities.

The securities law prohibits the knowing sale of fraudulent, illegal securities to buyers. *See generally* R.C. Chapter 1707; R.C. 1707.44. 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 institution 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 reveal that 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 Eighth District's expansive and unlawful interpretation of the Aiding-and-Abetting Statute must be reversed for at least two fundamental reasons. *First*, such a reading would improperly and unfairly wreak havoc on banks, brokerage and investment firms, and asset managers across Ohio, subjecting them to potential liability for millions of dollars in damages simply because a bad actor utilized an investment or brokerage account or otherwise deposited funds into an institution's system—all without these institutions' knowledge of the fraudulent

scheme. These harms would extend to the banks' customers too, thwarting the fundamental purpose of the securities laws. *Second*, the lower court's decision directly contravenes the language of the Aiding-and-Abetting Statute and this Court's prior decisions. As the trial court and the dissenting opinion below rightly observed, "mere participation in a transaction" is not enough to establish liability.

I. The lower court's wrongful interpretation of the Aiding-and-Abetting Statute would lead to harmful real-world consequences for financial institutions and customers.

The Ohio Securities Act was not intended to make a financial institution liable for securities fraud simply because a bad actor uses its lawful financial services. The Eighth District's decision, however, ignores this well-established principle. 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. In other words, the Eighth District's decision would effectively make banks and other financial institutions strictly liable for the wrongful conduct of its customers—without the requisite proof of scienter or conduct showing knowing participation in the fraudulent scheme.

The impact of this unprecedented ruling would be devastating to financial institutions across the State and unnecessarily inflict harm on innocent customers.

A. Holding financial institutions liable for merely providing ordinary banking services to a customer who commits a fraud would impose unworkable and impossible to implement standards on financial institutions.

The standard the lower court adopted rests on a number of factually flawed and unfair assumptions about the extent to which a bank could—and should —monitor, investigate, and take action against its own customers. In short, it 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. For example, it assumes that a financial institution is able to monitor and investigate each transaction by every customer that uses its services to determine whether signs of potential securities fraud exist. It assumes that a bank can and should recognize those signs as "red flags" of misconduct. And it assumes that it is practical and lawful for the bank to then take action against its consumers to prevent transactions based on such "red flags." And it assumes that a bank should take those steps, even assuming it could.

These assumptions are unfounded. Such an expectation is not only unworkable (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.

B. Holding banks and brokerage firms to these impossible standards would harm, not help, consumers.

The burden of these unworkable standards does not rest on the financial institutions alone. The lower court's decision wholly ignores the inevitable hardships such a standard would work on the very consumers the securities laws are designed to protect. By forcing an innocent financial institution to pay millions for the misdeeds of its consumers, the lower court's standard of liability would necessarily require all financial institutions to subject all consumers to heightened scrutiny at the account-opening and ongoing-monitoring stage. This increased scrutiny would not only lead to increased costs for both the institutions and the consumers, but would also result in many innocent consumers being delayed or denied access to financial services or investigated for potential wrongdoing because of perceived "red flags." This scenario is even more problematic

given the types of information the majority of the lower court says should be viewed as "red flags"—information like 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 does or should require.

C. Holding financial institutions liable for fraudulent customer conduct it did not actively participate in and could not have predicted or prevented would result in uncertainty and unfairness across the financial industry.

The lower court's standard is problematic for the additional reason that it would undermine the certainty and predictability on which the financial industry depends for its stability and success. Moreover, it would lead to fundamentally unfair consequences for the financial institutions. 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.

D. Holding innocent financial institutions liable for "mere participation in a transaction" would incentivize victims to pursue the financial institutions rather than the culpable party.

Finally, 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.

Legitimate companies—like SIFMA's and OBL'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. Overbroad aiding-and-abetting statutes can capture innocent, legitimate businesses and expose them to unnecessary litigation and damages. *See, e.g.*, *Twitter, Inc. v. Taamneh*, 598 U.S. 471, 489 (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").

The actual fraudsters, by contrast, are likely to escape the consequences of their own misconduct. Lawsuits like this are rarely brought against the individual that actually committed the fraudulent securities scheme. The Aiding-and-Abetting Statute was not intended to shift punishment for fraud from the perpetrators to legitimate banking institutions. But that's what the lower court's decision creates: an easier case against the financial institution that merely provided its customary, ordinary business services than against the fraudster that perpetuated the fraud.

II. The lower court's wrongful interpretation of the Aiding-and-Abetting Statute contravenes the plain language of the statute and this Court's precedent.

In addition to imposing the very real and significant harms described above, the Eighth District's interpretation of the Aiding-and-Abetting Statute violates the plain language of the statute and this Court's rulings. Both the plain language of the law and the Court's application require 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.*, 1996-Ohio-151. 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.

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, amici curiae the Securities Industry and Financial Markets Association and the Ohio Bankers League respectfully request that the Court reverse the judgment of the Eighth District Court of Appeals and affirm the trial court's well-reasoned opinion that Appellees' operative complaint must be dismissed.

Respectfully submitted,

/s/ Brodi J. Conover

Brodi J. Conover (0092082)
BRICKER GRAYDON LLP
2 East Mulberry Street
Lebanon, Ohio 45036
Phone: (513) 870-6693
bconover@brickergraydon.com

Ryan L. Richardson (0090382)
BRICKER GRAYDON LLP
100 South Third Street
Columbus, Ohio 43215
Phone: (614) 227-2348
rrichardson@brickergraydon.com

Counsel for Amici Curiae
The Securities Industry and Financial Markets Association and the Ohio Bankers League

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing was sent via email transmission on February 3rd, 2025 to the following:

David P. Meyer (0065205)
Counsel of Record
Courtney M. Werning (0089120)
Jared W. Connors (0101451)
MEYER WILSON CO., LPA
305 W. Nationwide Blvd.
Columbus, Ohio 43215
Phone: (614) 224-6000
dmeyer@meyerwilson.com
cwerning@meyerwilson.com
jconnors@meyerwilson.com

Rex H. Elliott (0054054)
Barton R. Keyes (0083979)
COOPER ELLIOTT
305 W. Nationwide Blvd.
Columbus, Ohio 43215
Phone: (614) 481-6000
rexe@cooperelliott.com
bartk@cooperelliott.com

Counsel for Plaintiffs-Appellees

Geoffrey J. Ritts (0062603)
James R. Saywell (0092174)
Counsel of Record
Samuel V. Lioi (No. 100464)
JONES DAY
901 Lakeside Avenue
Cleveland, Ohio 44114
Phone: (216) 586-3939
gjritts@jonesday.com
jsaywell@jonesday.com
slioi@jonesday.com

Yvette McGee Brown (0030642)
H. Cole Hassay (0101116)
JONES DAY
325 John H. McConnell Blvd., Suite 600
Columbus, Ohio 43215
Phone: (614) 281-3865
ymcgeebrown@jonesday.com
hhassay@jonesday.com

Counsel for Interactive Brokers Appellants

Jeffrey S. Dunlap (0067923)
UB GREENSFELDER LLP
Skylight Office Tower
1660 West 2nd Street, Suite 1100
Cleveland, Ohio 44113-1406
Phone: (216) 583-7000
jdunlap@ubglaw.com

Trial Counsel for Interactive Brokers Appellants

/s/ Brodi J. Conover
Brodi J. Conover (0092082)