IN THE SUPREME COURT OF OHIO

CONSTANTINE BITOUNIS, et al., *Plaintiffs-Appellees,* **v.** **INTERACTIVE BROKERS LLC, et al.,** *Defendants-Appellants.*	Case No. 2024-1290 On appeal from the Eighth District Court of Appeals Cuyahoga County, Ohio Court of Appeals Case No. 23-113193

BRIEF OF THE PUBLIC INVESTORS ADVOCATE BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF APPELLEES CONSTANTINE BITOUNIS, ET AL.

Alan L. Rosca
ROSCA SCARLATO LLC 2000
Auburn Drive, Suite 200
Beachwood, OH 44122
arosca@rscounsel.law

216-946-7070

Attorney for Public Investors Advocate Bar Association

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STATEMENT OF INTEREST OF THE AMICUS CURIAE, PIABA

Public Investors Advocate Bar Association ("PIABA") is a bar association comprised primarily of attorneys who represent members of the investing public. The mission of PIABA is to promote the interests of, and to help protect the investing public. PIABA also advocates for public education regarding investment fraud and industry misconduct. PIABA often issues comment letters regarding FINRA rule changes, provides testimony to government agencies and Congress, and files *amicus* briefs on a variety of issues pertaining to the protection of the investing public—the very people and businesses who provide corporations with the capital needed to drive economic activity in the United States. Particularly relevant to this case, PIABA members often represent victims of fraudulent investment schemes, also known as Ponzi schemes, in instances where such schemes are perpetrated by investment professionals who are associated with financial industry members.

This brief was not authored in whole or in part by counsel for appellants. Moreover, no funding was provided by appellants or any other group or individual to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

Appellees asserted one legal claim against Appellant Interactive Brokers, LLC ("Interactive Brokers" or the "Firm"), alleging that the Firm participated and/or aided in the sale to Appellees of unregistered securities issued by the Epitome Ponzi scheme, in violation of the Ohio Securities Act (the "Act"). In response, Appellant has anchored its defenses to series of misrepresentations concerning (i) the nature of its relationship with the Epitome Ponzi scheme (the "Epitome Scheme" or the "Scheme"), and (ii) the purpose and breadth of the Ohio Securities Act.

First, Appellant structures its defense around an effort to minimize its connection to the Epitome Scheme despite its repeated admission of providing critical support to the Scheme and its principal, Constantine Antonas. In the First Amended Complaint ("FAC"), Appellees charge that, but for Interactive Brokers' participation in the fraudulent securities offering, Antonas would have wholly lacked the resources, technology, legitimacy, and capacity to orchestrate his unlawful operation. Moreover, Appellant substantially downplays its own internal compliance processes and protocols, which are meant to prevent this very type of investment fraud, as these practices are likely to create liability for the Firm that is not contemplated in any of the case law that Interactive Brokers relies on in its defense. More specifically, the Firm all but disowns its own practice of requesting and reviewing fund documents and related banking data before approving a hedge fund for trading on its platform – a process that failed to address any of the red flags listed by Appellees in the FAC. Ultimately, however, Appellant's repeated compliance failures are additional but not required proof of its participation in and culpability for the Epitome Scheme.

Second, Appellant has offered an exceedingly narrow interpretation of the Ohio Securities Act – one which inverts a statute designed for broad application into a law that only applies to those parties that are the primary force behind a securities law violation. This construction contradicts the plain language of the statute and its subsequent interpretations by Ohio's courts.

Notwithstanding Appellant's improper framing of the Act's scope and purpose, Appellees' sole claim against Appellant is that the Firm's conduct constituted participation and/or aid to non-party Antonas and his unlawful sale of the unregistered Epitome Scheme securities to Appellees. Moreover, in Appellees' FAC, Appellees describe specific conduct by Appellant that meets and exceeds Ohio's threshold for liability under the Ohio Securities Act.

STATEMENT OF THE CASE AND FACTS

PIABA adopts the Statement of the Case and Facts as set forth in Appellees' FAC.

ARGUMENT

> Proposition of Law: As drafted, and as subsequently interpreted by Ohio's courts, the Ohio Securities Act establishes liability for violations of the Act for those who participate or aid in the sale of unregistered securities and who benefit from the same, regardless of knowledge, intent, or the alignment of an institution's business practices with the violative conduct.

I. Relevant Factual Considerations

Before addressing the legal rationale for rejecting the dismissal of Appellees' claim, it is necessary to first set forth the factual background regarding the relationship between Epitome and Appellant. That background provides the facts to which the relevant provisions of the Ohio Securities Act discussed herein apply.

First, Antonas and the Epitome Scheme sought and received Appellant's permission to operate a hedge fund on its platform and to use the Firm's name in offering documents provided to investors, including Appellees. As such, and in order to apparently receive such approval, Antonas provided Appellant with a series of documents that discussed the Epitome fund and referenced Antonas as the manager of Epitome. An important question that is beyond the scope of this *amicus* brief is the existence and extent of any due diligence duties by Appellant as to Epitome and Antonas.

Second are the significant incentives that firms like Appellant have to partner with hedge funds like Epitome. Hedge funds present two substantive sources of revenue for a firm like Appellant. The first source of revenue is commissions from trading activity: hedge funds like Epitome fees to firms like Appellant for every trade executed on those firms' platform. In addition to commissions, firms like Appellant benefit from a second source of revenue from funds like Epitome, which is often far greater for pooled accounts like the one operated by Epitome: interest revenue. While commission revenue is dependent on trading activity and potentially marginal in volume, the interest generated by Appellees' collective $25 million in funds would not have been dependent on any trading. Indeed, firms like Appellant source substantial revenue from the interest generated by customers' cash.

II. The Ohio Securities Act Is Broad in Its Remedial Scope and Is Designed to Afford Victims of Securities Fraud with the Ability to Seek Remedies from Parties that Facilitated Unlawful Conduct.

By its drafting language and through subsequent interpretations by the courts of Ohio, the scope of the Ohio Securities Act is broad and purposefully inclusive of all manners of conduct that constitute participation and/or aid in an unlawful securities transaction.

A. The Ohio Securities Act attaches liability to those who participate in or aid securities fraud and does so with a more expansive scope than federal securities laws.

§ 1707.43(A) of the Ohio Securities Act establishes broad liability for those who "participated in or aided" a violation of the Act First, the operative clause of the statute reads as follows: "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…" (emphasis added). Ohio Rev. Code Ann. § 1707.43(A). Moreover, Ohio courts have routinely upheld an

expansive interpretation of the clause, holding that "[t]he language in this provision has been held to be broad in scope." *Fed. Mgt. Co. v. Coopers & Lybrand*, 137 Ohio App. 3d 366, 391, 738 N.E.2d 842 (10th Dist.2000). Furthermore, Ohio's application of aiding and abetting liability to violations of the Ohio Securities Act is understood to exceed that of similar provisions in the federal securities laws:

> As section 1707.43 applies to anyone who "participated in or aided the seller in any way" in a sale violating Ohio's securities laws, this provision is much broader than the parallel federal provision in section 12(1). This wide-ranging application is typical of most states' securities laws. See, e.g., *Molecular Technology*, 925 F.2d at 920 n. 7 (most states' Blue Sky laws do not require scienter). Rescission is thus available if the buyer shows that the violation was one materially affecting the protective goals of the state's securities laws.
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> *Riedel v. Acutote of Colo.,* 773 F. Supp. 1055, 1066 (S.D. Ohio 1991).

With this framing, it becomes apparent that the Eighth District properly rejected a dismissal of the FAC. The operative pleadings here allege the participation of Appellant in the Epitome Scheme in a manner that not only aided Antonas but that provided him with critical support to effectuate his fraud on Appellees, and also allege that, Appellant was the beneficiary of the substantive commission revenue and other fees generated by the Epitome scheme's use of the Firm's services.

B. The Ohio Securities Act emphasizes participation in violative misconduct over substantive involvement or actual knowledge.

The question before the Court is whether Appellants (i) engaged in some form of "participation or assistance in the sale" of the unregistered Epitome securities, and (ii) received "some form of remuneration, either direct or indirect." *In re Nat'l Century Fin. Enters., Inc., Inv. Litig.,* 755 F. Supp. 2d. 857, 884-85 (S.D. Ohio 2010). This two-part test ensures that no individual

or entity who advances the sale of unregistered securities, and who ultimately profits from those efforts, is entitled to retain the benefit of a bargain steeped in fraudulent conduct.

Given Ohio's broad application of the aiding and abetting clause of the Act to "participation" in violative conduct, Appellant has repeatedly argued that Appellees' claims lack a nexus to the sale of the Epitome securities. However, Appellees' FAC establishes this nexus. Moreover, efforts to frame the established nexus between Appellant's conduct and the Epitome sales as insufficient under the text of the Act or Ohio jurisprudence requires a necessary but telling deviation from Ohio law entirely. In both Appellant's merit brief and the amicus filings before this Court, arguments levied in defense of Appellant's position rely on legal interpretations that either originate from outside of Ohio's courts and/or speak to aiding and abetting liability in contexts separate and apart from the Ohio Securities Act. Conversely, an analysis that centers on the Act and its subsequent interpretations by Ohio's courts returns to the same conclusion: the Eighth District's decision comports with prior guidance that the Act "is a remedial act that must be liberally construed to effectuate its purposes." *Stuckey v. Online Resources Corp*., 909 F.Supp.2d 912, 948 (S.D.Ohio 2012), citing *In re Columbus Skyline Secs.,* 74 Ohio St.3d 495, 499 (1996) ("In order to further the intended purpose of the Act, its securities anti-fraud provisions must be liberally construed.").

Here, Appellant's alleged review and approval of Epitome to trade as a hedge fund on Appellant's platform, which occurred after Appellant reviewed and approved offering documents that were thereafter used by Antonas to solicit and sell his unregistered securities establishes the nexus between Appellant and the sales of Epitome in their FAC. Further, Appellees pleadings allege subsequent failures by Appellant to thwart the Epitome Scheme, which failures suggest

continued misconduct by the Firm, although tying this alleged continued misconduct to the original sales is not necessary to uphold the Eighth District's decision.

C. The misapplication of *Boyd v Kingdom Trust Co.* and the creation of a radical and unfounded defense based on a financial institution's "routine business activities."

In various briefs submitted to date, Appellant seeks to rely on this Court's decision in *Boyd v Kingdom Trust Co*. and argues that this decision shields from liability any financial institution that participated in a violation of the Act but did so in the course of its general business practices. Such an interpretation is overbroad and would lead to absurd results. A closer examination of the decision in *Boyd* highlights the critical differences between that case and the present matter. First, the defendants in *Boyd* were alleged to have participated in the **purchase** of illegal securities, and not the **sale** of illegal securities, as is the case here. See *Boyd v. Kingdom Tr. Co.,* 2018-Ohio-3156, ¶ 1, 154 Ohio St. 3d 196, 196, 113 N.E.3d 470, 471. This distinction between liability for participation in an unlawful sale versus an unlawful purchase is material and was treated as such by the Court in *Boyd*: "The General Assembly has demonstrated its intent to treat the "sale" and "purchase" of securities as two distinct acts." *Boyd* at 472. This distinction was also a point of focus for the appeals court, which italicized "purchase" in its opening analysis, before asserting that liability for participation in the "*purchase* of illegal securities" was a new and unsettled question. *Boyd v. Kingdom Tr. Co.,* No. 17-3026, 2017 U.S. App. LEXIS 15908, at *3 (6th Cir. Aug. 18, 2017). Conversely, the issue in the present matter - liability for simple participation or aid in the sale of an illegal security - is settled law and settled in favor of allowing for application of the clause here based on a natural reading of the operative text.

The reason for the purchase/sale distinction, and the degree of its importance here, is highlighted by each case's fact pattern. In *Boyd*, "participation" in a purchase merely consisted of

defendants following plaintiffs' own instructions to purchase and custody the securities in question. In the present matter, Appellant's alleged participation and aid consisted of the material steps of: (i) reviewing the Epitome Scheme's offering materials, corporate documents, regulatory filings, and banking records, before (ii) partnering with Antonas, lending its name to the Epitome Scheme's offering documents, and providing his fraudulent venture with the necessary trading platform and the perceived legitimacy of aligning the fraud with a FINRA registered broker-dealer.

Moreover, the Court in *Boyd* was answering a very specific question, whether "the Ohio Securities Act, imposes joint and several liability on persons who ***aided in the purchase*** of illegal securities ***but did not participate or aid in the sale*** of the illegal securities." (emphasis added). *Boyd v. Kingdom Tr. Co.,* 2018-Ohio-3156, ¶ 1, 154 Ohio St. 3d 196, 196, 113 N.E.3d 470, 471. The question itself implies that had the defendants in *Boyd* conducted themselves similarly in a hypothetical sales process, that the Court would have had grounds to impose liability. Nonetheless, *Boyd* fails to offer applicable guidance here, even if broadly applied to the question of liability for participation or aid in ***any*** element of an unlawful securities transaction. This disconnect stems in part from the disparate nature of the allegations against the respective defendants. In *Boyd*, plaintiffs did "not allege that the [defendants] had ***any*** role" in the underlying Ponzi scheme, nor did they allege that the defendants "knew or ***had reason to know***" that they were participants in a fraudulent securities venture. (Emphasis added.) *Boyd v. Kingdom Tr. Co*., at 471. Accordingly, the defendants in *Boyd* were seeking to avoid liability for participation in a scheme that they entered into under a good-faith assumption. Conversely, Appellant had ample notice that the Epitome Scheme was a fraud and still elected to partner with Antonas despite these red flags, according to the allegations in the operative pleadings.

Finally, the distinctions outlined above underscore the danger of the argument that the holding in *Boyd* shields a financial institution operating in Ohio from liability for participation in securities fraud, so long as its participation lacked outright collusion and fell within the scope of its "normal business activities." Appellant's Brief pg. 12. This novel defense, allegedly derived from *Boyd* but never stated by the Court in its holding, would represent a radical restriction to the ability of any Ohio court to hold financial institutions responsible for their roles in unlawful securities transactions that victimize Ohio residents. In actuality, the holding in *Boyd* was far more narrow and spoke uniquely to the practice of banks being held liable for accepting deposits tied to the unlawful sale of securities. Conversely, in the present matter, Appellant agreed not just to accept Appellees' deposited funds, but also agreed to accept Antonas and the Epitome Scheme as customers of the Firm who would use the Firm's name and platform to market and operate a hedge fund whose very existence was fraudulent. Such conduct, should not be deemed to be "normal business activities" nor should it serve as a safe harbor for otherwise actionable conduct.

On the whole, Ohio's courts have established that an aiding or participating claim under the Act has a very low threshold for application and a very high threshold for dismissal.

CONCLUSION

For the foregoing reasons, PIABA respectfully submits that the district court's decision rejecting the dismissal of Appellees' claim against Interactive Brokers was proper and should be upheld.

Date: March 25, 2025

/s/ Alan L. Rosca
Alan L. Rosca
ROSCA SCARLATO LLC
2000 Auburn Drive, Suite 200
Beachwood, OH 44122
216-946-7070
arosca@rscounsel.law

Attorney for Amicus Curiae Public Investors Arbitration Bar Association

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of March 2025, I electronically filed the foregoing Amicus Curiae Brief with the Clerk of the Court for the Ohio Supreme Court.

Dated: March 25, 2025

/s/ *Alan L. Rosca*

Alan L. Rosca
ROSCA SCARLATO LLC
2000 Auburn Drive, Suite 200
Beachwood, OH 44122
216-946-7070
arosca@rscounsel.law

Attorney for Amicus Curiae Public Investors Arbitration Bar Association