UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO

(Western Division)

CYNTHIA H. BOYD
21755 State Route 739
Raymond, OH 43067

and

THOMAS E. FLANDERS
11101 Ashbury Meadows, DR.
Centerville, OH 45458,

Plaintiffs,

On behalf of themselves and all other similarly situated.

v.

THE KINGDOM TRUST COMPANY
1105 Ky-121
Murray, KY 42071

and

PENSCO TRUST COMPANY
595 Market Street, 4th Floor
San Francisco, CA 94105-7576

And

John Doe, 1-25
(Names and Addresses Unknown),

Defendants.

CASE NO. 3:16-cv-00009

Judge Thomas Rose

MOTION OF PENSCO TRUST COMPANY TO DISMISS THE CLASS ACTION COMPLAINT FOR VIOLATIONS OF THE OHIO SECURITIES ACT, O.R.C. §1707.01 *et seq.*

ORAL ARGUMENT REQUESTED

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NOTICE OF MOTION AND MOTION TO DISMISS

Pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, Defendant PENSCO Trust Company LLC ("PENSCO") moves to dismiss Plaintiffs' Complaint for violations of the Ohio Securities Act, Ohio Revised Code section 1707.01 *et. seq.* because it does not state a claim upon which relief can be granted. Specifically, Plaintiffs have failed to allege that PENSCO engaged in any activities beyond routine banking activities, nor have Plaintiffs alleged any facts that would show that PENSCO "participated in or aided the seller in the sale" of an unregistered security in violation of Ohio Revised Code Section 1707.43. For these reasons, which are further explained in the Memorandum in Support, Plaintiffs' Complaint should be dismissed with prejudice.

Dated: February 23, 2016

Respectfully submitted,

By: */s/ Caroline H. Gentry* _____

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PENSCO TRUST COMPANY

MEMORANDUM IN SUPPORT OF DEFENDANT PENSCO TRUST COMPANY'S MOTION TO DISMISS

I. INTRODUCTION

The Internal Revenue Code requires that Individual Retirement Accounts be held by a qualified custodian. Defendant PENSCO Trust Company, LLC ("PENSCO"), a trust company regulated by state banking authorities, has been a custodian of self-directed Individual Retirement Accounts for over 26 years, enabling its more than 45,000 customers to build wealth in tax-deferred accounts. PENSCO is a passive custodian; it does not do anything except hold its clients' Individual Retirement Account ("IRA") funds and follow its clients' written instructions. Clients bring investments to PENSCO to hold in their IRA accounts; PENSCO does not bring investments to clients, recommend any investments, or review any investments for clients. Each client's relationship with PENSCO is governed by a Custodial Agreement providing that the client, and not PENSCO, is solely responsible for reviewing investments, making investment decisions, and monitoring their investments.

Plaintiffs Cynthia H. Boyd, Thomas E. Flanders, and the putative class members (collectively "Plaintiffs") are investors who decided to invest their IRA funds in investments offered and sold by William Apostelos ("Apostelos"). After Plaintiff Flanders decided to invest with Apostelos, he entered into a custodial agreement with PENSCO to hold the investment. PENSCO is not alleged to have had anything to do with Mr. Flanders' decision to invest with Apostelos.[1] There is no allegation that PENSCO has any relationship with Apostelos or passed any information about the investment from Apostelos to Mr. Flanders. Likewise, there is no allegation that PENSCO had any idea that Apostelos' investments were fraudulent. The only involvement on PENSCO's part was acting for Mr. Flanders, at his direction, to perform the ministerial actions required of an IRA custodian to take possession of the investment in Mr. Flanders' account. Unfortunately, Mr. Flanders suffered significant losses from Apostelos' criminal fraud. Now, because he is unable to recover his losses from Apostelos, Mr. Flanders

[1] Because Plaintiffs' allegations against PENSCO focus only on the association between PENSCO and Mr. Flanders, this motion is limited to that relationship.

seeks to hold PENSCO liable.

Plaintiffs' Complaint, however, fails to state a claim or a plausible factual scenario on which liability could be found. The crux of Plaintiffs' argument is that PENSCO "participated in or aided the seller" in the sale of the unregistered securities as defined under Ohio Revised Code Section 1707.43. While in some ways a broad statute, Section 1707.43 has never been construed to create liability for passive IRA custodians or other financial institutions performing ordinary financial activities for customers. Nor should it be construed in such a way, for it would be absurd to find that a bank "participated in or aided the seller" by simply sending a wire to make an investment at its client's direction or holding the investment certificate in the bank's vault for its customer. Indeed, cases have quite sensibly held that such ordinary financial functions performed for customers do not constitute "participation" under Section 1707.43. Instead, Section 1707.43 is meant to protect consumers from the sellers and marketers of securities, and those who help the sellers or encourage the buyers.

Recognizing that they are trying to fit a square peg into a round hole, Plaintiffs rely on general allegations in an attempt to cloud the requirements for finding liability under Section 1707.43. Plaintiffs argue that, "but for" PENSCO's services, Apostelos would not have been able to sell the Ponzi scheme securities. Putting aside the logical leaps necessary to make this argument true, Section 1707.43 does not create liability where the alleged connections between a Defendant and a seller of a security are as tenuous as they are here. Mr. Flanders found the investment offered by Apostelos and made a decision to invest with no involvement on PENSCO's part. Mr. Flanders then came to PENSCO and requested that it take custody of the investment because federal law requires such investments to be held by a custodian. Finally, PENSCO, acting on behalf of Mr. Flanders at his request, placed the investment in his IRA account. Section 1707.43 does not impose liability for simply carrying out the custodial functions mandated by the Internal Revenue Code, and the Complaint fails to state a claim against PENSCO. Unless Plaintiffs can plead something more than PENSCO acting as a passive custodian (which they cannot), the Complaint should be dismissed with prejudice.

II. FACTUAL BACKGROUND

A. Self-Directed IRAs

PENSCO is a Self-Directed IRA ("SDIRA") custodian. Like all IRA custodians, SDIRA custodians maintain custody of IRA assets and are subject to IRS regulations. As the Securities and Exchange Commission publication cited by Plaintiffs makes clear: "[SDIRA] custodians are responsible only for holding and administering the assets [of an IRA]. . . and generally do not evaluate the quality or legitimacy of any investment in the self-directed IRA or its promoters." *Investor Alert: Self-Directed IRAs and the Risk of Fraud*, SEC Office of Investor Education and Advocacy (https://www.sec.gov/investor/alerts/sdira.pdf). "Investors should understand that the custodians and trustees of self-directed IRAs may have limited duties to investors, and that the custodians and trustees for these accounts will generally not evaluate the quality or legitimacy of an investment and its promoters." *Id.* at 1. Indeed, most custodial agreements between an SDIRA custodian and an investor, including the one governing the relationship between Mr. Flanders and PENSCO, "explicitly state that the self-directed IRA custodian has no responsibility for investment performance." *Id* at 2. Effectively, the only difference between an SDIRA custodian and a traditional IRA custodian is that the former can hold the broad array of assets permitted to be held in IRAs by the Internal Revenue Code, including real estate, promissory notes, tax lien certificates, and private placement securities. *See id.* at 3; *see also* Compl., ¶ 39.

B. The Apostelos Ponzi Scheme

Plaintiffs allege that, in September 2009, William Apostelos ("Apostelos") and two other individuals formed Midwest Green Resources, LLC ("Midwest Green"). Compl., ¶ 21. Subsequently, on October 19, 2009, Apostelos formed WMA Enterprise, LLC, ("WMA"). Compl., ¶ 25. Apostelos created both companies as vehicles to offer unregistered securities to

various investors, including Plaintiffs. Compl., ¶¶ 21-24. The Midwest Green equity securities and the WMA promissory notes are hereinafter collectively referred to as the "Securities."

After creating these companies, Apostelos solicited investors, including Mr. Flanders, to purchase the Securities. Compl., ¶ 20. There is no allegation that PENSCO had any involvement in soliciting any investor. Apostelos made multiple fraudulent misrepresentations and Mr. Flanders, relying on these misrepresentations, purchased the Securities with funds from his IRA. Compl., ¶¶ 2, 20, 48. There is no allegation that PENSCO had any involvement or awareness of any of the representations being made by Apostelos. After receiving investors' money and issuing the Securities, Apostelos began to pay earlier investors with funds raised from later investors. Compl., ¶ 35. Eventually the Ponzi scheme unraveled and, on October 15, 2014, a group of investors filed a petition for involuntary bankruptcy against Apostelos. Compl., ¶ 36.

C. PENSCO's Alleged "Participation"

Plaintiffs' sole operative allegation against PENSCO is that, but for PENSCO's services, Apostelos would not have been able to sell the Securities to Plaintiffs. Compl., ¶ 49. The Complaint alleges that "Apostelos had Plaintiffs and other investors open accounts with PENSCO." Compl., ¶ 45. PENSCO, like any other IRA custodian, would "maintain custody of the IRA assets and all transaction and other records pertaining to them, file required IRA reports [with the IRS], issue client statements, and perform other administrative duties on behalf of the SDIRA owner of the IRA account." Compl., ¶ 39; *see also* Declaration of Kirk W. Merritt filed concurrently with this Motion ("Merritt Decl."), Exs. A & B.[2]

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[2] Generally, when considering a motion to dismiss, a district court is not permitted to consider matters beyond the complaint. *Mediacom Southeast LLC v. BellSouth Telcoms., Inc.*, 672 F.3d 396, 399 (6th Cir. 2012). However, "[w]hen a court is presented with a Rule 12(b)(6) motion, it may consider the Complaint . . . and exhibits attached to defendant's motion to dismiss *(footnote continued on next page)*

By entering into the Custodial Agreement with PENSCO, Mr. Flanders agreed that he (and not PENSCO) would have "sole authority and responsibility to direct the investment of Custodial Account assets." Merritt Decl., Ex. B, Art. IX, § 2(a). Mr. Flanders also agreed that he (and not PENSCO) "shall be solely responsible for determining the . . . legality" of any investment he directed PENSCO to buy for his account. *Id.*, Art. IX, § 2(b).

After Mr. Flanders opened his account, he instructed PENSCO to buy the Securities in his account. Compl., ¶ 48. Before carrying out his purchase requests, PENSCO required Mr. Flanders complete certain standard documents, including but not limited to an Unsecured Note Investment Authorization Form and a completed Subscription Agreement that Plaintiffs were required to read, approve and sign. Compl., ¶¶ 51-52; Merritt Decl., Ex. C (Flanders' Investment Authorization).[3] By executing the Investment Authorization, Mr. Flanders acknowledged that he (and not PENSCO) was responsible for "determining the suitability, nature, value, risk, safety and merits" of the investment. Merritt Decl., Ex. C. Only after Mr. Flanders executed these documents that directed PENSCO to act did PENSCO transmit the funds from Mr. Flanders' account for the Securities.

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so long as they are referred to in the Complaint and are central to the claims contained therein." (*Bassett v. NCAA*, 528 F.3d 426, 430 (6th Cir. 2008); *accord, Amini v. Oberlin Coll.*, 259 F.3d 493, 502 (6th Cir. 2001). If a defendant were prohibited from introducing pertinent documents upon Plaintiffs' failure to do so, "plaintiff[s] with . . . legally deficient claim[s] could survive a motion to dismiss simply by failing to attach a dispositive document upon which it relied." *Weiner v. Klais & Co.*, 108 F.3d 86, 89 (6th. Cir. 1997). Plaintiffs refer to this agreement in Paragraph 17 of the Complaint: "Defendants agreed to provide account related services to residents of Ohio who purchased securities from Apostelos with the aid and participation of Defendants." Compl., ¶ 17 (emphasis added). The scope of PENSCO's duties and its relationship to both Plaintiffs and Apostelos are central to this dispute. Thus it is appropriate for the Court to consider the Custodial Agreement. *See Bassett,* 528 F.3d 426, *supra* note 2.

[3] Plaintiffs have referred to these records and they are central to Plaintiffs' claims that PENSCO aided Apostelos in the sale of the security. Thus, it is appropriate for this Court to consider these documents. *See Bassett,* 528 F.3d 426, *supra* note 2.

Plaintiffs do not allege that PENSCO had any knowledge of Apostelos' Ponzi scheme, that PENSCO made any representations regarding any security Mr. Flanders purchased, or that PENSCO passed any information from Apostelos to Mr. Flanders. There are no allegations that PENSCO had any relationship with Apostelos prior to Mr. Flanders' purchase of the Securities or had any interaction with him outside of acting on Mr. Flanders' behalf.

III. ARGUMENT

The Complaint must be dismissed if it does not "contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw a reasonable inference that the defendant is liable for the misconduct alleged." *Id.* While the Court shall accept as true well-pleaded factual allegations in the Complaint, the Court "need not accept as true legal conclusions or unwarranted factual inferences." *Mixon v. Ohio*, 193 F.3d 389, 400 (6th. Cir. 1999). Nor are courts "bound to accept as true legal conclusions couched as factual allegation." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (citation omitted). To the contrary, the Court has an obligation "to draw on its judicial experience and common sense" to determine that the well-pleaded facts provide more than a mere possibility of misconduct. *Iqbal*, 556 U.S. at 679. If the factual allegations fail to raise a right to relief above a speculative level, a defendant's 12(b)(6) motion should be granted. *Bihn v. Fifth Third Mortg. Co.*, 980 F. Supp. 2d 892, 897 (S.D. Ohio 2013).

A. Plaintiffs Have Not Alleged That PENSCO Has Undertaken Any Activities Other Than Routine Banking Activities.

Without a single allegation that PENSCO acted outside the scope of normal commercial banking activities, the Complaint fails to state a claim. Pursuant to Ohio Revised Code Section 1707.43, every person that has "participated in or aided the seller in any way in making such sale or contract for sale" of a security in violation of Chapter 1707 is jointly and severally liable to

the purchaser for the full amount paid by the purchaser. Ohio Rev. Code § 1707.43(A). Ohio courts have held that this statute does not create liability for financial institutions engaged in "normal commercial banking activities." *See Wells Fargo v. Smith,* No. CA2012-04-006, 2013 Ohio App. LEXIS 751 at *29 (Ohio Ct. App. Mar. 11, 2013); *see also Boomershine v. Lifetime Capital, Inc.,* No. 22179, 2008 Ohio App. LEXIS 7 (Ohio Ct. App. Jan. 4, 2008).

PENSCO is a bank under Ohio law. Plaintiffs correctly allege that PENSCO is a "trust company chartered by the State of New Hampshire" and that PENSCO is a "regulated, self-directed IRA custodian." Compl., ¶¶ 12, 44. "'Bank' means any bank, trust company, savings and loan association, savings bank, or credit union that is incorporated or organized under the laws of the United States, any state of the United States, Canada, or any province of Canada and that is subject to regulation or supervision by that country, state, or province." Ohio Rev. Code § 1707.01(O) (emphasis added). PENSCO is therefore a bank for purposes of Section 1707.43.

Wells Fargo and *Boomershine* are directly on point here and are particularly instructive with regard to defining the scope of "normal commercial banking activities" that are outside the ambit of Section 1707.43. In *Wells Fargo*, a customer sued a financial corporation named AmeriFirst Financial ("AmeriFirst") and its mortgage loan officer under Section 1707.43. *Wells Fargo*, 2013 Ohio App. LEXIS 751 at *5. The plaintiff had mortgaged her home with AmeriFirst and invested the proceeds in an unregistered security that turned out to be a Ponzi scheme. *Id*. at 4. Prior to the mortgage, the loan officer at AmeriFirst had entered into an agreement with the seller of the illicit securities by which the seller would refer buyers to the loan officer and the loan officer would assist the buyers in obtaining mortgages from AmeriFirst. *Id*. The defendants did not receive any extraordinary compensation for issuing the mortgages; they did not plan, organize, or participate in the underwriting of the securities; nor did they prepare offering or solicitation documents. *Id*. at 3, 16. The Court of Appeal affirmed the order

granting summary judgment because both AmeriFirst and its loan officer were engaged in normal commercial banking activities, which do not constitute "participation" under Section 1707.43. *Id.* at 16.

Boomershine further explains the scope of "normal commercial banking activities." There, the plaintiffs sued USBank, among other defendants, for violations of Section 1707.43. *Boomershine,* 2008 Ohio App. LEXIS 7 at *2-3. Plaintiffs opened three separate accounts with USBank to aid in the administration of their investments. *Id*. at 2. USBank charged a flat fee for these services. *Id*. The court explained that "[a]t most, [USBank] collected and held premiums from the investors, . . . facilitated the payments necessary to keep [plaintiffs' investments] in effect, and assisted in the distribution of insurance proceeds" — all normal commercial banking activities. *Id*. at 15. The Court of Appeal held that USBank was entitled to summary judgment because these normal banking services did not constitute "participation" in the sale of the securities under section 1707.43. *Id*.

In contrast, *Federated Management Company v. Coopers & Lybrand* delineates the types of activities that go beyond "normal commercial banking activities." 137 Ohio App. 3d 366, 393 (Ohio Ct. App. 2000). There, the plaintiff trustees sued numerous defendants including a securities underwriter for violations pursuant to Section 1707 *et. seq*.. *Id*. at 374. The plaintiffs claimed that the defendant underwriter was jointly and severally liable for the sale of the illicit securities because it "participated in or aided the seller" in violation of Section 1707.43. *Id*. To support their claim, the plaintiffs presented evidence that the underwriter acted as the sellers' financial advisor and that the underwriter "conceived, organized and directly participated in the underwriting of the [securities]." *Id*. at 390-393. The Court of Appeal held that such activities went beyond "normal commercial banking activities." *Id*. at 393. While the defendant's "mere

involvement" with the seller of the securities was insufficient to confer liability, conceiving of and organizing the sale of the securities went too far. *Id*.

Here, PENSCO's alleged conduct is similar to that of the defendant in *Boomershine* and does not even approach the level of AmeriFirst in *Wells Fargo* (in which the court still found no violation of Section 1707.43), let alone the violations committed by the underwriter in *Federated Management*. Plaintiffs allege only that PENSCO "took title, custody, and possession, of all assets in Plaintiffs' IRA accounts[,]" executed transactions on Plaintiffs' behalf, and required that Plaintiffs provide certain information to open accounts or conduct transactions. Compl., ¶¶ 47-52. This is completely consistent with traditional banking activities. Indeed, as a regulated trust company acting pursuant to the Internal Revenue Code, PENSCO is required to follow specific rules and regulations regarding account management. *See, e.g.,* Merritt Decl., Ex. B (Flanders' Custodial Agreement) at 1 (stating that "PENSCO Trust has established the following Individual Retirement account custodial agreement . . . in accordance with the requirements of Section 408(a) of the Internal Revenue Code of 1986 and the regulations thereunder.").

The Complaint fails to allege any facts that could support an inference that PENSCO's conduct went outside the scope of "normal commercial banking activities." Plaintiffs have not alleged PENSCO had any communication with Apostelos or his associates prior to the sale of the securities. Nor have they alleged that PENSCO solicited or marketed investments. The Complaint only points to PENSCO's performance of traditional custodial duties. As case law makes clear, "[T]he willingness of a bank to become the depository of funds does not amount to a personal participation or aid in the making of a sale." *Hild v. Woodcrest Assn.*, 391 N.E.2d 1047, 1058 (Ohio Ct. Com. Pl. 1977) (holding that while an accountant that prepared a private placement memorandum did "participate" in the sale of the security, a co-defendant mortgage

company could not be held to have "participated" when its conduct was limited to the preparation and execution of legal documents relating to the loan that plaintiff used to purchase the illicit securities).

A court "draw[s] on its judicial experience and common sense" to determine that the well-pleaded facts provide more than a mere possibility of misconduct. *Iqbal*, 556 U.S. at 679. Plaintiffs have failed to allege that any of the activities listed above go beyond traditional and ministerial banking functions. If the common banking functions PENSCO undertakes were deemed to be "participating or aiding the seller" in the sale of a security, liability under Section 1707.43 would be virtually endless. Every regulated banking institution in any way connected to an investor that decides to buy or sell securities would face potential strict liability, and the self-directed IRA industry in particular would be turned on its head. This cannot be the law.

B. Plaintiffs Fail To Allege Any Specific Acts That PENSCO Undertook That Would Constitute Participating or Aiding In the Sale Of A Security.

Aside from the law relating to financial institutions, the Complaint also fails to allege facts concerning how PENSCO participated in or aided Apostelos in the sale of the Securities. Liability under Section 1707.43 may be found when a defendant relays information from sellers to investors, arranges meetings between sellers and investors, collects money for investments, distributes documents from the seller to investors, distributes principal and interest payments to the investors, and actively markets the securities. *See Wells Fargo Bank*, 2013 Ohio App. LEXIS 751 at *14; *see also, Boland v. Hammond*, 144 Ohio App. 3d 89 (Ct. App. 2001); *In re Nat'l Century Fin. Enters., Inc.*, 755 F. Supp. 2d 857, 885 (S.D. Ohio 2010). Similarly, a defendant may be liable if it induces the purchase of the security. *See Hild*, 391 N.E.2d at 1058. Forms of inducement include manufacturing marketing materials or financial disclosures, advising the issuer of the security, introducing or connecting investors and issuers, and other activities designed to attract investors. *See Federated Mgmt. Co.*, 137 Ohio App. 3d 366. The

common thread among all of these activities is that in order to be liable, the defendant must have gone beyond merely assisting the buyer of the security—the defendant must have aided the seller in some manner.

Here, the Complaint does not allege that PENSCO undertook any activities that constitute participating or aiding in the sale of a security. For good reason: by contract, PENSCO does not undertake and expressly disclaims any and all activities that go beyond the simple custodial services it provides. *See* Merritt Decl. Ex. B (Flanders' Custodial Agreement) at 5 (describing PENSCO's limited duties). The Custodial Agreement provides that "PENSCO Trust and PENSCO INC. shall have no investment responsibility with respect to the investment of assets in the Custodial Account. It is the [d]epositor . . . [who has] the sole authority and responsibility to direct investment of Custodial Account Assets." *Id.* at Art. IX, § 2(a). Mr. Flanders agreed that he "shall be solely responsible for determining the suitability, nature, prudence, value, viability, risk, safety, legality, tax consequences and merit" of any investment he chose to make. *Id.* Further, Mr. Flanders agreed it was his responsibility to "perform any 'due diligence' or other investigation with respect to[] any particular investment." *Id.* PENSCO simply acted as a bank, holding his IRA accounts as required by federal law.

C. Plaintiffs' Conclusory Statements Concerning PENSCO's Interactions With Apostelos Are Not A Basis For Liability.

Plaintiffs' allegations concerning PENSCO's supposed relationship with Apostelos are insufficient to confer liability pursuant to Section 1707.43. At only two points in the Complaint do Plaintiffs even allude to any interaction between PENSCO and Apostelos, let alone allege facts that would show that PENSCO "participated in or aided the seller" in the sale of the Securities. First, Plaintiffs allege that "Apostelos would have the Plaintiffs execute powers of attorney giving him (or one of his associates) the ability to request the Defendants purchase Unregistered Securities using the IRA assets." Compl., ¶ 48. Second, Plaintiffs allege that

Apostelos or his associates, "on behalf of Defendants, routinely assisted Plaintiffs with completing account applications and related documents required by Defendants to transfer IRA accounts into Defendants' custody." Compl., ¶ 46. Neither of these allegations suggests that PENSCO actually did anything wrong and both are insufficient to state a claim.

1. Any communications between Apostelos and PENSCO stemming from the power of attorney should be treated as communications between PENSCO and Plaintiffs.

Any implication that PENSCO participated or aided in the sale of the security because PENSCO communicated with Apostelos in his role as plaintiffs' agent is simply misguided. A power of attorney is "a writing or other record that grants authority to an agent to act in the place of the principal." Ohio Rev. Code § 1337.22(G). Powers of attorney authorize agents to perform specified acts on behalf of the principal. *Schmuck v. Dumm*, No. 6133, 1983 Ohio App. LEXIS 13134, at *4 (Ohio Ct. App. July 25, 1983). Mr. Flanders alleges that he provided Apostelos the power of attorney to execute purchases using his IRA assets. Compl., ¶ 48. By authorizing Apostelos or his associates to execute purchases on his behalf, Mr. Flanders granted authority for Apostelos to communicate with PENSCO. Mr. Flanders cannot now claim such communications, which he requested and authorized, serve as the basis for liability against PENSCO for aiding the seller in the sale of the Securities.

2. Plaintiffs have not alleged sufficient facts to support the allegation that Apostelos was acting "on behalf" of PENSCO.

The claim that Apostelos was acting "on behalf" of PENSCO, whatever that means, is "a legal conclusion couched as a factual allegation," and must be disregarded. *See Twombly*, 550 U.S. at 555. "A plaintiff cannot overcome a Rule 12(b)(6) motion to dismiss simply by referring to conclusory allegations in the complaint that the defendant violated the law." *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 504 (6th Cir. 2013) (citation omitted). Rather, Plaintiffs must plead "enough factual matter to raise a plausible inference of

wrongdoing." *Id*. (quotation marks and citation omitted). Plaintiffs have not alleged any facts to support the assertion "Apostelos or his associates, *on behalf of Defendants*, routinely assisted Plaintiffs with completing account applications." Compl., ¶¶ 46, 61 (emphasis added). These allegations are a "naked assertion devoid of further factual enhancement." *Iqbal*, 556 U.S. at 678.

The claim that Apostelos was acting "on behalf" of PENSCO also contradicts Plaintiffs' other allegations and the judicially noticeable account documents attached. Mr. Flanders agreed that "PENSCO Trust shall be authorized, and shall have the responsibility, only to acquire, hold and dispose of such investments as directed by the Depositor and or the Depositor's Designated Representative . . . ." Merritt Decl. Ex. B (Flanders' Custodial Agreement) at 4 (emphasis added).[4] The Plaintiffs' complaint even recognizes that PENSCO, as a SDIRA custodian, performs its duties "on behalf of the SDIRA owner of the IRA account," not on behalf of Apostelos or his associates. Compl., ¶ 39. The assertion that Apostelos acted on behalf of PENSCO, without additional facts, is merely the contradictory legal conclusion that Plaintiffs would like this Court to draw, *i.e.* PENSCO aided the seller in the sale of the Unregistered Securities. Such a conclusion "stops short of the line between possibility and plausibility." *Iqbal*, 556 U.S. 662. Without more, Plaintiffs' Complaint must be dismissed.

D. Plaintiffs Cannot Stretch Section 1707.43 To Create Liability Here.

Finally, the Legislature never intended Section 1707.43 to confer "participation" liability on passive custodians such as PENSCO. By way of example, Ohio Revised Code Section 1707.431 "excludes certain persons from being deemed to have effected, participated in, or aided in an unlawful sale of securities." *Boland*, 144 Ohio App. 3d at 94. "[A]ny person, other than an

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[4] The "Depositor's Designated Representative" is an agent that the Depositor designates and authorizes to act on his behalf. *See* Merritt Decl. Ex. B (Flanders' Custodial Agreement) at 3.

investment advisor or an investment advisor representative, 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" shall not be deemed to have affected, participated in, or aided the seller in any way. *Id.* (citing Ohio Rev. Code § 1707.431(B)).

Plaintiffs have not alleged that PENSCO brought them together with Apostelos, so there is no need to determine whether Section 1707.431 applies here. Section 1707.431 is nevertheless relevant, however, because it evinces the Legislature's intent with regard to the scope of liability for "participation." It would be illogical to hold that PENSCO should be liable under Section 1707.43 when the legislature expressly excluded a whole range of conduct that, by any measure, would be considered more culpable than PENSCO's. Such an interpretation would lead to perverse outcomes. For example, if a trust company not only held the Plaintiffs' assets, but also introduced Plaintiffs to the issuers of the fraudulent securities, that company would fall squarely within the exclusion, while a company like PENSCO that simply held the securities would not. Such a reading is completely inconsistent with the goal of Section 1707.43: to protect investors from the sale of unregistered securities. Because "[i]t is a well-settled rule of statutory interpretation that statutory provisions be construed together and the [Ohio] Revised Code be read as an interrelated body of law" (*see Fisher v. Hasenjager*, 116 Ohio St. 3d 53, 59 (Ohio 2007)), Plaintiffs should not be permitted to stretch Section 1707.43 to create liability here.

IV. CONCLUSION

Plaintiffs have failed to allege any facts suggesting that PENSCO "participated or aided the seller" in the sale of the Securities in violation of Section 1707.43. Plaintiffs' only substantive allegation is that PENSCO, like any other federally regulated IRA custodian, undertook normal commercial banking activities that Ohio courts have held do not violate

Section 1707.43. Moreover, Plaintiffs fail to allege that PENSCO ever had any communication with Apostelos other than those communications requested by Mr. Flanders or otherwise aided Apostelos in selling his illicit securities. Without more, Plaintiffs' complaint fails to state a claim against PENSCO and should be dismissed.

Dated: February 23, 2016

Respectfully submitted,

By: */s/ Caroline H. Gentry* _____

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PENSCO TRUST COMPANY

CERTIFICATE OF SERVICE

I hereby certify that on this 23rd day of February, 2016, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the counsel of record in this matter.

s/ Caroline H. Gentry
Caroline H. Gentry (0066138)