

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

STEPHEN L. FLOOD,	:	
Luzerne County Controller, and	:	
THE LUZERNE COUNTY	:	
RETIREMENT BOARD o/b/o	:	
THE LUZERNE COUNTY	:	
EMPLOYEE RETIREMENT SYSTEM,	:	
	:	
Plaintiffs,	:	
	:	CIVIL ACTION NO. 3:CV-03-1803
v.	:	
	:	
THOMAS A. MAKOWSKI, et al.,	:	(JUDGE CAPUTO)
	:	
Defendants.	:	

MEMORANDUM

Presently before the Court is a motion for interlocutory appeal. (Doc. 190.) I will deny the motion because Defendants have failed to show that there is a controlling question of law which will materially advance the ultimate termination of litigation.

FACTUAL BACKGROUND

The present action focuses on the events leading up to and surrounding the investment contracts made by the Luzerne County Retirement Board and Board members during the period of 1988 and 2002. Plaintiffs allege that various Board members engaged in a pay-to-play scheme in which contracts to invest or manage pension plan assets were awarded in exchange for campaign contributions to various Board members' reelection campaigns.

On October 9, 2003, Plaintiffs filed a ninety-eight page Complaint raising eight claims against twenty-six Defendants. All Defendants filed motions to dismiss, which I granted in part and denied in part in an Order of August 24, 2004. A single Defendant,

Joyce Associates, Inc., was dismissed from the action. Four Defendants have since settled their cases with the Plaintiffs.

The following claims remain at this point:

- (1) Count I Breach of fiduciary duty - Defendants Makowski, Pizano, Crossin, Jones, ASCO Financial Group, Inc., and Donald Williamson;
- (2) Count III Violating RICO § 1962(c), conducting and participating in an enterprise by engaging in a pattern of racketeering activity - Defendants Makowski, Pizano, Crossin, Jones, ASCO Financial Group, Inc., Donald Williamson, Maria Williamson, Joseph J. Joyce Associates, Joyce Jackman & Bell, Joseph Joyce, Manufacturers Life Insurance Company (U.S.A.), and Nationwide Life Insurance Company;
- (3) Count IV Violating RICO § 1962(d), conspiring to violate § 1962(c) - all remaining Defendants;
- (4) Count VI Violating RICO § 1962(d), conspiring to violate § 1962(b) - all remaining Defendants;
- (5) Count VII Violating the Investment Advisors Act - Defendants Donald Williamson and ASCO Financial Group, Inc.
- (6) Count VIII Unjust enrichment - Defendants ASCO Financial Group, Inc., Donald Williamson, First Security Investments, Inc., FSC Securities Corporation, Manufacturers Life Insurance Company (U.S.A.), Nationwide Life Insurance Company,

Joseph C. Perfilio, Joseph Joyce Insurance, Joseph J. Joyce Associates, Joseph Joyce, Michael Joyce, and John Joyce.

Presently before the Court is Motion of ASCO Financial Group, Inc., Donald P. Williamson, Maria Williamson, Joseph C. Perfilio, Michael Joyce and Devonshire Capital Management, LLC for Certification of August 24, 2004, Order for Interlocutory Appeal. (Doc. 190.) Defendants Thomas A. Makowski, Thomas P. Pizano, Frank Crossin, Joseph Jones, Joseph J. Joyce Associates, Inc., Joseph Joyce Insurance, John J. Joyce, Joseph Joyce, Jr., William Joyce, Joyce Jackman & Bell Insurers, FSC Securities Corporation, and First Security Investments, Inc. joined in the motion. (Docs. 193, 194, 196, & 199.)

DISCUSSION

A party may appeal an interlocutory order only when the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). In the present case, Defendants contend that the question whether the acts alleged in the Complaint are actionable as securities fraud is an issue of law which meets this criteria.

At the heart of securities fraud is the requirement that the fraud be related to the purchase or sale of securities. 15 U.S.C. § 78j(b) and 15 U.S.C. § 77f; see generally *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 173 (3d Cir. 2001). Defendants contend that I erred in concluding that the acts alleged in the Complaint were not actionable as securities fraud. In support, they cite *Bald Eagle Area School District v.*

Keystone Financial, Inc. 189 F.3d 321, 327 (3d Cir. 1999). However, I find *Bald Eagle* distinguishable. In particular, the plaintiffs in *Bald Eagle* alleged in their complaint that the transactions in question involved securities. *Id.* at 329 ("The School Districts allege that Black's Ponzi scheme was securities fraud. We, like the District Court, must accept these allegations as true").

In contrast to the securities transactions openly alleged in the complaint in *Bald Eagle*, the Plaintiffs in the present action did not allege securities transactions in their Complaint. In their reply briefs, Defendants argue that Plaintiffs admitted in their brief in opposition to the present motion that some of the transactions involved securities. This putative admission was not before the Court at the time the original Order was released on August 24, 2004. Moreover, the statement in Plaintiff's brief which Defendants say is an admission is unclear at best. It does not identify which transactions involved securities, which would put the Court in the precarious position of guessing at random the relationship of the "security transaction" to the fraudulent schemes.

Defendant First Security Investments also argued that there is no factual issue in regard to its transactions because exhibits submitted to the Court while the motion to dismiss was pending undisputedly proved that the transactions involved securities. While Defendant First Security Investments is correct that the evidence was before the Court, I was under no obligation to consider the evidence at that time. The Court of Appeals for the Third Circuit has stated that "a court may consider an undisputedly authentic document that a defendant attaches as an exhibit to a motion to dismiss if the plaintiff's claims are based on the document," but the court did not require consideration of such

documents. *Pension Benefit Guar. Corp. v. White Consol. Indus.*, 998 F.2d 1192, 1196 (3d Cir. 1993) (emphasis added). Because of the complexity of the case, I chose not to consider the documents.¹ Defendant First Security Investments may resubmit this evidence for my consideration as part of a motion for summary judgment.

Notwithstanding the language in Plaintiff's brief in opposition to the present motion and First Security Investment's evidence, I made an express finding in my Order that whether the transactions involved securities was an unresolved factual question.

It is apparent to me that whether the particular investments in the alleged frauds were securities would entail a fact-specific analysis of each particular investment. The facts alleged in the Complaint do not permit this analysis, nor do they need to. Plaintiffs' primary allegations relate to the manner in which contracts with the investment companies were entered into by the Board members. The specific investments resulting from those contracts do not need to be plead with particularity. Construing the Complaint in the light most favorable to Plaintiffs, at least some (e.g., transaction involving annuities), if not all, of the transactions in question did not involve securities and, thus, could not form the basis of a securities fraud claim.

(Doc. 181 at 33-34) (emphasis added). As the Supreme Court has held, trial court rulings that an issue of fact exists are not appropriate for interlocutory appeals. *See Johnson v. Jones*, 515 U.S. 304, 315 (1995) (discussing trial court determinations of whether there is a genuine issue of fact on motion for summary judgment).

If a fact-finder determines that none of the transactions involved securities, then, as a matter of law, none of the acts alleged in the Complaint are actionable as securities fraud. Defendants do not dispute this fundamental principle. Thus, because there is a

¹ My decision not to consider the evidence at that time was also motivated by the fact that the documents were not attached to the motion to dismiss, as is the requirement. *Pension Benefit Guar. Corp.*, 998 F.2d at 1196. Instead, Defendant First Security Investment submitted the documents with its reply brief, after Plaintiffs' opportunity to respond to the motion to dismiss had already passed. (See Doc. 157.2, Ex. D.)

material issue of fact in this case, there is no controlling question of law that would materially advance the case. Thus, I will deny the request for interlocutory appeal on the securities fraud issues.

Defendants also contend that the Court should certify appeal for issues related to the Investment Advisors Act (hereinafter IAA) claims. However, I find that these issues would not materially advance the ultimate termination of the case because the RICO claims predominate the case. Even if the Court of Appeals were to rule in Defendants' favor on the issues related to the IAA claims, all of the Defendants would remain in the case, and the case would still require substantial discovery. Thus, I will deny the request for interlocutory appeal on the issues related to the IAA.

Lastly, Defendants request that, should the Court decline to certify the matter for appeal, the Court could instead revise the August 24, 2004 Order. I am disinclined to modify my Order for the same reasons that I denied certification of the appeal.

An appropriate Order follows.

November 30, 2004
Date

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge

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THOMAS A. MAKOWSKI, et al.,	:	(JUDGE CAPUTO)
	:	
Defendants.	:	

ORDER

NOW, this 30th day of November, 2004, **IT IS HEREBY ORDERED** that Motion of ASCO Financial Group, Inc., Donald P. Williamson, Maria Williamson, Joesph C. Perfilio, Michael Joyce and Devonshire Capital Management, LLC for Certification of August 24, 2004, Order for Interlocutory Appeal (Doc. 190) joined by Defendants Thomas A. Makowski, Thomas P. Pizano, Frank Crossin, Joseph Jones, Joseph J. Joyce Associates, Inc., Joseph Joyce Insurance, John J. Joyce, Joseph Joyce, Jr., William Joyce, Joyce Jackman & Bell Insurers, FSC Securities Corporation, and First Security Investments, Inc. is **DENIED**.

/s/ A. Richard Caputo
A. Richard Caputo
United States District Judge