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## INTRODUCTION

Both sides now agree that this case is procedurally flawed, and that the Court should not reach the merits regarding the Division of Securities' power to remedy securities-law violations.

The sole issue is whether this Court should vacate the decision below—and it should. Neither Mrs. Dillabaugh nor the other recipients of the disputed funds appealed any of the preliminary orders that may have frozen their funds, and therefore, the appeals court had no jurisdiction to reach the issue.

## ARGUMENT

In one sense, no dispute remains. Mrs. Dillabaugh admits that she has no further interest in fighting the Division over whether it once had power to seek temporary injunctive relief against her. Dillabaugh Br. at 2, 4. She even announces in advance that she would waive any oral argument. *Id.* at 2. On the other hand, as to the seemingly narrow issue of whether to vacate the decision below, Mrs. Dillabaugh seems at points indifferent, *id.* at 3, 5, but she also implies that maintaining the decision is preferable, *id.* at 4.

The Division urges the Court to decline Mrs. Dillabaugh's half-hearted invitation to ignore a jurisdictional flaw and to leave an invalid ruling in place. First, Mrs. Dillabaugh offers nothing to counter the Division's showing that the appeals court never had jurisdiction. Second, that lack of jurisdiction does not just make vacatur optional, but requires it.

In short, the settled facts here—along with Mrs. Dillabaugh's implicit admissions by silence—*require* the decision below to be vacated.

### ~~A. Mrs. Dillabaugh offers no explanation for how jurisdiction could have existed below.~~

Mrs. Dillabaugh offers nothing to dispute the Division's comprehensive showing that the court of appeals lacked jurisdiction. She fails to assert, let alone demonstrate, that the final order she appealed to the Second District had granted the Division any relief *against her*.

Instead, her two feeble responses are irrelevant, as neither shows that the appeals court had jurisdiction over her challenge to the Division’s authority to seek preliminary relief. First, she says that “[a]t the time of the appeal, based on the nature of the state’s broad legal action, requests for relief, and other factors, Mrs. Dillabaugh had a good faith belief in the jurisdiction of the appellate court over her cross appeal.” Dillabaugh Br. at 3. But a litigant’s subjective good faith cannot create jurisdiction. Jurisdiction could have existed in the Second District if, and only if, Mrs. Dillabaugh had appealed some order that aggrieved her—and she did not.

Second, Mrs. Dillabaugh refers in a footnote to a separate dispute she had with Hartford Insurance. See *id.* at 3 n.4. That side issue, however, did not create jurisdiction over any dispute she had *with the Division of Securities* over its enforcement authority. She says that “the Final Order still impacts Ms. Dillabaugh in specific ways. For example, the Final Order prohibits Defendant Hartford from making any payment to Ms. Dillabaugh” without court approval. *Id.* But the Hartford dispute is irrelevant to whether Mrs. Dillabaugh had standing to appeal her dispute *with the Division*. And she never identified any Hartford (or other collateral) issues in her Second District appeal. Simply stated, she has not countered the Division’s showing that the final order did not impose any relief as between her and the Division, and therefore has not shown how the Second District could have had jurisdiction below.

Mrs. Dillabaugh’s failure to identify a jurisdictional basis in the Second District is conclusive, but the Division also notes that Mrs. Dillabaugh is wrong in suggesting that jurisdiction only evaporated more recently. Mrs. Dillabaugh asks “whether the case is *now moot* (solely due to actions of the Director),” *id.* at 3 (emphasis added), and she refers to the controversy as no longer existing “at this stage of the case,” *id.* at 4. Through these qualifiers, she seems to imply that jurisdiction *did exist* initially— but again, she never shows how.

Further, she mistakenly suggests that the Division itself has done something to alter the jurisdictional landscape. *Id.* at 2. Worse yet, she misrepresents the Division’s position by suggesting that the Division’s *own argument* turns on a change in circumstances: “The Director asserts that, now that the Receiver has been appointed and has initiated independent litigation on behalf of the Receivership Estate, there is nothing left for the Director to do, vis a vis Ms. Dillabaugh.” *Id.* at 2. All of that is wrong. The Division’s position has never been that jurisdiction was “mooted” by more recent events, but that the case “was *never* properly before the court” of appeals. Division Br. at 1 (emphasis added). See also, e.g., *id.* at 2, 11. The Division’s references to the Receiver did not say that the intermediate appeal had been a live controversy until the Receiver’s appointment or until the Receiver initiated litigation, but only that the Division *sought* preliminary relief to preserve funds *until* a Receiver took over. *Id.* at 19-22. But the preliminary injunctions were no basis for jurisdiction, both because she did not appeal them, and because they expired on their own terms once the Final Order was entered. The trial court’s Final Order was all that she purported to appeal, and nothing about other events changes the fact that the Final Order did not grant relief *as between Mrs. Dillabaugh and the Division*. Therefore, the appeals court never had appellate jurisdiction to review the earlier dispute between these parties about the Division’s power to seek preliminary relief.

**B. The lack of jurisdiction below requires the appeals court’s decision to be vacated, for both doctrinal and practical reasons.**

The appeals court’s lack of jurisdiction should end the matter, because it is fundamental that a decision issued by a court with no jurisdiction must be vacated. See, e.g., *Bender v. Williamsport Area Sch. Dist.* (1986), 475 U.S. 534, 549 (vacating appellate decision for lack of appellate standing below); *State ex rel. DeWine v. Burge* (2011), 128 Ohio St. 3d 236, 2011-Ohio-235, ¶¶ 21, 23 (affirming writ of prohibition to correct patent lack of jurisdiction);

*Cuyahoga County Bd. of Comm'rs v. State* (2006), 112 Ohio St. 3d 59, 2006-Ohio-6499, ¶ 29 (vacating decisions below for lack of standing); *State Auto. Mut. Ins. Co. v. Titanium Metals Corp.* (2006), 108 Ohio St. 3d 540, 2006-Ohio-1713, ¶ 12 (vacating decision where appellate jurisdiction was absent due to lack of final order). Indeed, Mrs. Dillabaugh rightly admits, at one point, that *if* “the court of appeals lacked jurisdiction,” then “the opinion [below] ought to be vacated.” Dillabaugh Br. at 3. But she also wavers, saying that “even if the Director is correct that the Second District should not have decided Mrs. Dillabaugh’s cross-appeal because there was no live controversy, that is equally true of the instant appeal [to this Court].” *Id.* at 4-5. That latter suggestion is wrong, as the Court should not leave in place a jurisdictionally flawed ruling, and it is not “equally true” that this appeal lacks controversy.

First, the Court should follow the settled practice of vacating a ruling below when it concludes that jurisdiction was lacking. Mrs. Dillabaugh cites no precedent for leaving in place a jurisdictionally flawed ruling.

Second, Mrs. Dillabaugh is wrong in saying that the appeal to *this* Court lacks controversy. The jurisdictional question itself is the live controversy before this Court. And that is always the case in appeals of jurisdictional rulings. If Mrs. Dillabaugh were right that a lower court’s jurisdictional flaw leaves nothing for this Court to review, then this Court could never review jurisdictional matters.

Finally, the scope of the Second District’s merits ruling is another reason to vacate the decision below. The appeals court radically restricted the Division’s power to protect victims of securities fraud, and the Division has explained why that ruling was wrong. Division Br. at 19-24. Contrary to Mrs. Dillabaugh’s suggestion, the Division does not ask this Court to “expand[] [its] authority for future cases.” See Dillabaugh Br. at 4. To the contrary, the Division explained

in its opening brief that it sees no path for this Court even to reach the merits. Nevertheless, the Division does urge the Court to vacate a sweeping precedent that, if left in place, would have grave effects—particularly when the ruling was based on no jurisdiction. For her part, Mrs. Dillabaugh offers no reason at all why a jurisdictionally flawed ruling should survive.

Accordingly, the Court should vacate the decision below for lack of appellate jurisdiction.

\* \* \* \* \*

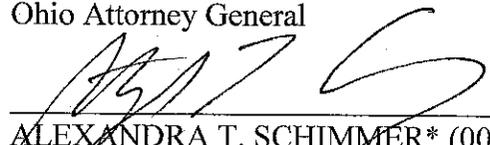
If the Court somehow disagrees with both parties and reaches the merits, it should uphold the Division’s authority for all the reasons stated in the Division’s opening brief, none of which Mrs. Dillabaugh addresses. She offers only conclusory statements that the appeals court was right and that “the clear and unambiguous language of” the statute “clearly and unambiguously” supports her view. Dillabaugh Br. at 4. She says nothing more, and she does not respond to the Division’s textual analysis or the cases cited. That is not enough to support a ruling on the merits in her favor, nor is it enough to support leaving in place the decision below.

## CONCLUSION

For all the reasons above, the Court should vacate, for lack of appellate jurisdiction below, the portion of the Second District's decision concerning the Division's power to seek relief against third parties who hold funds derived from securities fraud. In the alternative, if the Court reaches the substantive issue, it should hold that R.C. 1707.26 authorizes the Division to seek temporary injunctive relief against third parties who have received funds that are likely derived from securities fraud, in order to protect those funds until a receiver is appointed under R.C. 1707.27 and exercises his powers to protect the funds.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Reply Brief of Plaintiff-Appellant David Goodman, Director, Ohio Department of Commerce was served by U.S. mail this 8th day of August, 2011 upon the following counsel:

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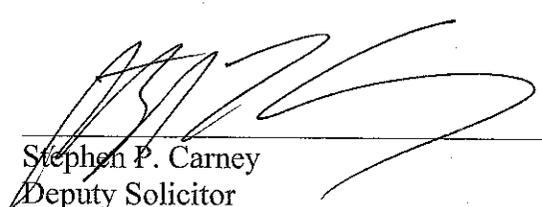
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