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INTRODUCTION

This is a breach of contract action against a milk cooperative, White Eagle Cooperative Association, Inc., and its marketing contractors, TC Jacoby and Co., Inc. and Dairy Support, Inc., brought by a former member, DeVries Dairy, LLC. Beyond its core claim for breach of contract based on allegedly inequitable premium payments, DeVries has alleged certain related torts against White Eagle: namely, negligent misrepresentation and conversion, which were defeated on summary judgment, and tortious acts in concert. This latter claim, pleaded against all defendants, is the subject of the certified question and is the only surviving tort cause of action against White Eagle.

This Court's precedent precludes a cause of action for tortious acts in concert where a party has not engaged in any underlying tort and thus the Court should decline to answer the certified question, at least as applied to White Eagle. In the event the Court chooses to accept the certified question, it should answer it in the negative on the basis of Ohio case law on acts in concert (or "aiding and abetting") involving financial fraud claims. In those cases, courts are reluctant to tag a defendant with liability unless liability would exist severally. Acts in concert, then, serve only as proof of the independent liability of each actor and an "acts in concert" count would be redundant. Accordingly, White Eagle respectfully submits that the Court should decline to answer the certified question or, if it does answer, it should reject the application of Restatement (2d) of Torts § 876 to these circumstances.

STATEMENT OF THE CASE

Petitioner DeVries Dairy, LLC is a corporate dairy farm – one of the largest dairy producers in the Midwest. DeVries is also a disgruntled former member of Respondent White Eagle Cooperative Association, Inc., a small milk marketing cooperative with about 19 members. (Docket No. 62, at p. 2.) DeVries quit its membership in White Eagle in early 2008, and sued White Eagle in early 2009 for breach of contract and related tort claims. DeVries' initial claims against White Eagle were: (1) breach of contract; (2) breach of covenant of good faith and fair dealing; (3) conversion; and (4) negligent misrepresentation. (Docket No. 1.) After discovery, White Eagle moved for summary judgment on all of DeVries' claims. (Docket No. 28.)

After briefing on summary judgment was concluded, DeVries filed an Amended Complaint naming TC Jacoby & Co., Inc. ("Jacoby") and Dairy Support, Inc. ("DSI") as defendants. (Docket No. 49.) In the Amended Complaint, DeVries also added a "tortious acts in concert" claim pursuant to Restatement (2d) of Torts § 876, against all defendants. (Id. at pp. 16-17, ¶¶ 111-117.) In that claim, DeVries alleged that Jacoby and DSI "effectively controlled all aspects of the operation of White Eagle, including control over the milk produced by DeVries and the proceeds due to DeVries after the marketing of its milk" and "provided substantial encouragement and assistance to White Eagle in carrying out the day-to-day operations, including payment of the proceeds due to members of White Eagle, such as DeVries Dairy." (Id. at p. 16, ¶¶ 112-113.) DeVries further alleged that "both Jacoby and DSI owed a fiduciary duty to DeVries as a member of White Eagle," and that White Eagle "was aware of all of the actions taken by Jacoby through DSI and others in, among other things, failing to pay to DeVries Dairy the amount due under the terms of the marketing agreement and bylaws and, at the same time

ensuring that other members received more premiums even though they were in the same or substantially the same position as DeVries.” (Id. at p. 16, ¶¶ 114-115.) Without specifically identifying the precise underlying tortious conduct, DeVries alleged that all Respondents are subject to liability for the commission of tortious acts in concert under the Restatement (2d) of Torts § 876. (See Docket No. 82, at p. 2.)

In a lengthy Report and Recommendation, the Magistrate Judge recommended that the Court grant White Eagle’s motion for summary judgment on all of DeVries’ claims against White Eagle. (Docket No. 62, pp. 6-13.) In addressing DeVries’ “tortious acts in concert” claim, the Magistrate Judge concluded, “Plaintiff has not demonstrated that Defendant White Eagle is liable for any tortious acts or that Defendant White Eagle engaged in tortious behavior in collusion with Jacoby and/or Dairy Support. Consequently, such claim lacks merit as to Defendant White Eagle.” (Id. at p. 13.)

Upon DeVries’ objection to the Magistrate’s Report, the District Court entered summary judgment for White Eagle on DeVries’ claims for breach of good faith and fair dealing, negligent representation and conversion. (Docket No. 75; p. 24.) The District Court held that DeVries’ breach of contract remained only on the “narrow” issues of whether the premiums it received in 2008 were fair and equitable and even if they were not fair and equitable, whether DeVries waived the right to contest those premiums. (Id.)

The District Court, however, declined to address the “tortious acts in concert” claim, reasoning that DeVries pleaded that claim after White Eagle had moved for summary judgment (although White Eagle asserted in briefing on objections to the Magistrate’s Report that summary judgment was properly granted on that claim). (See Docket No. 70, at p. 7; and Docket

No. 75, at p. 17.) In sum, aside from the “tortious acts in concert” claim, no other tort claims remain viable against White Eagle.

After reviewing briefing on Jacoby and DSI’s motion to dismiss the tortious acts in concert claim, the District Court certified the following question to this Court: “Under the applicable circumstances, does Ohio recognize a cause of action for tortious acts in concert under the Restatement (2d) of Torts, § 876?” (Docket No. 82, at p. 3.) For purposes of this brief, White Eagle will assume that the tortious act identified by DeVries is breach of fiduciary duty, as referenced in the Amended Complaint. (Docket No. 49, at pp. 14-15.)

ARGUMENT ON CERTIFIED QUESTION

I. THIS COURT HAS ALREADY DECIDED THAT § 876 CANNOT APPLY TO WHITE EAGLE AND THEREFORE THE COURT SHOULD DECLINE TO ANSWER THE CERTIFIED QUESTION.

White Eagle respectfully submits that Ohio law does not recognize a cause of action for tortious acts in concert where a defendant (in this case, White Eagle) did not engage in the underlying tortious conduct. As such, the Court should decline to answer the certified question, at least as applied to White Eagle.

While DeVries, Jacoby and DSI consented to the certification of this question, White Eagle did not take a position on the District Court’s certification order. White Eagle did not oppose the certification order because the other parties and the District Court desired an answer. However, from White Eagle’s perspective, declining to answer the certified question would essentially answer it in the negative because, at least as applied to White Eagle, the law is settled in Ohio. *See Dunn v. Ethicon, Inc.*, 106 Ohio St.3d 1531, 2005-Ohio-5146, 835 N.E.2d 381

("The court declines to answer the certified question because the applicable law is settled in Ohio.")

In the only case before it to squarely consider § 876, this Court was unequivocal that, if the cause of action exists at all in Ohio, it "has application only when the principal actor's behavior amounts to tortious conduct." *Great Cen. Ins. Co. v. Tobias*, 37 Ohio St.3d 127, 131, 524 N.E.2d 168 (1988) (finding § 876 "cannot apply" to bar patron who encouraged excess drinking where tavern keeper itself was not liable).¹ This is in line with the Restatement itself, which explains that it "is essential that the conduct of the actor be in itself tortious." § 876, *comment (c)*.²

There is no viable, independent tort claim against White Eagle following the District Court's ruling on summary judgment. The District Court granted summary judgment to White Eagle on DeVries' conversion and negligent misrepresentation claims. (Docket No. 75). Except for the concerted action claim, all that survives is a narrow breach of contract claim regarding certain premiums paid to DeVries. (*Id.*) In Ohio, it is axiomatic that a breach of contract is not actionable in tort. *Ketcham v. Miller*, 104 Ohio St. 372, 136 N.E. 145 (1922). Accordingly,

¹ See also *Allstate Fire Ins. Co. v. Singler*, 14 Ohio St.2d 27, 236 N.E.2d 79 (1968) (no liability to one who did not "actively participate[] or agree[]" to commit the underlying arson), accord *Beacon Ins. Co. v. Patrick*, 8th Dist. No. 70663, 1997 Ohio App. LEXIS 1333 (April 3, 1997).

² See also *comment (c)* ("One who innocently, rightfully and carefully does an act that has the effect of furthering the tortious conduct or cooperating in the tortious design of another is not for that reason subject to liability"); *comment (d)* ("Advice or encouragement to act operates as a moral support to a tortfeasor and if the act encouraged *is known to be tortious* it has the same effect upon the liability of the adviser as participation or physical assistance") (emphasis added); *comment (e)* ("When one personally participates in causing a particular result in accordance with an agreement with another, he is responsible for the result of the united effort if *his act, considered by itself, constitutes a breach of duty...*") (emphasis added).

there is no independent tortious conduct attributable to White Eagle itself. Pursuant to *Tobias*, White Eagle therefore cannot be held liable under a concerted action theory, even if the Court were to accept certification of the question and find § 876 applicable to the facts of this case. 37 Ohio St.3d at 131.

In *Tobias*, this Court ruled that a cause of action for tortious acts in concert cannot lie against a defendant who did not engage in tortious behavior. Accordingly, the Court should decline to answer the certified question, at least as applied to DeVries' claim against White Eagle.

II. IF THE COURT ACCEPTS CERTIFICATION OF THE QUESTION, IT SHOULD NOT APPLY § 876 IN THIS CIRCUMSTANCE.

If the Court does accept certification of the question, it should not apply § 876 in this circumstance. For purposes of this brief, we will assume that DeVries's complaint alleges concerted actions by White Eagle, Jacoby, and DSI to breach a fiduciary duty owed DeVries by shortchanging DeVries on premiums and overpaying the other members of White Eagle. This cause of action could best be described as aiding and abetting breach of fiduciary duty. Ohio law does not support the existence of such a cause of action.

The most analogous cause of action addressed within Ohio case law is aiding and abetting common law fraud. The Tenth Appellate District specifically addressed the question of whether Ohio recognizes a cause of action for aiding and abetting common law fraud in *Federated Mgmt. Co. v. Coopers & Lybrand*, and answered the question in the negative. *Federated*, 137 Ohio App.3d 366, 381, 738 N.E.2d 842, (10th Dist. 2000), *disc. app. denied by Federated Mgmt. Co. v. Coopers & Lybrand*, 90 Ohio St.3d 1424, 735 N.E.2d 902 (2000).

In *Federated*, the plaintiffs seem to have alleged that a company committed fraud in connection with a note offering and that a defendant bank aided and abetted the fraud by not disclosing information in its possession which was contrary to the fraudulent prospectus. 137 Ohio App.3d at 380. The trial court dismissed, holding that aiding and abetting fraud was not a cognizable cause of action in Ohio. *Id.* On appeal, the Tenth District affirmed. After reviewing the authority cited in favor of aiding and abetting liability, the court held:

The cases cited by appellants stand more for the proposition that one is liable if one actually engages in conduct that is wrongful. Thus, one is not liable as an aider or abettor but as an active wrongdoer. Such person would be liable under a claim for fraud – not as an aider and abettor of fraud. See *Klein v. Equitable Life Assurance Soc.* (1984), 17 Ohio App.3d 50, 53, 477 N.E.2d 1190 (relief on the ground of fraud can be had only against those shown to be a party thereto); *Fahey v. Banking Co. v. Adams* (1994), 98 Ohio App.3d 214, 218, 648 N.E.2d 68. Hence, this court believes the case law indicates that one who engages in any way in fraudulent behavior is liable for fraud itself, not as an aider and abettor to fraud.

Id. at 381 (citations in original); see also *id.*, citing and discussing *Burton v. DePew*, 47 Ohio App.3d 107, 547 N.E.2d 995 (12th Dist. 1988) (complaint stated a claim for wrongful death, not aiding and abetting wrongful death) and *LaCrone v. Ohio Bell Telephone Co.*, 114 Ohio App. 299, 182 N.E.2d 15 (10th Dist. 1961) (telephone company that installed tap directly liable for invasion of privacy, not aiding and abetting invasion of privacy);³ accord *Collins v. Nat'l*

³ The opinion also cites, but does not discuss, *Kuhn v. Bader*, 89 Ohio App.3d 107, 101 N.E.2d 322 (3rd Dist. 1951) the facts of which closely resemble Illustration (7) to Restatement (2d) of Torts §876. In *Kuhn*, two target shooters negligently fired identical guns in a field. A farmhand was injured by one of the bullets but it was impossible to know from which gun. *Kuhn* stands for the proposition that a plaintiff can recover from either or both defendants in such circumstances. The facts of that case are clearly distinguishable from the case at hand – there is no such causation problem here which would prevent the plaintiff from recovering for its alleged harm. To the extent *Kuhn* remains good law, it is inapposite to the certified question.

City Bank, 2nd Dist. No. 19884, 2003-Ohio-6893, ¶32. Essentially, *Federated* held that a “tortious acts in concert” claim is unnecessary and redundant in a fraud case – any act aiding and abetting fraud would necessarily be, in and of itself, fraud.

In briefing before the District Court, DeVries attempted to avoid the implications of *Federated* on this case by relying on a later Tenth District case, *King v. Ross Corr. Inst.*, 10th Dist. No. 02AP-256, 2002-Ohio-7360, which DeVries suggests overruled *Federated* by stating, in *dicta*, that Ohio has adopted § 876 of the Restatement. *Id.* at ¶26. However, *King* contains no discussion whatsoever of *Federated* and does not even address the merits of § 876, finding any such claim waived. *Id.* Further, the facts of *King* are entirely distinguishable from the present circumstance – that case dealt with alleged abuse by prison guards and fellow inmates.

Nor has DeVries identified any other authority applying § 876 in a commercial context. *See, e.g., Pierce v. Bishop*, 4th Dist No. 10CA6, 2011-Ohio-371 (impound lot not liable on complicity theory for turning car over to visibly intoxicated driver); *Schuerger v. Clevenger*, 8th Dist. Nos. 85128 and 85129, 2005-Ohio-5333 (employer opening bar tab not actionable on § 876 basis). The cases cited by DeVries, and those identified by White Eagle in its research, in which § 876 was considered as a basis for recovery generally concern torts which result in physical harm or property damage such as dram shop liability [*Tobias; Pierce; Schuerger*], automobile accidents [*State Auto. Mut. Ins. Co. v. Rainsberg*, 86 Ohio App.3d 417, 621 N.E.2d 520 (8th Dist. 1993); *Collopy v. Gardiner*, 12th Dist. No. CA85-08-057, 1986 Ohio App. LEXIS 6284 (April 7, 1986)], arson [*Singler; Patrick*], and intentional torts [*King; Matheney v. Van Horn*, 10th Dist. No. 00AP-719, 2000 Ohio App. LEXIS 6016 (Dec. 21, 2000); *Garrett v. Blum*,

4th Dist. No. CA 447, 1987 Ohio App. LEXIS 7978 (July 20, 1987); *Andonian v. A.C. & S., Inc.*, 97 Ohio App.3d 572, 647 N.E.2d 190, (9th Dist. 1994)].

None of these cases are remotely analogous to the facts of this case, which alleges merely economic loss, and none of them found the defendant liable for tortious acts in concert on the substantive merits. However, *see Garrett* (default judgment). Furthermore, none of these cases explicitly accept § 876 as a theory of liability recognized by the State of Ohio. *See, e.g., Andonian* at 191 (“We need not determine whether Ohio recognizes Section 876 because we conclude that appellants did not prove the elements necessary to sustain a claim under that section.”)

DeVries’ claim against White Eagle is most closely analogous to that brought by the plaintiffs in *Federated* – if not identical (*Federated* at 374 refers to that plaintiff’s claim as “breach of fiduciary duty/acting in concert”) – and the logic of *Federated* should apply with equal force in this circumstance. DeVries alleges that each defendant owed it a fiduciary duty. (Amended Complaint, ¶99.) If White Eagle engaged in a breach of fiduciary duty, it would be liable for that breach, not for aiding and abetting a breach, just as those participating in fraudulent behavior would be liable for fraud itself, not for aiding and abetting fraud. *Federated*.

Indeed, it is difficult to conceive of a circumstance in which one would aid and abet a fiduciary duty breach without also breaching a fiduciary duty. The *raison d’etre* of the breach of fiduciary duty cause of action is protection of the fiduciary relationship – a fiduciary duty can only be breached where a duty is owed. *See, e.g., LeRoy v. Allen, Yurasek & Merklin*, 114 Ohio St.3d 323, 2007-Ohio-3608, 872 N.E.2d 254 (no cause of action by minority shareholder against

close corporation attorney, even if fiduciary relationship existed, because private transfer of stock was not a matter to which a fiduciary duty related).

Accordingly, White Eagle submits that if this Court accepts the certified question, it should follow the logic of the Tenth District in *Federated* and answer the question in the negative. One who engages in behavior which breaches a fiduciary duty can only be held liable for that breach, not for aiding and abetting a fiduciary duty breach.

CONCLUSION

For the foregoing reasons, Respondent White Eagle Cooperative Association, Inc. respectfully requests that the Court decline to answer the certified question, or, alternatively, answer the certified question in the negative.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing **Preliminary Memorandum of Respondent White Eagle Cooperative Association, Inc.** has been sent via regular U.S. mail this 16th day of December

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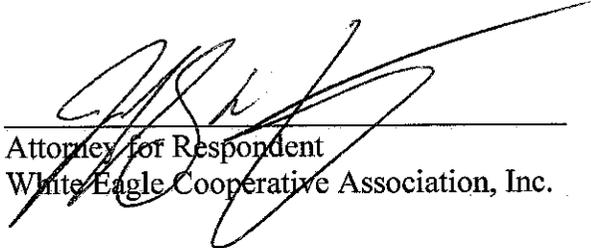
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