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## INTRODUCTION

At heart, this is a breach of contract case. Petitioner DeVries Dairy, LLC alleges Respondent White Eagle Cooperative Association, Inc., a milk cooperative, breached its contract with DeVries by making allegedly inequitable premium payments. But, in addition, 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 White Eagle and its marketing contractors, Respondents TC Jacoby and Co., Inc. and Dairy Support, Inc., 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 the principal actor has not engaged in any underlying tort. Such is the case here. In addition, there is no purpose to a claim for aiding and abetting breach of fiduciary duty where each of the Respondents (if DeVries' allegations are accepted as true) would be directly liable for the alleged breach itself. Accordingly, White Eagle respectfully submits that the Court should reject the application of Restatement (2d) of Torts § 876 to these circumstances.

## STATEMENT OF THE FACTS

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 claim 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

### **I. Respondent White Eagle's Counter-Propositions of Law**

(1) Ohio does not recognize a cause of action for tortious acts in concert under the Restatement (2d) of Torts § 876 where the principal actor has not committed any underlying tort. *Great Cen. Ins. Co. v. Tobias*, 37 Ohio St.3d 127, 524 N.E.2d 168 (1988).

(2) Ohio does not recognize a cause of action for aiding and abetting breach of fiduciary duty where each defendant allegedly owes the plaintiff a fiduciary duty.

### **II. Summary of Argument**

DeVries attempts to broaden the scope of the certified question in its proposition of law, which generally proposes that Restatement § 876 should be part of the law of Ohio. Its brief addresses § 876 broadly, without specific analysis of its application to its claim. But the Northern District of Ohio was careful to confine the question presented to whether a claim of tortious acts in concert exists in the “applicable circumstances” of this case. The question before this Court is not whether a hypothetical concerted action claim could be cognizable under Ohio law; it is whether such a cause of action exists under Ohio law on these facts.

The Northern District of Ohio did not certify the subject question for an advisory opinion on the Restatement’s general applicability in Ohio – it asks this Court to provide it with a tool for resolution of the present dispute between these parties. Accordingly, this merit brief addresses whether a claim for tortious acts in concert exists under Ohio law in these circumstances.

In this matter, White Eagle has not itself engaged in any tortious conduct – every tort claim against it (except the concerted action claim) has been dismissed. Ohio law is settled that a party cannot be liable on a concerted action theory where there is no underlying tortious conduct attributable to the principal actor. *Great Cen. Ins. Co. v. Tobias*, 37 Ohio St.3d 127, 524 N.E.2d 168 (1988).

Moreover, DeVries' allegation that each of the Respondents owed it a separate fiduciary duty renders its claim for aiding and abetting breach of fiduciary duty redundant and unnecessary. There is no need to impose aiding and abetting liability to a fiduciary which could be directly liable for its own breach. See *Federated Mgmt. Co. v. Coopers & Lybrand*, 137 Ohio App.3d 366, 381, 738 N.E.2d 842, (10<sup>th</sup> Dist. 2000) ("one who engages in any way in fraudulent behavior is liable for fraud itself, not as an aider and abettor to fraud"). The purpose of a concerted action claim is to expand the scope of liability. That purpose is not served by permitting a superfluous cause of action against a party which could be directly liable for the complained-of conduct.

Lastly, Ohio precedent and public policy, particularly the economic loss doctrine, and precedent from sister jurisdictions, support White Eagle's position. Therefore, White Eagle respectfully submits that this Court should adopt White Eagle's counter-propositions of law and answer the certified question in the negative.

**III. Counter-Proposition of Law No. 1: Ohio Does Not Recognize a Cause of Action for Tortious Acts in Concert Under the Restatement (2d) of Torts § 876 Where the Principal Actor Has Not Committed Any Underlying Tort. *Great Cen. Ins. Co. v. Tobias*, 37 Ohio St.3d 127, 524 N.E.2d 168 (1988).**

Ohio law does not recognize a cause of action for tortious acts in concert where the principal actor (in this case, White Eagle) did not engage in the underlying tortious conduct.

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.” *Tobias*, 37 Ohio St.3d at 131 (finding § 876 “cannot apply” to bar patron who encouraged excess drinking where tavern keeper itself was not liable).<sup>1</sup> 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)*. Following the District Court’s ruling on summary judgment, there remains no viable, independent tort claim against the principal actor in these circumstances – White Eagle.

Although this issue has not been previously addressed or briefed, White Eagle is the “principal actor” in these circumstances because all of DeVries’ claims arise from alleged breaches of its contract with White Eagle by White Eagle and its *agents*, Jacoby and DSI. (Amended Complaint, ¶ 12). Moreover, DeVries alleges in pleading its concerted action claim that Jacoby and DSI “provided substantial assistance and encouragement to *White Eagle*” – thereby identifying White Eagle as the principal actor in this case. (Amended Complaint, ¶ 113) (emphasis added).

While the Amended Complaint goes on to allege that White Eagle had knowledge of Jacoby and DSI’s activities and likewise “provided substantial assistance and encouragement to Jacoby,” these allegations cannot render either Jacoby or DSI “principal actors” here because those entities are (by DeVries’ own admission) agents of White Eagle. (Amended Complaint, ¶¶ 115-16).<sup>2</sup> In any case, DeVries concludes the pleading of its claim by alleging that:

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<sup>1</sup> See also *Allstate Fire Ins. Co. v. Singler*, 14 Ohio St.2d 27, 30, 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*, 8<sup>th</sup> Dist. No. 70663, 1997 WL 156710 (April 3, 1997).

<sup>2</sup> See *Larson v. Cleveland R. Co.*, 142 Ohio St. 20, 34, 50 N.E.2d 163 (1943) (liability of principal and agent “not through concert of action”); see also *Schlegel v. Bank of Am., N.A.*, 505 F.Supp.2d 321, n. 50 (W.D.Va. 2007) (“a principal and his agent cannot engage in concerted action”).

By providing substantial assistance and encouragement to **White Eagle** in committing tortious acts against DeVries Dairy, LLC, and by **committing their own tortious acts** as described herein, all defendants are subject to liability for the results of all of those tortious acts.

(Amended Complaint, ¶ 117) (emphasis added).

This final statement of DeVries' claim makes plain that White Eagle is alleged to be the principal actor that was assisted and encouraged by Jacoby and DSI. Accordingly, White Eagle is the principal actor.

But 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 claim for breach of contract regarding certain premiums paid to Petitioner. (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). “[T]he existence of a contract action excludes the opportunity to present the same case as a tort claim.” *Textron Fin. Corp. v. Nationwide Mut. Ins. Co.*, 115 Ohio App.3d 137, 151, 684 N.E.2d 1261 (9<sup>th</sup> Dist. 1996); see also *Cuthbert v. Trucklease Corp.*, 10<sup>th</sup> Dist. No. 03AP-662, 2004-Ohio-4417, ¶44, 2004 WL 1879023 (when an alleged breach is of a duty that is created by a contract and is “independent of any duty imposed by law, the cause of action is one of contract, not tort”). Accordingly, there is no independent tortious conduct attributable to White Eagle itself. Because White Eagle, the principal actor, is not liable for any tortious act, none of the Respondents may be held liable under a concerted action theory pursuant to *Tobias*.

Notably, neither DeVries nor its amicus urge this Court to abandon its sound opinion in *Tobias*. Rather, both cite the case with approval.<sup>3</sup> Additionally, DeVries relies on a more recent

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<sup>3</sup> *Merit Brief of Petitioner, DeVries Dairy, LLC* at 4-6 (“This court reversed because the facts did not support such a claim”); *Brief of Amicus Curiae, Ohio Association of Justice, In*

decision of the Eleventh District, which rejected liability under § 876(b) (without determining whether such a claim was cognizable under Ohio law) because there was no underlying tort attributable to the principal actor. *Whelan v. Vanderwirst of Cincinnati, Inc.*, 11<sup>th</sup> Dist. No. 2010-G-2999, 2011-Ohio-6844, 2011 WL 6938600, ¶31. In an even more recent case, the Franklin County Court of Common Pleas similarly dismissed a claim for aiding and abetting breach of fiduciary duty against a proposed merger partner where the plaintiff shareholders had no cause of action against the principal actors – the company and its directors. *Henkel v. Aschinger*, 167 Ohio Misc.2d 4, 2012-Ohio-423, ¶44, 962 N.E.2d 395 (C.P.).

In keeping with this Court’s precedent, the wisdom of which no party challenges, Respondent White Eagle respectfully submits that *Tobias* controls in the applicable circumstances and precludes the cause of action asserted by Petitioner.

**IV. Counter-Proposition of Law No. 2: Ohio Does Not Recognize a Cause of Action for Aiding and Abetting Breach of Fiduciary Duty Where Each Defendant Allegedly Owes the Plaintiff a Fiduciary Duty.**

Moreover, there can be no liability under Ohio law for aiding and abetting where each defendant would otherwise be directly liable for the alleged tort. DeVries alleges that each of the Respondents owed it a fiduciary duty. (Amended Complaint, ¶ 99). Without passing on the merits of that allegation, and assuming its truth for purposes of this brief, the fact that each

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*Support of Petitioner, DeVries Dairy, LLC* at 8 (“[*Tobias*] was not a rejection of §876, but rather a proper application of the section”). Likewise, DeVries and the Respondents unanimously approved of *Tobias* in their preliminary memoranda. See *DeVries’ Preliminary Memorandum* at 4-6; *Preliminary Memorandum of Respondents T.C. Jacoby and Co., Inc. and Dairy Support, Inc.* at 4-6; and *Preliminary Memorandum of Respondent White Eagle Cooperative Association, Inc.* at 5-6.

Respondent owed DeVries an independent fiduciary duty precludes aiding and abetting liability.<sup>4</sup> Stated simply, if each of the Respondents breached a fiduciary duty to Petitioner, each would be liable for its breach, not for “aiding and abetting breach of fiduciary duty.”

A similar theory of aiding and abetting liability was alleged by the plaintiff in *Federated*, 137 Ohio App.3d 366, 738 N.E.2d 842 (10<sup>th</sup> Dist. 2000). In a well-reasoned opinion, the Tenth District rejected the *Federated* plaintiff’s claim that its bank had aided and abetted common law fraud because “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. Having carefully reviewed case law purportedly favorable to the existence of aiding and abetting liability under Ohio law, the *Federated* panel determined that those cases actually stood for the proposition that “one is not liable as an aider or abettor *but as an active wrongdoer.*” *Id.* (emphasis added). Assisting a fraud is, in and of itself, fraud.

Subsequent cases applying Ohio law have followed the reasoning of *Federated* to reject claims of civil aiding and abetting in the fraud context. See, e.g., *Collins v. Nat’l City Bank*, 2<sup>nd</sup> Dist. No. 19884, 2003-Ohio-6893, 2003 WL 22971874, ¶33; *Childs v. Charske*, 129 Ohio Misc.2d 50, 59, 2004-Ohio-7331 (C.P.); *Dottore v. National Staffing Services, LLC*, Case No. 3:06CV1942, 2010 WL 2106223, \*9 (N.D. Ohio May 25, 2010) (Carr, J.). Furthermore, in light of *Federated*, the United States Court of Appeals for the Sixth Circuit reconsidered its prior determination that this Court would recognize aiding and abetting liability, as described in § 876(b). *Pavlovich v. Nat’l City Bank*, 435 F.3d 560, 570-71 (6<sup>th</sup> Cir. 2005), questioning *Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 533 (6<sup>th</sup> Cir. 2000). Notably, in each of the

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<sup>4</sup> Also, for purposes of this brief, it is assumed that DeVries alleges concerted actions under § 876(b) to breach fiduciary duties owed Petitioner. In other words, DeVries alleges “aiding and abetting breach of fiduciary duty” against each Respondent.

cases cited above, the defendant to the aiding and abetting claim was also alleged to owe a fiduciary duty to the plaintiff. See *Federated* at 374 (claims included “breach of fiduciary duty/acting in concert”).

Implicit in these decisions is that “aiding and abetting” liability cannot lie where the defendant is *directly* liable for the underlying tort.<sup>5</sup> As explained by DeVries in its merits brief at page 15, the “basic premise of tort law, that a harmed party should be entitled to recompense for injury suffered, lies at the root of concerted action claims.” That purpose is not served where adding a § 876 claim does not expand the scope of liability. If recompense is available to the injured party from all of the alleged tortfeasors directly, an aiding and abetting cause of action is simply unnecessary.

If the Respondents breached their fiduciary duties, they would be liable for their breaches, not for aiding and abetting breach; just as those participating in fraudulent behavior would be liable for fraud itself, not for aiding and abetting fraud. *Federated*. Ohio has long recognized the maxim “*cessante ratione, cessat ipsa lex.*” *Burgett v. Burgett*, 1 Ohio 469 (1824) (roughly: “where the reason ends, so does the law”). As there is no reason to impose a superfluous aiding and abetting claim here, Ohio law should not recognize a cause of action under § 876 in the applicable circumstances of this case.

**V. The Commercial Context Is Not a Red Herring.**

For this reason, the commercial context of this case is not a “red herring,” as suggested by DeVries. On the contrary, the commercial nature of DeVries’ claim matters greatly to

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<sup>5</sup> But given that its breach of fiduciary duty claim is identical to its breach of contract claim, DeVries cannot succeed on the merits of that cause of action either, although that argument is technically beyond the scope of this brief. See *Ketcham*, 104 Ohio St. 372 (breach of contract not actionable in tort); see also *Textron Fin. Corp.*, 115 Ohio App.3d 137 (same); *Cuthbert*, 2004-Ohio-4417 (same).

determining whether there is any purpose in imposing § 876 liability in the applicable circumstances. In the business context, especially where the alleged losses are purely economic (as is the case here), a sophisticated commercial plaintiff is less likely to be exposed to the causation or remuneration problems that may be encountered by a victim of personal injury or property damage.<sup>6</sup>

Consider *Kuhn v. Bader*, 89 Ohio App.3d 107, 101 N.E.2d 322 (3<sup>rd</sup> Dist. 1951). 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. The plaintiff in *Kuhn* was entitled to recover from both defendants on those facts. The premise of tort law was served by expanding the scope of liability in that case: the victim suffered an injury and would not have been entitled to recompense without relaxing the burden of proof on the element of causation.<sup>7</sup>

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<sup>6</sup> As explained in White Eagle's preliminary memorandum, every case explicitly citing §876 under Ohio law (with the sole exception of *Henkel*, 167 Ohio Misc.2d 4, *supra*) concerns claims of non-commercial injury, such as: (a) dram shop liability (*Tobias*; *Pierce v. Bishop*, 4<sup>th</sup> Dist No. 10CA6, 2011-Ohio-371, 2011 WL 322444; *Schuerger v. Clevenger*, 8<sup>th</sup> Dist. Nos. 85128 and 85129, 2005-Ohio-5333, 2005 WL 2462070); (b) automobile accidents (*State Auto. Mut. Ins. Co. v. Rainsberg*, 86 Ohio App.3d 417, 621 N.E.2d 520 (8<sup>th</sup> Dist. 1993); *Collopy v. Gardiner*, 12<sup>th</sup> Dist. No. CA85-08-057, 1986 WL 4234 (April 7, 1986)); (c) arson (*Singler*, 14 Ohio St.2d 27; *Patrick*, 1997 WL 156710); and individual and employer intentional torts (*King v. Ross Corr. Inst.* 10<sup>th</sup> Dist. No. 02AP-256, 2002-Ohio-7360, 2002 WL 31894913; *Matheney v. Van Horn*, 10<sup>th</sup> Dist. No. 00AP-719, 2000 Ohio App. LEXIS 6016 (Dec. 21, 2000) (not available in Westlaw); *Garrett v. Blum*, 4<sup>th</sup> Dist. No. CA 447, 1987 WL 14303 (July 20, 1987) (not available in Westlaw); *Andonian v. A.C. & S., Inc.*, 97 Ohio App.3d 572, 647 N.E.2d 190, (9<sup>th</sup> Dist. 1994)). None of these cases impose liability on a § 876 basis and only *King* explicitly assumes that the cause of action is part of the law in Ohio.

<sup>7</sup> However, it is not apparent that *Kuhn* is a § 876 case, although its facts are somewhat similar to Illustration (6) to that section of the Restatement. Were it decided today, it seems more likely that an Ohio court, rather than simply holding both shooters automatically liable, would instead apply Restatement (2d) of Torts § 433(B)(3) and shift the burden of proof on the causation element to the defendants. See *Minnich v. Ashland Oil Co.*, 15 Ohio St.3d 396, 473 N.E.2d 1199 (1984); see also *id.* at 400 (Holmes, J., dissenting) (discussing *Summers v. Tice*, 33 Cal.2d 80, 199 P.2d 1 (1948), a case with facts nearly identical to *Kuhn*).

But in the commercial context, it is extremely unlikely, and certainly not the case here, that a victim of purely economic loss would be in a position analogous to that of the *Kuhn* plaintiff. If two negligent drivers crash into a third car at the same moment, it may be difficult to sort out who caused the innocent driver's physical injuries, but a victim of a fraud or a breach of fiduciary duty ought to know (or could discover) who is culpable for her economic loss (or, at least, who benefited from her loss). There is no need to expand the scope of liability to avoid causation problems that do not exist in the context of solely economic harm.

Similarly, Amicus Curiae Ohio Association for Justice's hypothetical of a shell company formed for the purpose of business torts is actually illustrative of why § 876 does not serve a compensatory purpose in the commercial context. (Amicus Brief at 2.) As O.A.J. itself acknowledges, a parent company that directs or encourages its shell company's tortious acts will be liable for those acts if the corporate veil is pierced. (Id.) Therefore, Ohio law has already avoided the compensation problem posited by O.A.J. without the aid of § 876. Further to the point, a civil conspiracy claim could be available to the victim of such a scheme, providing yet another avenue of relief without need for adding a redundant cause of action in the form of § 876. *Williams v. Aetna Fin. Co.*, 83 Ohio St.3d 464, 700 N.E.2d 859 (1998).<sup>8</sup>

*Cessante ratione, cessat ipsa lex.* There is no reason to apply § 876 in this context and therefore the Court should not adopt the rule in this case.

**VI. DeVries Unnecessarily Broadens the Scope of the Certified Question and As a Result Overstates Authority From Other Jurisdictions.**

Rather than confront the certified question – whether § 876 applies in this circumstance – DeVries' proposition of law suggests that this Court should generally adopt § 876 without any

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<sup>8</sup> In any case, even if O.A.J.'s hypothetical were an apt illustration of the need for tortious acts in concert liability in some circumstances, it is inapt in these circumstances. This shell company problem does not present itself in this case.

analysis of its actual claim. DeVries' generalization of the question not only fails to confront the arguments identified above, but results in it overstating the treatment of § 876 by other jurisdictions.

DeVries cites *Steelvest, Inc. v. Scansteel Service Center, Inc.*, 807 S.W.2d 476, 484-85 (Ky. 1991) for the proposition that Kentucky recognizes § 876. While some courts have relied on § 876(b) in analyzing the common law claim for aiding and abetting breach of fiduciary duty identified in *Steelvest*, the Restatement is not mentioned at all by the Kentucky Supreme Court in its analysis – which is primarily focused on the companion breach of fiduciary duty claim. *Steelvest*, 807 S.W.2d at 486 (“The bank may have breached this fiduciary relationship by agreeing to lend money to Scanlan to help him form Scansteel with the knowledge that such formation could have an adverse effect on Steelvest”). Moreover, the Sixth Circuit cases supposedly supporting § 876 under Kentucky law distinguish *Steelvest* to find no aiding and abetting liability. *Miles Farm Supply, LLC v. Helena Chem. Co.*, 595 F.3d 663, 666 (6<sup>th</sup> Cir. 2010) (“Consistent with the district court, we think Helena is entitled to summary judgment on Miles’ aiding-and-abetting claim”); *Bariteau v. PNC Fin. Serv. Group, Inc.*, 6th Cir. No. 07-5703, 285 Fed.Appx. 218, 225, 2008 WL 2669688 (July 9, 2008) (“The district court did not err in concluding that Bariteau’s amended complaint fails to state a claim for aiding and abetting fraud”).

Furthermore, as DeVries’ own brief relates, outside of the *Steelvest* case in Kentucky, none of the highest state courts within the Sixth Circuit have expressly recognized a claim for aiding and abetting breach of fiduciary duty. Nor has the Kentucky Supreme Court or any of the other highest state courts in Sixth Circuit expressly adopted § 876 as a theory of liability.

With respect to Ohio's other immediate neighbors, only Pennsylvania and West Virginia have applied § 876 – but not in connection with a breach of fiduciary duty claim. *Skipworth by Williams v. Lead Indus. Ass'n*, 690 A.2d 169 (Pa. 1997) (no cause of action for concert of action where plaintiff could not identify who manufactured the lead pigment that caused injury); *Hough v. Hough*, 519 S.E.2d 640 (W.Va. 1999) (aiding and abetting wrongful death). The Indiana Supreme Court has not addressed the issue at all and only *one* Indiana appellate court has applied § 876 – and, again, not on the basis of aiding and abetting breach of fiduciary duty. *Buchanan v. Vowell*, 926 N.E.2d 515 (Ind. App. 1998) (aiding and abetting drunk driving).

Therefore, contrary to DeVries' suggestion that rejecting § 876 as cause of action in these circumstances would result in Ohio becoming a "regional minority of one," answering the question certified by the District Court in the negative will keep Ohio in the regional majority. Indeed, declining to answer in the affirmative would keep Ohio in line with *the majority of forty states* nationwide that have never expressly adopted or applied aiding and abetting liability under § 876. (Amicus Brief at 5.)

In any case, whatever the law may be in other jurisdictions, it is for this Court to determine what the law is in the State of Ohio.

## **VII. Consistency With the Economic Loss Doctrine.**

More broadly, rejecting DeVries' theory of liability here would be consistent with the economic loss doctrine. This doctrine has been explained by this Court as follows:

The economic-loss rule generally prevents recovery in tort of damages for purely economic loss. See *Chemtrol Adhesives, Inc. v. Am. Mfrs. Mut. Ins. Co.* (1989), 42 Ohio St.3d 40, 45, 537 N.E.2d 624; *Floor Craft Floor Covering, Inc. v. Parma Community General Hosp. Assn* (1990), 54 Ohio St. 3d 1, 3, 560 N.E.2d 206. "[T]he well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable." *Chemtrol*, 42 Ohio St.3d at 44, 537 N.E.2d 624, quoting *Nebraska Innkeepers, Inc. v. Pittsburgh-Des Moines Corp.*

(Iowa 1984), 345 N.W.2d 124, 126. See, also, *Floor Craft*, 54 Ohio St.3d at 3, 560 N.E.2d 206. This rule stems from the recognition of a balance between tort law, designed to redress losses suffered by breach of a duty imposed by law to protect societal interests, and contract law, which holds that “parties to a commercial transaction should remain free to govern their own affairs.” *Chemtrol*, 42 Ohio St.3d at 42, 537 N.E.2d 624. See, also, *Floor Craft*, 54 Ohio St.3d at 7, 560 N.E.2d 206, quoting *Sensenbrenner v. Rust, Orling & Neale Architects, Inc.* (1988), 236 Va. 419, 425, 374 S.E.2d 55, 5 Va. Law Rep. 1040. ““Tort law is not designed \* \* \* to compensate parties for losses suffered as a result of a breach of duties assumed only by agreement. That type of compensation necessitates an analysis of the damages which were within the contemplation of the parties when framing their agreement. It remains the particular province of the law of contracts.”” *Floor Craft*, 54 Ohio St.3d at 7, 560 N.E.2d 206, quoting *Sensenbrenner*, 236 Va. at 425, 374 S.E.2d 55.

*Corporex Dev. & Constr. Mgmt. v. Shook*, 106 Ohio St.3d 412, 2005-Ohio-5409, ¶6, 835 N.E.2d 701 (citations *sic*).

In this case, all of DeVries’ damage claims arise from premium payments it alleges to be inequitable under its contract with White Eagle. Its damages, then, are for solely economic loss and whether premised on the tortious acts in concert or breach of contract claim will be identical in amount. Accordingly, refusing the application of § 876 in this context would be consistent with the economic loss doctrine – which refuses to render an alleged breach of contract actionable in tort. *Corporex* at ¶6; see also *Ketcham*, 104 Ohio St. 372; *Textron Fin. Corp.*, 115 Ohio App.3d at 151; *Cuthbert*, 2004-Ohio-4417, ¶44.

Furthermore, that the damages to DeVries would be same whether it is somehow successful on its tortious acts in concert or breach of contract claim – or both – underscores that the § 876 claim in this context is unnecessary and redundant. At the end of this case, if DeVries prevails on the merits, it can only collect its damages once and the causes will merge into the judgment. In considering waiver of tort and suit in *assumpsit* (before that form of action was extinguished by Civ.R. 2), Professor Corbin argued that where the relief requested in tort or *assumpsit* would be identical and merge in the judgment, the *assumpsit* action was superfluous

and should not be recognized. Corbin, *Waiver of Tort and Suit in Assumpsit*, 19 Yale L.J. 221, 222 (1909-1910).<sup>9</sup> Likewise, here, DeVries' tortious acts in concert claim, which seeks the same relief from White Eagle as its breach of contract claim, is superfluous and should not be recognized in this context.

Competing here are two views of the origins of common law causes of action. DeVries and its amicus posit § 876 as a fixed part of the common law, which in their view is essentially "a transcendental body of law outside of any particular State but obligatory within it unless and until changed by statute." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 79, 58 S.Ct. 817, 82 L.Ed. 1188 (1938). To DeVries, § 876 exists in and of itself and is available for any plaintiff whether needed or not. White Eagle instead construes the common law – and tort law, specifically – from a more pragmatic perspective: causes of action exist to remedy compensable injuries that cannot otherwise be remedied. The common law does not and should not create new causes of action where the courts cannot identify a compensable injury that has no other remedy.

This pragmatic view is demonstrated by the demise of the "alienation of affections" tort – which was abolished when society determined that loss of a spouse to another, while painful, was not an injury the courts should recognize. *Strock v. Pressnell*, 38 Ohio St.3d 207, 213, 527 N.E.2d 1235 (1988) ("The trend toward abolition of these actions has expanded in recent years with increased societal interest on personal choice, the decriminalization of sexual activities in many states, and skepticism about the role of law in protecting feelings and enforcing highly

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<sup>9</sup> "After one fair and square judgment on the merits, however, the plaintiff has no right of action remaining in any form. He has had his day in court. If he elects to sue in tort, and judgment goes against him, he is estopped from suing a second time in *assumpsit*. *Nemo debet bis vexari pro eadem causa*. If the plaintiff gets judgment in his favor in the first action, his whole cause of action is merged in the judgment and the same maxim applies. There is in this case the additional reason that a second judgment in another form of action would generally be of little additional service to the plaintiff. These rules should apply whether the judgment in the plaintiff's favor has been satisfied or not."

personal morality”). Analogously, because DeVries cannot identify an independent injury outside of its economic loss (which may be recovered through other causes of action), the Court should not recognize the unnecessary § 876 claim it avers here.

Accordingly, answering the certified question in the negative would be consistent with this Court’s precedent on the economic loss doctrine and would serve judicial economy by avoiding the application of duplicative and unnecessary causes of action.

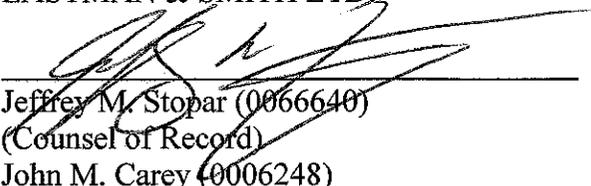
### CONCLUSION

For the foregoing reasons, and consistent with this Court’s decision in *Tobias* and the well-reasoned opinion of the Tenth District in *Federated*, § 876 is inapplicable in these circumstances. Moreover, DeVries has not articulated any injury in this case which cannot be remedied through causes of action that already exist under Ohio law – such as breach of contract or breach of fiduciary duty. Accordingly, there is no need to recognize an entirely new tort in this context, particularly where DeVries alleges purely economic loss.

Respondent White Eagle Cooperative Association, Inc. therefore respectfully requests that this Court adopt its counter-propositions of law and answer the certified question in the negative.

Respectfully submitted,

EASTMAN & SMITH LTD



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**CERTIFICATE OF SERVICE**

A copy of the foregoing **Merit Brief of Respondent White Eagle Cooperative Association, Inc.** has been sent via regular U.S. mail this 7<sup>th</sup> day of May 2012 to John N. Mackay, Esq. and David W. Wicklund, Esq., Shumaker, Loop & Kendrick, LLP, 1000 Jackson Street, Toledo, OH 43624, Ryan K. Miltner, Esq., Miltner Law Firm, 100 North Main Street, P.O. Box 477, New Knoxville, OH 45871, Alfred W. Ricciardi, Esq., Aiken, Schenk, Hawkins & Ricciardi, 4742 North 34<sup>th</sup> Street, Phoenix, AZ 85016, Philip C. Graham, Esq. and Kimberly Means Steuterman, Esq., Helfrey, Neiers & Jones, P.C., 120 South Central Avenue Ste. 1500, St. Louis, MO 63105, Richard M. Kerger, Esq., Kerger & Hartman, 33 South Michigan Street, Ste. 100, Toledo, OH 43604; and Thomas R. Houlihan, 159 South Main Street, Suite 1000, Akron, OH 44308-1322.

  
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