

ORIGINAL

IN THE SUPREME COURT OF OHIO

DEVRIES DAIRY, LLC,,	:	Case No. 2011-1995
	:	
Petitioner,	:	On Review of Certified Question
	:	from the United States District Court
v.	:	for the Northern District of Ohio
	:	
WHITE EAGLE COOPERATIVE	:	
ASSOCIATION, ET AL.,	:	United States District Court Case
	:	No.: 3:00-cv-00207-JGC
Respondents.	:	

MERIT BRIEF OF RESPONDENTS
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STATEMENT OF FACTS

The following question has been certified to this Court by the Hon. James G. Carr, United States District Court for the Northern District of Ohio, Western Division:

Under the applicable circumstances, does Ohio recognize a cause of action for tortious acts in concert under the Restatement (2d) of Torts, § 876?

Respondents T.C. Jacoby & Co. (“Jacoby”) and Dairy Support, Inc. (“Dairy Support”) do not necessarily, for purposes of this proceeding only, dispute the statement of facts recited by Petitioner DeVries Dairy, LLC (“DeVries”) in its opening brief except to clarify that all of Petitioner’s “facts” are allegations taken from its Amended Complaint filed in the District Court. Respondents Jacoby and Dairy Support also provide this Court with the following supplemental “facts,” all of which are alleged by DeVries in its Amended Complaint.

A. Additional Facts From DeVries’ First Amended Complaint

The gravamen of DeVries’ First Amended Complaint arises out of allegations that White Eagle, a cooperative marketing association, underpaid DeVries’ producer premiums for its milk in 2007 and 2008. (See DeVries’ First Amended Complaint, Appendix A, at 4-5, ¶¶15-30). DeVries alleges that White Eagle, without any basis and in violation of the Membership Agreement between DeVries and White Eagle (“the Agreement”), made unwarranted deductions to its producer premiums in 2007. (*Id.* at 4, ¶18). DeVries also alleges that White Eagle made unwarranted deductions to its producer premiums in 2008, allegedly made because DeVries treated its dairy cows with recombinant bovine somatotropin (“rBST”), a hormone that some dairy producers use to increase milk production. (*Id.* at 5-6, ¶¶31-39). The First Amended Complaint alleges claims for relief against Defendant White Eagle for breach of contract (First Claim for Relief), breach of the covenant of good faith (Second Claim for Relief), and

conversion (Third Claim for Relief). (*Id.* at 11-13, ¶¶72-88). In its breach of contract and covenant of good faith claims, DeVries seeks a minimum of \$625,000.00 in damages for the alleged underpayment of producer premiums. (*Id.* at 12, ¶¶76, 82). DeVries' conversion claim seeks damages "in an amount to be proven at trial." (*Id.* at 13, ¶88).

The First Amended Complaint alleges claims for relief against Defendants Jacoby and Dairy Support for negligent misrepresentation (Fourth Claim for Relief); breach of fiduciary duty (Fifth Claim for Relief); and negligence (Sixth Cause of Relief). (Appendix A at 13-16, ¶¶89-110). In its claim for negligent misrepresentation, DeVries alleges that representatives of Jacoby or Dairy Support wrongly represented to DeVries that there would not be a financial penalty to DeVries for continuing to treat its cows with rBST; DeVries maintained its membership in White Eagle and continued to ship milk to the cooperative in reliance on the representations; and thereby DeVries Dairy was damaged in an amount to be determined at trial. (*Id.* at 13-14, ¶¶90-97). In their Fifth Claim for Relief, DeVries alleges that Jacoby and Dairy Support breached their fiduciary duty to DeVries by entering into agreements for the sale of DeVries' milk to other clients of Jacoby and Dairy Support; by not disclosing those agreements to DeVries; and by providing certain benefits to Jacoby and Dairy Support's clients not available to DeVries. (*Id.* at 14, ¶¶100-103). In its negligence claim, DeVries alleges that Jacoby and Dairy Support breached the duties owed to DeVries by failing to fully disclose and properly account for monies due DeVries and by wrongfully withholding and manipulating the producer premiums. (*Id.* at 15-16, ¶109).

The District Court's Certified Question of State Law relates to Plaintiff's Seventh Claim for Relief, which DeVries entitles "Tortious Acts in Concert," and which is directed towards all Defendants – White Eagle, Jacoby, and Dairy Support. (Appendix A at 16-17, ¶¶111-117).

Plaintiff's Seventh Claim for Relief attempts to hold White Eagle liable for Jacoby and Dairy Support's alleged tortious acts and, at the same time, it also attempts to hold Jacoby and Dairy Support liable for White Eagle's alleged tortious acts. (*Id.*) DeVries alleges that Jacoby and Dairy Support are liable for White Eagle's acts because Jacoby, through Dairy Support, and others provided "substantial encouragement and assistance to White Eagle" in carrying out its day-to-day operations, including payment of the proceeds due to members of White Eagle, such as DeVries. (*Id.* at 16-17, ¶113-117). Conversely, DeVries alleges that White Eagle is liable for Jacoby and Dairy Support's acts because White Eagle provided substantial assistance and encouragement to Jacoby with regard to its treatment of DeVries and the failure of Jacoby to ensure that DeVries was treated equitably and fairly "concerning the marketing of its milk and the proceeds to be paid as a result of that marketing." (*Id.* at 16-17, ¶116-117). In prior briefing before the Northern District of Ohio, DeVries acknowledged that its "Tortious Acts in Concert" claim for relief is based solely on the Restatement of the Law 2d, of Torts § 876.

B. Only Subsections (b) and (c) of the Restatement of the Law 2d, of Torts § 876 Are At Issue.

The District Court's certified question is limited to whether Ohio law recognizes Section 876 of the Restatement of the Law 2d, of Torts "under these circumstances." In its opening brief, DeVries erroneously contends that the allegations of its Amended Complaint cover all three types of conduct addressed in subsections (a) – (c) of the Restatement of the Law 2d, of Torts, Section 876. (See Petitioner's Brief at pg. 4). Contrary to DeVries' assertion, however, its Amended Complaint does not contain any allegations that would implicate Section 876(a) in the instant certified question.

Section 876 of the Restatement of the Law 2d, of Torts, entitled "Persons Acting in Concert," provides:

For harm resulting to a third person from the tortious conduct of another, one is subject to liability if he:

(a) does a tortious act in concert with the other or pursuant to a common design with him,

or

(b) knows that the other's conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other so to conduct himself, or

(c) gives substantial assistance to the other in accomplishing a tortious result and his own conduct, separately considered, constitutes a breach of duty to the third person.

In its Amended Complaint, DeVries alleges that White Eagle is liable for Jacoby and Dairy Support's actions under Section 876 (b) of the Restatement above because White Eagle knew that Jacoby and Dairy Support's conduct constituted a breach of duty ("the cooperative was aware of all of the actions taken by Jacoby through DSI...and aware of the ongoing relationship between Jacoby and United Dairy and the inherent conflict of interest it posed"), and White Eagle provided "substantial assistance and encouragement to Jacoby with regard to its treatment of DeVries Dairy." Additionally, DeVries alleges that Jacoby and Dairy Support are also liable for White Eagle's actions under Section 876 (c) of the Restatement above because Jacoby and Dairy Support "provided substantial encouragement and assistance to White Eagle in carrying out the day-to-day operations" and Jacoby and Dairy Support breached their own fiduciary duty to DeVries (See Appendix A, DeVries Fifth Claim for Relief).

DeVries' Amended Complaint, however, does not contain any facts alleging that Jacoby, Dairy Support, and White Eagle performed their tortious acts in concert with each other or pursuant to a common design so as to implicate subsection (a) of the Restatement in this certified question. (Appendix A). The Comment to subsection (a) of Restatement Section 876 provides

that “parties are acting in concert when they act in accordance with an agreement to cooperate in a particular line of conduct or to accomplish a particular result. The agreement need not be expressed in words and may be implied and understood from the conduct itself.” An examination of DeVries’ Amended Complaint in its entirety reveals that DeVries does not allege any “agreement,” – either express or implied – amongst the various defendants anywhere in the Amended Complaint so as to implicate Section 876(a) of the Restatement. As a result, this Court should not address Section 876(a) in the context of the certified question from the United States District Court.

ARGUMENT

A. PROPOSITION OF LAW

Ohio does not recognize a cause of action under the Restatement (2d) of Torts, § 876(b) or (c) under the circumstances pled by Petitioner in its Amended Petition.

B. STANDARD OF REVIEW

This Court properly has a very limited scope of review when addressing certified questions of state law from federal courts. When answering a certified question of state law from a federal court, this Court determines whether Ohio has previously recognized the particular cause of action under the known facts as alleged, and the proper scope of its review is to interpret the existing law of Ohio “as we find it.” *See, Albrecht v. Ohio*, 889 N.E.2d 120 (Ohio 2008); *see also Sutowski v. Eli Lilly & Company*, 82 Ohio St.3d 347, 355, 696 N.E.2d 187 (Ohio 1998)(“It is, however, the role of the court to interpret the law, not to legislate.”).

I. This Court Should Answer the Certified Question in the Negative Because This Court Has Not Previously Recognized Restatement of the Law 2d, Torts, Section 876, At Least Under Facts Similar to Those Alleged by Petitioner.

This Court should initially answer the question certified by the District Court in the negative because this Court has not previously recognized Section 876 at all, much less under facts similar to those alleged by Petitioner. Jacoby and Dairy Support agree with DeVries’ initial assertion that only two decisions of this Court appear to have addressed Restatement Section 876: *Great C. Ins. Co. v. Tobias*, 37 Ohio St. 3d 127, 524 N.E.2d 168 (1988) and *Allstate Fire Ins. Co. v. Singler*, 14 Ohio St. 2d 27, 30, 236 N.E.2d 79 (1968). DeVries contends that this Court should affirmatively answer the certified question because this Court has implicitly treated Section 876 as the law of Ohio in *Tobias* and *Singler* when disposing of those claims on their

facts. (Petitioner’s Brief at pg. 4-5). DeVries’ concedes in its brief that this Court did not expressly adopt Section 876 claims in either *Tobias* or *Singler*, and the majority of Ohio’s appellate courts agree with that conclusion. See, e.g. *Andonian v. AC & S, Inc.*, 97 Ohio App.3d 572, 574, 647 N.E.2d 190 (Ohio App. 9 Dist. 1994)(concluding that this Court has never expressly approved Section 876). As the petitioner, DeVries bears the burden of demonstrating that Ohio courts previously recognized Section 876 (b) and (c) with respect to similar claims, and did so at the time that DeVries’ claims arose. See, e.g. *Albrecht*, 889 N.E.2d at 123. (plaintiffs must show in answering a certified question that the state law in effect at the time of the incident gave them a property interest). Respondents acknowledge that this Court mentioned Section 876 in *Tobias* and *Singler* when disposing of those claims on their facts, but there is no language in either *Tobias* or *Singler* indicating that this Court was recognizing or adopting Section 876 as the law of Ohio. Respondents are unaware of any prior decisions in which this Court has concluded that simply disposing of a claim on its facts constitutes an implicit “recognition” of a particular cause of action under Ohio law,¹ nor would such an approach be warranted under the cardinal principle of judicial restraint. See, *Meyer v. United Parcel Service, Inc.*, 122 Ohio St. 3d 104, 118, 909 N.E.2d 106 (Ohio 2009), citing *PDK Laboratories, Inc. v. United States Drug Enforcement Administration*, 362 F.3d 786, 799 (C.A.D.C. 2004)(in which now Chief Justice John G. Roberts expressed “the cardinal principle of judicial restraint—if it is not necessary to decide more, it is necessary not to decide more.”) To the contrary, this Court has relied on clear, affirmative language from its prior decisions that adopts a particular cause of action, and any such language is simply not present in either *Tobias* or *Singler*. See, e.g. *Firestone v. Galbreath*, 67 Ohio St. 3d 87, 616 N.E.2d 202 (Ohio 1993)(this Court answered “yes” to whether Ohio

¹Moreover, DeVries fails to cite any authority for this proposition in its brief.

recognized the tort of intentional interference with expectancy or inheritance by referencing its prior explicit adoption of same in *Morton v. Pettitt*, 124 Ohio St. 241, 247, 177 N.E. 591, 593 (Ohio 1931)). Neither *Tobias* nor *Singler* assist DeVries in satisfying its burden with respect to this certified question, and this Court should answer the certified question in the negative.

II. This Court Should Also Answer the Certified Question in the Negative Because Ohio Appellate Courts Have Not Recognized A Cause of Action Under Section 876 of the Restatement (Second) of Torts Under Facts Similar To Those Alleged by Petitioner.

In its Brief, DeVries also contends that a number of Ohio appellate court decisions have previously “recognized” Restatement Section 876 as the law of Ohio merely because those courts have rejected the various claims brought in those cases on their facts. (Petitioner’s Brief at pg. 6-9). DeVries’ argument is misplaced and again runs contrary to the principle of judicial restraint. Moreover, DeVries’ position is simply not supported by this Court’s prior precedent in handling certified questions of law from federal courts.

In support of its position, DeVries cites *Andonian v. AC & S*, 97 Ohio App.3d 572, 647 N.E.2d 190 (9th Dist. 1994); *King v. Ross Correctional Institution*, 2002 WL 31894913 (Ohio App. 10 Dist. 2002); *Scheurger v. Clevenger*, 2005 WL 2462070 (Ohio App. 8 Dist. 2005); *Pierce v. Bishop*, 2011 WL 322444 (Ohio App. 4 Dist. 2011); and *Whelan v. Vanderwist of Cincinnati*, 2011 WL 6938600 (Ohio App. 11 Dist. 2011). As DeVries acknowledges, none of these decisions contain any language explicitly adopting Section 876 as the law in Ohio, but instead, the various decisions mention Section 876 when disposing of the claims on their facts. None of the plaintiffs in *Andonian*, *King*, *Scheurger*, *Pierce*, or *Whelan* ultimately prevailed with respect to their Section 876 claims. Again, research has not revealed any prior decision in which this Court has affirmatively answered a certified state law question, and recognized a particular

cause of action based on prior decisions that simply dispose of a claim on the alleged merits,² nor would such an approach be consistent with this Court's precedent or the familiar maxims of judicial restraint. *Meyer*, 122 Ohio St. 3d at 118; *Firestone*, 67 Ohio St. 3d at 88.

Moreover, none of DeVries' authorities individually support affirmatively answering the certified question. In *Andonian* and *Whelan*, the Court of Appeals of Ohio explicitly declared that it was *not* deciding whether Ohio had recognized Section 876. In *Andonian*, the Ninth District explicitly stated that it was refusing to answer whether Ohio recognizes Section 876(b) claims because such a determination was unnecessary (again following the cardinal principle of judicial restraint): "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." *Andonian*, 97 Ohio App.3d at 574. Similarly, the Eleventh District in *Whelan*, as recently as December, 2011, refused to answer the question of whether Ohio recognizes Section 876 (b) claims. Instead, the Eleventh District indicated that it was specifically avoiding the issue by affirming the trial court's dismissal based on the facts: "However, we find that *even if an aiding and abetting claim was recognized in Ohio*, the facts as alleged in Whelan's complaint fail to state a viable claim upon which relief could be granted against Netherland/Indiana Insurance." *Whelan*, 2011 WL 6938600 at *4. Based on the above explicit disclaiming language, it defies logic to argue that *Andonian* and *Whelan* support DeVries' position that Ohio's appellate courts have recognized Section 876 claims.

This Court should also not give effect to *King* or *Pierce* because it was clear that the Court of Appeals of Ohio in those decisions mentioned Section 876 claims in dicta. The United States Supreme Court has held that a court is not bound to follow dicta from a prior case in

² DeVries also fails to cite any authority for this proposition in its brief.

which the point at issue “was not fully debated.” *Cent. Virginia Community College v. Katz*, 546 U.S. 356, 363, 127 S.Ct. 990, 163 L.Ed.2d 945 (2006). Similarly, this Court has found that dicta from a prior case “has no binding effect on this court’s decision in this case.” *see e.g. Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.*, 70 Ohio St.3d 281, 284, 638 N.E.2d 991 (1994). Courts have noted that the problem with dicta, and a good reason that it should not have the force of precedent for later cases, is “that when a holding is unnecessary to the outcome of a case, it may be made with less care and thoroughness than if it were crucial to the outcome.” *See, e.g. Bauer v. Garden City*, 163 Mich.App. 562, 571, 414 N.W.2d 891 (1987). Here, it is clear that any references to Section 876 in *King* and *Pierce* were purely dicta and should be disregarded.

In *King*, the Tenth District never addressed the merits of appellant’s Section 876 claim, but instead, summarily rejected the claim of trial error based on purely procedural grounds - that appellant asserted a theory of liability under Section 876 for the first time on appeal:

However, we find that neither the complaint nor the trial transcript expressly or implicitly set forth such a claim. Plaintiff cannot espouse a theory of liability for the first time on appeal and then argue that the evidence adduced at trial supported such a theory when the theory was never expressly or implicitly pled in the complaint or argued at trial. Accordingly, the first assignment of error is not well-taken. *King*, 2002 WL 31894913 at *5.

Similarly, the Fourth District in *Pierce*, in affirming the trial court’s granting of summary judgment in favor of the defendant towing company, had already addressed all of the arguments raised by the parties on appeal before engaging in a *sua sponte* discussion of Section 876 (b) of the Restatement. Clearly, the Fourth District’s reference to Section 876 in *Pierce* was unnecessary to the disposition of the appeal, and should be disregarded as dicta. *See, Pierce*, 2011 WL 322444 at *8 (Kline, J. concurring in judgment but not in discussion of Section 876). *See also Litva v. Richmond*, 172 Ohio App.3d 349, 354, 874 N.E.2d 1243 (Ohio App. 7 Dist.

2007)(“an appellate court must limit its review of a summary judgment to that which was on record before the trial court.”).

Schuerger is also clearly distinguishable from DeVries’ claims because it addressed a Section 876 (b) claim that is wholly unlike DeVries’ proposed use of Sections 876(b) and (c) in this case. *Schuerger* was an alcohol-intoxication case where a sports bar patron sought to extend liability under Section 876(b) to a company that provided an open bar tab to its employees at an employee party. Courts have traditionally characterized Section 876(b) claims as “aiding-abetting, or concerted action by substantial assistance.” See *Halberstam v. Welch*, 705 F.2d 472, 477 (D.C. Cir. 1983)(cited by DeVries in its opening brief). Section 876(b) cases typically focus on what constitutes an aider-abettor’s “knowing substantial assistance or encouragement” to a principal tortfeasor. *Halberstam*, 705 F.2d at 477-479. In *Schuerger*, the plaintiff bar patron alleged that a company’s action in maintaining an unlimited bar tab for the benefit of its employees provided “substantial encouragement” under Section 876(b) to the principal tortfeasor (the bar) to breach its statutory duty by continuing to serve liquor to an obviously intoxicated company employee. *Schuerger*, 2005 WL 2462070 at *1. On appeal, the Eighth District affirmed the trial court’s granting of summary judgment, finding that the company’s act of providing a bar tab, without more, could not be considered “substantial encouragement” to the tortious actions of the bar to permit secondary liability under Section 876(b) of the Restatement. *Id.* at *2.

Here, in contrast to one aider-abettor in the alcohol-intoxication context, DeVries in its Amended Complaint seeks to hold two separate sets of commercial aider-abetters for each others’ tortious acts as principals. DeVries seeks to hold Jacoby and Dairy Support liable for aiding-abetting the tortious acts of the principal, White Eagle, and conversely, to hold White

Eagle for aiding-abetting the tortious acts of the principals, Jacoby and Dairy Support. *Schuerger* does not support Petitioner's argument that Ohio has adopted the Restatement under "these circumstances," and this Court should answer the certified question in the negative.³

III. This Court Should Also Answer the Question in the Negative Because Those Ohio Appellate Courts Addressing Analogous Actions Have Concluded That a Cause of Action Under Section 876 Does Not Exist Under Ohio law.

This Court should also ultimately answer the District Court's question in the negative because Ohio appellate courts addressing analogous actions have held that a cause of action under Section 876 of the Restatement of Torts does not exist under Ohio law.

In *Federated*, certain investment advisers and managers, and attorneys-in-fact filed suit on behalf of purchasers of notes against creditor bank which advised the corporation, the underwriter of notes, an accounting firm, and several other defendants. *See, Federated Management Co. v. Coopers & Lybrand*, 137 Ohio App.3d 366, 374, 738 N.E.2d 842 (Ohio App. 10 Dist. 2000). The plaintiffs asserted the following claims against each defendant: violations of R.C. 1707.41 and 1707.43; common-law fraud; negligent misrepresentation; breach of fiduciary duty/acting in concert; negligence, and violations of various sections of the Securities Act of 1933. *Federated*, 137 Ohio App.3d at 374. The plaintiffs also asserted a claim for breach of contract against two of the lead underwriters in the issuance of the notes. *Id.*

³Citing three decisions from the Ohio Court of Appeals prior to *Tobias and Singler*, Amicus Curiae also argues that aiding and abettor liability has long been recognized in Ohio courts. See Amicus Curiae Brief at pg. 3-4, citing *Wall v. Glass*, 1930 WL 2104 (Ohio App. 6 Dist. 1930); *Kuhn v. Bader*, 89 Ohio App. 203 (3rd Dist. 1951); and *LeCrone v. Ohio Bell Tel. Co.*, 120 Ohio App. 129 (10th Dist. 1963). None of these three decisions appear to have explicitly adopted Section 876(b) as the law of Ohio. Moreover, these decisions are distinguishable in that none of these decisions addressed facts even remotely similar to those alleged here - where an aggrieved commercial party attempts to hold two separate sets of commercial aider-abettors liable for each others' tortious acts as principals.

On appeal, the Tenth District rejected the appellants' first assignment of error, that the trial court erred in dismissing their claims for aiding and abetting common-law fraud and for common law fraud, to the extent that the fraud claim was based on fraudulent concealment. *Id.* at 380-381. The Tenth District initially noted that the appellants may have waived any appellate challenge to the dismissal of their aiding and abetting claim by not responding to the argument in the motion to dismiss that Ohio did not recognize a cause of action for aiding and abetting fraud. *Id.* The Tenth District then proceeded to address appellants' claimed point of error anyway, holding: "assuming that appellants did not waive the issue, the trial court was correct in concluding that Ohio does not recognize a claim for aiding and abetting common-law fraud." *Id.* at 381. The Tenth District found that the Ohio courts had previously "stopped short of acknowledging that a claim for aiding and abetting fraud was recognized in Ohio." *Federated*, 137 Ohio App.3d at 381, *citing Woodworth v. Huntington Natl. Bank*, 1995 WL 723664 (Ohio App. 10 Dist. 1995)(rejecting the claim of error that the trial court improperly granted summary judgment with respect to a claim for aiding and abetting fraud); and *Andonian*, 97 Ohio App.3d at 574.

After *Federated*, the Second District also concluded that Ohio law does not recognize a cause of action for aiding and abetting common-law fraud. *Collins v. National City Bank*, 2003 WL 22971874 (Ohio App. 2 Dist. 2003). In *Collins*, a property vendor who was unable to recover funds held in an escrow account by a bankrupt title company, filed a class action against the bank where the escrow funds were deposited. *Collins*, 2003 WL 22971874 at *5. The property vendor's complaint attempted to assert various claims against the bank, including breach of fiduciary duty, conversion, negligence, civil conspiracy, aiding and abetting common law fraud, intentional interference with a contract, and common law fraud (misrepresentation).

Id. at *5 (Ohio App. Dec. 19, 2003). On appeal, the Second District affirmed the trial court's dismissal of the property vendor's claim for aiding and abetting common law fraud, holding: "the court correctly held that aiding and abetting common law fraud is not cognizable in law."

*Id.*⁴

Similar to the plaintiffs in *Federated* and *Collins*, DeVries has asserted tortious claims of conversion, misrepresentation, breach of fiduciary duty, and negligence against the various defendants based on a financial dispute, and the Section 876 claims at issue are based on one or more of these alleged tortious activities. As in *Federated* and *Collins*, this Court should conclude that Ohio law does not recognize a Section 876 claim under the facts as alleged by DeVries.

DeVries argues that *Federated* and *Collins* are inapplicable here (or at least distinguishable), because both decisions addressed "aiding and abetting common law fraud" without explicitly citing Restatement Section 876. DeVries' argument is without merit. As outlined above, courts have traditionally characterized Section 876(b) claims as "aiding-abetting, or concerted action by substantial assistance." See *Halberstam*, 705 F.2d at 477. Moreover, various Ohio appellate decisions, including DeVries' own cited authorities, acknowledge that *Federated* and *Collins* were discussing Section 876(b) claims and have also referring to those claims as "civil aiding-abetting." See e.g. *Whelan*, 2011 WL 6938600 at *4 (citing *Federated* and *Collins* and characterizing Section 846(b) claims as "aiding-abetting"). Therefore, it is clear that *Federated* and *Collins* are directly on point to this Court's determination of the certified question.

⁴The Court of Common Pleas has also held that Ohio does not recognize claims for aiding and abetting common-law fraud in a real estate dispute. *Childs v. Charske*, 129 Ohio Misc. 2d 50, 822 N.E.2d 853 (Ohio Com. Pl. 2004).

DeVries also fails to distinguish *Federated* on the basis of the subsequent *King* decision. As support for this proposition, DeVries does not cite to any specific language in *King*, but notes the timing of both decisions and the fact that Judge Petree, who authored the *King* opinion, was also on the panel in *Federated*. However, as outlined above, the Tenth District's citation of Section 876 in *King* was purely dicta, and that section did not form the basis for the Court's holding. In contrast, the Tenth District's *Federated* decision addressed the merits of the appellant's appeal based on Section 876, finding, "assuming appellants did not waive this issue, we find that the trial court was correct in concluding that Ohio does not recognize a claim for aiding and abetting common-law fraud." *Federated*, 738 N.E.2d at 853. This Court should conclude that the facts as alleged in Plaintiffs' Amended Complaint are more analogous to Respondents' authorities (fraud) as opposed to Petitioner's authorities (dram shop and prisoner cases), and this Court should answer the certified question in the negative.

IV. This Court Should Also Answer the Question in the Negative Because the Out of State Authorities Cited by Petitioner and Amicus Curiae Are Not Relevant To Answering the Limited Certified Question Before this Court and None of The Cited Authorities Appear to Address Similar Facts to Those Alleged by Petitioner.

Decisions of other states' highest and appellate courts are not relevant to this inquiry since the Court's role in this case is simply to answer whether it has, prior to the submission of the certified question, recognized the point of law at issue here. If the Court were to do anything else in this conflict, it would be acting as a legislative body, since this is not an Ohio state court proceeding, which would afford the Court an opportunity to make "new" law. In their opening brief, DeVries also argues that this Court should positively answer the certified question because Restatement Section 876 is "recognized in other jurisdictions," including by certain of Ohio's "sister states." (Petitioner's Brief at pg. 11-13). Amicus Curiae, Ohio Association for Justice, similarly argues in its brief that this Court should expressly adopt Restatement Section 876 in its

entirety because “this Court would join the vast majority of states in recognizing this section as accurately restating the common law.” (Amicus Curiae’s Brief at pg. 5). Both DeVries and Amicus Curiae impermissibly attempt to limit the scope of the certified question before this Court, and as a result, their out-of-state authorities should not be considered as persuasive on the instant question before this Court.

In its certified question of state law, the Northern District of Ohio did not ask this Court whether it *should* adopt Restatement (2d) Torts, § 876 for all future Ohio actions. Instead, the Northern District of Ohio properly limited the scope of its certified question to asking whether Ohio *has* recognized a cause of action under Restatement (2d) of Torts, Section 876, under the facts as alleged by Petitioner. In light of the limited nature of the district court’s question, and the limited scope of this Court’s review, out-of-state authorities should have no bearing on whether Ohio has recognized similar claims to date. *See, Albrecht v. Ohio*, 889 N.E.2d 120 (Ohio 2008)(This Court interprets the existing law of Ohio as it finds it); *National Union v. Wuerth*, 122 Ohio St.3d 594, 597-561, 913 N.E.2d 939 (Ohio 2009)(limiting discussion of certified question to Ohio precedent); *Scott v. Houk*, 127 Ohio St.3d 317, 318, 939 N.E.2d 835 (Ohio 2010)(limiting discussion of certified question to Ohio decisions).⁵

Assuming *arguendo*, however, that this Court gives any consideration to out-of-state authorities, this Court should distinguish those authorities of Petitioner and Amicus Curiae. None of the out-of-state authorities cited by Petitioner or Amicus Curiae appear to address the truly unique situation that is present in this case where an aggrieved commercial party attempts

⁵For similar reasons, *Aetna Cas. and Sur. Co. v. Leahey Const. Co., Inc.*, 219 F.3d 519 (6th Cir. 2000) and *Pavolich v. Natl. City Bank*, 435 F.3d 560 (6th Cir. 2006) should not be considered as being persuasive to the instant certified question. If this Court decides that *Aetna* and *Pavolich* have some bearing on the inquiry, however, *Pavolich* should be considered the latest opinion of the Sixth Circuit on the subject.

to hold two separate sets of commercial aider-abettors for each others' tortious acts as principals. Again, DeVries seeks to hold Jacoby and Dairy Support liable for aiding-abetting the tortious acts of the principal, White Eagle, and conversely, DeVries seeks to hold White Eagle for aiding-abetting the tortious acts of the principals, Jacoby and Dairy Support. As a result, this Court should find that the out-of-state authorities provide no guidance regarding "under the applicable circumstances, does Ohio recognize a cause of action for tortious acts in concert under the Restatement (2d) of Torts, § 876?"

V. Public Policy Considerations Are Beyond the Scope of this Court's Review And For the Legislature to Decide.

This Court should also resist the invitation to engage in a public policy debate regarding whether Ohio should adopt the Restatement (2d) of Torts, § 876 because such an inquiry is beyond the scope of this Court's limited review. In *Albrecht*, this Court addressed a certified question of state law from the Southern District of Ohio asking whether the next of kin of a decedent have a protected right under Ohio law in the decedent's tissues, organs, blood or other body part. *Albrecht*, 118 Ohio St.3d at 350. This Court refused to address the public-policy arguments raised in numerous amicus briefs, noting "we must take the law of Ohio as we find it and leave the crafting of new solutions to the General Assembly." *Id.* Similarly, this Court refused to engage in public policy discussions when answering a certified question from the Northern District of Ohio regarding "whether market share exists in Ohio as a viable theory of liability in a DES products liability action? *Sutowski*, 82 Ohio St.3d at 355. This Court was sympathetic: "we recognize that the DES plaintiff who, without fault, is unable to identify the manufacturer responsible for her injury engenders sympathy...." *Id.* But, ultimately, this Court decided the certified question solely by interpreting Ohio law: "It is, however, the role of the court to interpret the law, not to legislate. (citation omitted) We believe the General Assembly

should decide the policy question of whether Sutowski's claims, or others like hers, warrant substantially altering Ohio's tort law." *Id.*

As in *Albrecht* and *Sutowksi*, this Court should reject the invitation to engage in a public policy discussion regarding whether Ohio should adopt Restatement (Second) of Torts, § 876. Those discussions are simply not relevant here given the limited scope of this Court's review in answering the certified state law question. Assuming, *arguendo*, however, that this Court is inclined to engage in such policy discussions, adoption of Restatement (Second) of Torts, Section 876 under the facts alleged by DeVries would have a profound impact on Ohio law. An action alleging tortious acts in concert seeks to impose liability onto a civil defendant by virtue of certain knowledge and that defendant's "substantial assistance or encouragement to the primary party in carrying out the tortious act." Restatement 2d, of Torts, § 876(b). Liability would be conferred upon a defendant even though that particular defendant may not have committed a tortious act. While perhaps appealing in certain contexts, this "bootstrapping" of liability would impermissibly expose parties in business disputes, such as the instant dispute here, to liability for undefined conduct that may not even be actionable itself. This would create a slippery slope of which this Court should be wary of entering into under these circumstances.

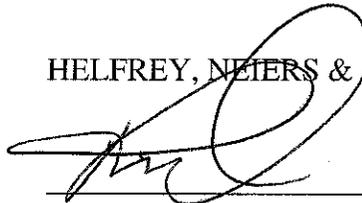
Moreover, adopting the Section 876 to the instant dispute would likely result in substantial confusion in the context of commercial transactions since Ohio courts have not previously defined what actions constitute "substantial assistance" in a commercial context nor have Ohio courts (or other courts for that matter) had an opportunity to explain just how two separate commercial entities can both be aiding and abetting each others' tortious acts as separate principals. Ultimately, this Court should reject the invitation to engage in a public policy debate, and decide the certified question based on its review of Ohio law.

CONCLUSION

This Court should answer the question certified by the District Court in the negative because this Court and Ohio appellate courts have not previously recognized Section 876 under facts similar to those alleged by Petitioner. Ohio appellate decisions addressing analogous actions have held that a cause of action under Section 876 of the Restatement of Torts does not exist under Ohio law. Ohio courts have not recognized Restatement Section 876 as the law of Ohio by rejecting claims brought in those cases on their facts. Decisions of other states' highest and appellate courts are not relevant to this inquiry since the Court's role in this case is to answer whether it has, prior to the submission of the certified question, recognized the point of law at issue here. This Court should also resist the invitation to engage in a public policy debate regarding whether Ohio should adopt the Restatement (2d) of Torts, § 876 because such an inquiry is beyond the scope of this Court's limited review. For all of the above reasons, this Court should negatively answer the district court's certified question of state law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 8th day of May, 2012, a copy of the foregoing was served via United States Mail upon the following:

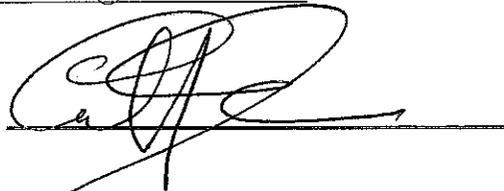
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APPENDIX

1. Petitioner DeVries Dairy LLC's First Amended Complaint filed in the United States District Court for the Northern District of Ohio.

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

DE VRIES DAIRY, LLC,
7188 Sager Road
LaRue, Ohio 43332

Plaintiff,

v.

WHITE EAGLE COOPERATIVE
ASSOCIATION,
An Indiana Agricultural Cooperative
P.O. Box 4577
South Bend, Indiana 46634-4577

and

T.C. JACOBY & CO., INC.
A Missouri Corporation
1716 Hidden Creek Court, Suite 200
St. Louis, Missouri 63131

and

DAIRY SUPPORT, INC.
A Missouri Corporation
1716 Hidden Creek Court, Suite 200
St. Louis, Missouri 63131

Defendants.

Case No. 3:09-CV-00207 (JGC)

Judge James G. Carr

FIRST AMENDED COMPLAINT

**(Breach of Contract; Breach of Covenant
of Good Faith; Conversion; Negligent
Misrepresentation; Breach of Fiduciary
Duty; Negligence; Tortious Acts in
Concert)**

JURY DEMAND ENDORSED HEREON

Plaintiff, DeVries Dairy, LLC ("DeVries Dairy") for its First Amended Complaint states as follows:

PARTIES, JURISDICTION AND VENUE

1. Plaintiff, DeVries Dairy, LLC ("plaintiff" or "DeVries") is a limited liability company organized under the laws of the State of Ohio. DeVries operates a commercial dairy farm in Marion County, Ohio as its principal place of business. For purposes of jurisdiction and venue, it is a citizen of Ohio.

1 Eagle's by-laws, the proceeds generated by the sale of DeVries Dairy's milk was to be blended
2 with the proceeds from the sales of milk of other member producers and to then be paid to
3 DeVries Dairy.

4 10. Under this "pooling" model, all members of the cooperative share in both high
5 value and low value sales, with adjustments made to payments to individual producers for the
6 specific protein, butterfat, and solids content of that producer's milk. Additional adjustments
7 are also made for the quality of the milk produced, as measured by the somatic cell count of the
8 producer's milk.

9 11. An adjustment, called the "Producer Price Differential," is made to conform
10 payments to the federal milk marketing order minimum price. A further adjustment, called a
11 "Producer Premium", is made to reflect the aggregate effect of marketing efforts of the
12 Association.

13 12. At all times relevant to this First Amended Complaint, White Eagle utilized and
14 as a result, DeVries Dairy was mandated to utilize the services of T.C. Jacoby & Company, Inc.
15 and Dairy Support, Inc., a wholly owned subsidiary of T.C. Jacoby & Company, Inc., as its
16 agent to handle the marketing of White Eagle's milk, the collection of proceeds from such
17 sales, the calculation of producer returns, the payment of returns to producers, and other day-to-
18 day aspects of the Association's management. Communication to DeVries Dairy on behalf of
19 the Association almost invariably came from T.C. Jacoby & Company, Inc. or Dairy Support,
20 Inc., acting as the duly appointed agent for the Association.

21 13. Plaintiff is informed and believes and on that basis alleges that at all times
22 relevant to this First Amended Complaint, in doing the acts and things complained of herein,
23 that each of the defendants was acting as an agent, and/or servant of each of the other
24 defendants, and that all acts were done within the course of such agency.

25 14. Further, DeVries Dairy is informed and believes and upon that basis alleges that
26 at all times relevant to this First Amended Complaint, that the affairs of White Eagle were so
27 inextricably intertwined with those of defendants Jacoby and Dairy Support that defendants
28 Jacoby and Dairy Support dominated and controlled the activities of White Eagle to such an

1 extent that all defendants should be held jointly and severally liable for the claims alleged in
2 this First Amended Complaint.

3 **Payments to DeVries Dairy and Wrongful Deductions Made by Defendants**

4 15. From October 2003 until April 2008, DeVries Dairy continued as a member of
5 White Eagle and shipped milk from its farm to White Eagle for marketing.

6 16. In August 2005, Dairy Support, Inc. announced a reduction in the Producer
7 Premium received by DeVries Dairy to \$0.75 per hundredweight of milk. This announcement
8 came in the form of a letter to DeVries Dairy and provided 30 days notice of the premium
9 reduction, pursuant to a requirement of a memorandum of understanding applicable to the
10 cooperative.

11 17. During the period from October 2005 through December 2007, White Eagle paid
12 DeVries Dairy a Producer Premium of \$0.75 per hundredweight of milk.

13 18. Beginning in 2007, White Eagle, without basis and in violation of the Agreement,
14 began reducing the Producer Premium paid to DeVries Dairy by at least ten cents per
15 hundredweight of milk and by as much as forty cents per hundredweight. No advance notice of
16 the premium change was provided to DeVries Dairy by White Eagle, Dairy Support, Inc., or
17 T.C. Jacoby & Company, Inc. For 2007, the aggregate amount of the unwarranted deductions
18 was at least \$90,000.00.

19 19. During the fall of 2007, DeVries Dairy explored alternative arrangements for the
20 marketing and selling of its milk production to purchasers other than White Eagle. One of the
21 reasons it explored such options was a concern over the financial viability of White Eagle.

22 20. Once these discussions became known to White Eagle, representatives of the
23 cooperative, who were employees of either Dairy Support, Inc. or T.C. Jacoby & Company,
24 Inc., engaged in conversations with members of DeVries Dairy. The purpose of these
25 conversations was to induce DeVries Dairy to continue its membership in White Eagle.

26 21. DeVries Dairy indicated to the White Eagle representatives that it had spoken
27 with another dairy cooperative, Dairy Farmers of America ("DFA"), about becoming a member
28 of DFA.

1 22. The White Eagle representatives told DeVries Dairy that it was not in the best
2 interest of DeVries Dairy to join DFA because DFA would prevent DeVries Dairy from
3 treating its cows with recombinant bovine somatotropin (also known as "rBST") or that DFA
4 would penalize DeVries Dairy monetarily for using rBST.

5 23. rBST is an FDA approved hormone that many dairy producers use to increase
6 milk production from their dairy cows. The FDA has determined that there is no known
7 difference between the milk produced by cows treated with rBST and those cows not treated
8 with rBST. Milk produced from cows treated with rBST can be and is regularly bottled for
9 beverage consumption, or manufactured into any of the spectrum of dairy products. Such milk
10 is Grade 'A' if it is produced at a facility with a Grade 'A' license.

11 24. The White Eagle representatives expressly told DeVries Dairy that if it continued
12 as a member of White Eagle, that DeVries Dairy would be permitted to continue to utilize rBST
13 in its cows and would not be penalized monetarily for utilizing rBST.

14 25. In 2008, White Eagle, again without basis and in violation of the Agreement,
15 further reduced the Producer Premium that it paid DeVries Dairy. Again, no advance notice of
16 the premium change was announced.

17 26. The Producer Premium paid to DeVries dairy for January 2008 was a negative
18 premium of \$1.85 per hundredweight.

19 27. The Producer Premium paid to DeVries dairy for February 2008 was a negative
20 premium of \$1.00 per hundredweight.

21 28. The Producer Premium paid to DeVries dairy for March 2008 was a negative
22 premium of \$2.50 per hundredweight.

23 29. The Producer Premium paid to DeVries dairy for April 2008 was a negative
24 premium of \$2.50 per hundredweight.

25 30. For 2008, the aggregate amount of unwarranted deductions was at least
26 \$525,000.00.

27 **The Defendants' Unfounded Rationale for Reducing DeVries Dairy's Producer Premiums**

28 31. In February 2008, shortly after the negative producer premium for the January
2008 milk production became known, DeVries Dairy inquired about the reasons for receiving a

1 negative premium. DeVries Dairy was told that the premiums were reduced because the dairy
2 treated its cows with rBST.

3 32. Despite the FDA approval of rBST and the fact that milk from cows treated with
4 rBST is indistinguishable from milk produced by non-treated cows, some purchasers of raw
5 milk have requested that their milk be supplied only from cows that are not treated with rBST.
6 Based upon statements made by representatives of White Eagle, certain buyers of milk from
7 White Eagle had allegedly begun requesting milk from cows not treated with rBST.

8 33. Nevertheless, White Eagle did not mandate that its members cease treating their
9 cows with rBST. Indeed, White Eagle Board of Directors never adopted any resolution or
10 policy authorizing the payment to producers of differing pay prices or Producer Premiums
11 based on whether or not the producer treated its cows with rBST, or at the least, no such policy
12 was ever conveyed to the White Eagle membership, including DeVries Dairy.

13 34. DeVries Dairy was approached by representatives of White Eagle to inquire
14 about DeVries Dairy's willingness to cease using rBST so that milk produced by DeVries Dairy
15 could be sold to customers requesting rBST-free milk.

16 35. Representatives of White Eagle told DeVries Dairy that even if it continued to
17 use rBST, it would continue to receive a competitive price for its milk. No written notification
18 of a premium change was ever provided to DeVries Dairy.

19 36. Based on these representations, DeVries Dairy elected to continue treating its
20 cows with rBST and to continue its membership in White Eagle.

21 37. DeVries Dairy was never informed that its Producer Premium would be reduced
22 for continuing to treat its cows with rBST.

23 38. Not only did White Eagle pay producers differing prices based on their use or
24 non-use of rBST, the prices paid to different producers using rBST was not consistent

25 39. Rather, the prices paid to DeVries Dairy were lower than other White Eagle
26 producers using rBST and the basis for reducing DeVries Dairy's premium violates the
27 Agreement and the by-laws of the Association and the obligation to equitably and fairly pool
28 the returns of all members' milk.

1 **DeVries Dairy Terminates its Membership in White Eagle**

2 40. Once it became apparent to DeVries Dairy that its Producer Premium was being
3 reduced based solely on its continued use of rBST, DeVries Dairy elected to cease use of the
4 hormone.

5 41. On or about February 17, 2008, DeVries Dairy provided an affidavit to the
6 Association, through T.C. Jacoby & Company, Inc., certifying that it no longer treated its cows
7 with rBST.

8 42. Despite the non-use of rBST, White Eagle continued to reduce the premium paid
9 to DeVries Dairy above the amount of the reduction for other members.

10 43. Shortly after receiving its second payroll reconciliation for 2008, again reflecting
11 a negative Producer Premium, DeVries Dairy provided White Eagle with the written notice
12 necessary to terminate its membership in the Association.

13 44. Under the terms of the By-Laws and the Agreement, the termination, delivered on
14 March 28, 2008, was effective on April 30, 2008.

15 45. Even though DeVries Dairy shipped milk from cows not treated with rBST
16 during the entirety of March and April 2008, White Eagle paid DeVries Dairy the lowest
17 Producer Premiums for those two months than for any other time period during DeVries
18 Dairy's membership in the Association.

19 46. The alleged reason for paying such negative premiums remained that DeVries
20 Dairy utilized rBST in its cows, even through other White Eagle producers who actually used
21 rBST received significantly higher Producer Premiums for milk marketed during that same time
22 period.

23 **The Control Over White Eagle Asserted by T.C. Jacoby & Co. and Dairy Support Inc.**

24 47. T.C. Jacoby & Co., Inc. ("Jacoby") is a Missouri corporation in the business of
25 marketing milk of dairy producers and dairy cooperatives to milk handlers. Jacoby also
26 markets surplus milk of milk handlers to other milk plants and located additional milk for milk
27 handlers when needed. Jacoby holds itself out as an expert in milk marketing, with multiple
28 decades of experience in marketing milk.

1 48. Dairy Support Inc. ("DSI") is a Missouri corporation and wholly owned
2 subsidiary of Jacoby. DSI was formed to provide risk management tools for the dairy industry.
3 DSI now principally provides payroll and accounting support to dairy cooperatives, including
4 White Eagle.

5 49. Knox Services, Inc. is an Ohio corporation, whose principal, Ronald Brechler, has
6 a long-standing business relationship with Jacoby. Knox Services provides field services
7 exclusively to cooperatives managed by Jacoby. The services provided by Knox Services
8 include testing of producer milk, managing issues of milk quality, and communicating to
9 producers on behalf of Jacoby and White Eagle (although the actual content of the
10 communications originate from Jacoby's offices).

11 50. Before White Eagle was actually formed as a cooperative, Jacoby marketed the
12 milk of multiple dairy producers as independent (non-cooperative member) dairy farmers.

13 51. As some point during 2003, Jacoby determined that certain advantages could be
14 gained by organizing some of these independent milk producers into a dairy cooperative.

15 52. Jacoby then took the legal and other steps necessary to organize White Eagle
16 Cooperative Association as a cooperative for these members. Jacoby's role in formation of the
17 cooperative included the initial determination to form the cooperative, the retention of counsel
18 in order to form the cooperative, and the provision of additional advice and guidance to the
19 founding members, for whom Jacoby served as their milk marketing agent.

20 53. From its inception, White Eagle retained Jacoby to act as the marketing agent for
21 the cooperative. This relationship, whereby Jacoby would be in control over all day-to-day
22 aspects of operating the cooperative, was contemplated from the initial formation of the
23 cooperative. Accordingly, all decisions about where the milk of White Eagle members would
24 be sold and all terms of sale were negotiated by Jacoby.

25 54. Further, the proceeds from the sale of White Eagle member milk were paid to
26 Jacoby, who was responsible for returning the proceeds to White Eagle producers and
27 establishing the payments to producers, including producer premiums. In essence, all members
28 of White Eagle, including DeVries, were required to turn over all control over their key asset,

1 their milk production, to Jacoby, and were also required to rely on his expertise and fidelity in
2 marketing their milk for the highest possible value.

3 55. White Eagle and Jacoby both acknowledge Jacoby's role as a fiduciary for the
4 cooperative and its members.

5 56. Jacoby is responsible for communication with the members of White Eagle, for
6 accounting to producers for proceeds of milk sales, and for paying producers. Jacoby delegated
7 certain of these responsibilities (and possibly others) to DSI, and to Knox Services.
8 Nonetheless, Jacoby maintains full control and oversight over the operations of DSI and over
9 communications to producers by Knox Services.

10 57. As noted above, Jacoby holds itself out as an expert in milk marketing, with
11 multiple decades of experience in the marketing of milk. Indeed, Jacoby represents itself
12 through the internet and other forms of communication as the expert in all issues concerning the
13 marketing and sale of milk through the use of a variety of agricultural operations, including
14 milk cooperatives. Jacoby also represents that it has ongoing relationships with some of the
15 largest entities in the dairy industry in the United States, including United Dairy, Land-O-Lakes
16 and Dairy Farmers of America, which Jacoby lists among its "clients."

17 58. As marketing agent for White Eagle, Jacoby marketed milk of DeVries Dairy to
18 the Kroger Company's Tamarack Plant, under an arrangement with United Dairy, who was a
19 sub contractor to the plant's primary supplier, Dairy Farmers of America. Jacoby did not
20 disclose to White Eagle or to DeVries the conflict of interest that it had in marketing the milk of
21 DeVries to other clients of Jacoby.

22 59. The agreement that Jacoby negotiated with United Dairy to supply the Kroger
23 plant with milk from DeVries Dairy was a one-year contract, and required only that the milk for
24 the plant was to be Grade A. Nothing in the agreement required that milk for the plant be from
25 cows not treated with rBST.

26 60. Kroger Company allegedly then unilaterally determined to no longer accept milk
27 from cows treated with rBST. At that time, Jacoby failed to take any steps to enforce the
28 contract it negotiated on behalf of White Eagle (to whom Jacoby owed a fiduciary duty) with
United Dairy (Jacoby's client). Further, Jacoby never sought to declare the agreement breached

1 by United Dairy, nor did Jacoby seek to force United Dairy to accept milk on the actual
2 negotiated terms.

3 61. Instead, when milk from DeVries Dairy was allegedly no longer eligible to be
4 delivered to the Kroger Plant, Jacoby and DSI changed the premium paid to DeVries Dairy
5 from a positive \$0.65 per hundredweight to a negative \$1.85 per hundredweight.

6 62. At about the same time, Jacoby and DSI established differing premiums for
7 producers that utilized rBST in their milking cows. In fact, some producers' premiums did not
8 change despite their continued use of rBST, while other members of White Eagle that
9 continued to use rBST saw their premiums reduced but not in the same magnitude as DeVries
10 Dairy.

11 63. After DeVries Dairy had terminated its membership in White Eagle, but before its
12 membership term expired, Jacoby sold the entirety of the milk produced by DeVries to a Land
13 O' Lakes plant located more than 400 miles from the DeVries Dairy farm at a price \$2.00 per
14 hundredweight below the USDA minimum classified price for raw milk.

15 64. In violation of its duty to DeVries, Jacoby then allocated all of the burden of this
16 distant and low value sale to DeVries, along with additional hauling expenses and low-value
17 sales, paying DeVries a negative premium for its milk of \$2.50 per hundredweight.

18 65. Jacoby did not to disclose to White Eagle or DeVries the conflict of interest in
19 marketing the milk of DeVries Dairy to Land O' Lakes – another of Jacoby's clients.

20 66. In addition, Jacoby entered into special premium arrangements for one White
21 Eagle producer, Hatfield Seven Dairy, at the behest of Jacoby's client, United Dairy.

22 67. The arrangement with Hatfield Seven Dairy was reached when United Dairy
23 approached Jacoby and asked that he market the milk of Hatfield Seven Dairy. To appease his
24 client, Jacoby agreed to market Hatfield Seven Dairy's milk through White Eagle, and to pay a
25 premium substantially higher than other White Eagle producers, including DeVries, received.
26 Hatfield Seven Dairy, despite utilizing rBST in its cows, received positive premiums between
27 \$1.50 and \$2.40 per hundredweight at the same time that DeVries was receiving negative
28 premiums of between \$1.00 and \$2.50 per hundredweight.

1 85. Rather than pooling the proceeds from the sale of such milk among all member
2 dairy producers as required by the Membership Agreement and By-Laws of the Association,
3 White Eagle intentionally distributed the revenue from milk sales that was properly payable to
4 DeVries to other members of the Association, retained the proceeds, or otherwise converted the
5 proceeds.

6 86. Pursuant to the Agreement, DeVries Dairy entrusted White Eagle with the milk
7 that it supplied and was required to hold the funds obtained on behalf of DeVries Dairy in a
8 fiduciary capacity and then remit them to DeVries Dairy.

9 87. White Eagle breached this duty and instead converted funds to its use by failing
10 to properly remit the amount due to DeVries Dairy for the milk entrusted to White Eagle to
11 market.

12 88. DeVries Dairy has been damaged in an amount to be proven at trial.

13 **FOURTH CLAIM FOR RELIEF**

14 **(Negligent Misrepresentation – Jacoby and Dairy Support)**

15 89. Plaintiff incorporates by reference all prior allegations of this First Amended
16 Complaint.

17 90. In conversations with representatives of DeVries Dairy, representatives of T.C.
18 Jacoby & Company, Inc. or Dairy Support Inc., acting on behalf of White Eagle asserted that
19 there would not be a financial penalty to DeVries Dairy for continuing to treat its cows with
20 rBST.

21 91. DeVries Dairy maintained its membership in White Eagle and continued to ship
22 milk to White Eagle in reliance on the representations of the White Eagle agents.

23 92. The White Eagle representatives asserted as of their own knowledge, or so
24 positively as to imply that they had knowledge, that there would be no financial ramifications to
25 DeVries Dairy, for continuing to treat its cows with rBST, when they knew that they did not
26 have sufficient information to justify said statements or that such statements were false or
27 incorrect.

28 93. White Eagle through its agents and representatives intended that DeVries Dairy
rely on the information provided and provided it for that purpose.

1 94. White Eagle failed to exercise reasonable care or competence in obtaining or
2 communicating this information to DeVries Dairy.

3 95. DeVries Dairy actually relied upon the information provided by White Eagle.

4 96. The reliance by DeVries Dairy on this information was justified.

5 97. As a result, DeVries Dairy has been damaged in an amount to be proven at trial.

6 **FIFTH CLAIM FOR RELIEF**

7 **(Breach of Fiduciary Duty – Jacoby and Dairy Support)**

8 98. Plaintiff incorporates by reference all prior allegations of this First Amended
9 Complaint.

10 99. There is a fiduciary duty between White Eagle and DeVries Dairy, LLC, between
11 T.C. Jacoby & Co., Inc. ("Jacoby") and DeVries Dairy, LLC, and between Dairy Support Inc.
12 ("DSI") and DeVries Dairy for the following reasons:

13 a. White Eagle's status as a fiduciary originates under its existence as a
14 cooperative marketing association operating for the benefit of its members.

15 b. Jacoby and DSI acted as an agent for White Eagle with respect to all
16 dealings with members, including, without limitation, those under the marketing agreement and
17 those involving the holding of funds collected on behalf of the members.

18 c. Jacoby and DSI acted as a trustee for the members with respect to all
19 dealings with members, including, without limitation, those under the marketing agreement and
20 those involving the holding of funds collected on behalf of the members.

21 100. The defendants, and each of them, breached their fiduciary duties owed to
22 DeVries by manipulating the producer premiums paid to DeVries, by failing to fully disclose
23 and properly account for monies due DeVries under terms of the Marketing Agreement, by
24 unjustly allocating additional expenses of hauling milk to DeVries, by allocating to DeVries the
25 lowest value sale for the entire White Eagle Cooperative, and otherwise acting in a way to
26 financially benefit themselves to the detriment of DeVries.

27 101. As a fiduciary, Jacoby and DSI had a duty to truthfully and fully disclose to
28 DeVries all business relationships in which either of them maintained a conflict of interest by
acting as an agent to both the seller of milk and buyer of milk.

1 102. Jacoby and DSI had a duty of loyalty to the members of White Eagle, including
2 DeVries Dairy not to engage in self-dealing actions as the marketing agent member milk.

3 103. These duties were violated by Jacoby and DSI by entering into agreements for the
4 sale of DeVries Dairy's milk to other clients of Jacoby and DSI, including United Dairy and
5 Land O' Lakes and by entering into an agreement with Hatfield Seven Dairy, LLC at the behest
6 of United Dairy, and providing special benefits to Hatfield Seven Dairy not otherwise available
7 to DeVries.

8 104. As a proximate and legal cause of the defendants' breaches of their fiduciary
9 duties arising from this relationship, DeVries did not realize that Jacoby and DSI would place
10 their own interests in appeasing its other clients above those of DeVries.

11 105. Accordingly, DeVries has been harmed in amount subject to proof at the time of
12 trial herein, because it has been deprived of income for the sale of its milk by reason of the
13 defendants' breaches of fiduciary duties.

14 106. The aforementioned conduct of defendants, and each of them, was an intentional
15 misrepresentation, deceit, or concealment of material facts known to defendants, with the
16 intention on the part of the defendants to exploit the trust and confidence reposed in defendants
17 by DeVries Dairy and to thereby deprive plaintiffs of property or legal rights or otherwise cause
18 injury, and was such a conscious disregard of plaintiff's rights, so as to justify an award of
19 exemplary and punitive damages in favor of DeVries Dairy and against defendants.

20 **SIXTH CLAIM FOR RELIEF**

21 **(Negligence – Jacoby and Dairy Support)**

22 107. Plaintiff incorporates the prior allegations of this First Amended Complaint.

23 108. At the time of all the actions described herein, both Jacoby and DSI owed a duty
24 to DeVries as a member of White Eagle due to, among other things, the marketing agreement,
25 Bylaws, the substantial control exerted by these defendants over the milk of DeVries, and the
26 obligation of these defendants to account to DeVries for all proceeds received in connection
27 with the marketing and sales of the milk produced by DeVries Dairy.

28 109. Defendants Jacoby and DSI breached the duties owed to DeVries Dairy by failing
to fully disclose and to properly account for the monies due to DeVries Dairy under the terms

1 of the marketing agreement and Bylaws and by wrongfully withholding and manipulating the
2 premiums due to DeVries Dairy which decreased the premiums paid to DeVries Dairy and
3 increased the amount due to defendants Jacoby and DSI.

4 110. As a direct and proximate result of these breaches of duty, plaintiff DeVries Dairy
5 was damaged in an amount to be proven at trial.

6 **SEVENTH CLAIM FOR RELIEF**

7 **(Tortious Acts in Concert – All Defendants)**

8 111. Plaintiff incorporates all prior allegations of this First Amended Complaint.

9 112. As noted above, Jacoby, through the use of DSI, Knox Services, and others,
10 effectively controlled all aspects of the operation of White Eagle, including control over the
11 milk produced by DeVries and the proceeds due to DeVries after the marketing of its milk.

12 113. Jacoby, through DSI and others, provided substantial encouragement and
13 assistance to White Eagle in carrying out the day-to-day operations, including payment of the
14 proceeds due to members of White Eagle, such as DeVries Dairy.

15 114. At the time of all the actions described herein, both Jacoby and DSI owed a
16 fiduciary duty to DeVries as a member of White Eagle due to, among other things, the
17 substantial control exerted by these defendants over the milk of DeVries.

18 115. Due to the substantial control exerted by Jacoby over the day-to-day operations of
19 White Eagle, the cooperative was aware of all of the actions taken by Jacoby through DSI and
20 others in, among other things, failing to pay to DeVries Dairy the amount due under the terms
21 of the marketing agreement and bylaws and, at the same time ensuring that other members
22 received more premiums even though they were in the same or substantially the same position
23 as DeVries.

24 116. White Eagle was also aware of the ongoing relationship between Jacoby and
25 United Dairy and the inherent conflict of interest that this relationship posed. Nevertheless,
26 White Eagle provided substantial assistance and encouragement to Jacoby with regard to its
27 treatment of DeVries Dairy and the failure by Jacoby to ensure that DeVries Dairy was treated
28 equitably and fairly concerning the marketing of its milk and the proceeds to be paid as a result
of that marketing.

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

5 WHEREFORE, Plaintiff DeVries Dairy prays for judgment against defendants as
6 follows:

- 7 A. For compensatory damages in an amount to be proven at trial.
- 8 B. For punitive and exemplary damages in an amount to be proven at trial.
- 9 B. For prejudgment and post-judgment interest on the foregoing sum at the highest
10 rate permitted by law.
- 11 C. For all costs incurred in pursuing this action.
- 12 D. For all reasonable attorney fees incurred in pursuing this action.
- 13 E. For other such relief as this Court may deem appropriate.

14 **JURY DEMAND**

15 Plaintiff requests a trial by jury comprised of the maximum number of permissible jurors
16 an all issues so triable.

17 DATED this 30th day of December 2010.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing First Amended Complaint was served upon John H. Vetne and John M. Carey, counsel for the defendant, White Eagle Cooperative Association by filing with the Court's ECF system.

/s/ Ryan K. Miltner
Ryan K. Miltner
Counsel for Plaintiff, DeVries Dairy, LLC

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