THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr. Circuit Court Judge

Case No. 2014-CP-40-3389
Appellant Case No. 2014-001652

Alan Wilson, Securities Commissioner of South Carolina,.....Respondent,

v.

Integrated Capital Strategies, LLC,.....Appellant.

AMICUS CURIAE BRIEF OF NORTH AMERICAN SECURITIES ADMINISTRATORS ASSOCIATION, INC.

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IDENTITY OF AMICUS CURIAE

The North American Securities Administrators Association, Inc. ("NASAA") is the non-profit association of state, provincial, and territorial securities regulators in the United States, Canada, and Mexico. NASAA has 67 members, including the securities regulators in all 50 states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. Formed in 1919, NASAA is the oldest international organization devoted to protecting investors from fraud and abuse in connection with the offer and sale of securities.

NASAA members' fundamental mission is protecting investors. Their principal activities include registering certain types of securities; licensing the firms and agents and representatives who offer and sell securities; investigating violations of state law; and, where appropriate, filing enforcement actions. State securities regulators also educate the public about investment fraud and advocate for the adoption of strong, fair, and uniform securities laws and regulations at both the state and federal level.

NASAA supports the work of its members by offering training programs, publishing investor education materials, presenting the views of its members before Congress on matters of securities regulation, and fostering multi-state discussions and information sharing. Another core function of NASAA is to represent the membership's position, as *amicus curiae*, in significant cases involving the interpretation of securities laws and the rights of investors.

NASAA and its members have a substantial interest in the outcome of this proceeding as an adverse decision in this matter would greatly limit the ability of the South Carolina Securities Division to investigate violations of the South Carolina Uniform Securities Act ("the Act") for the purpose of protecting investors. Furthermore,

a decision limiting the Commissioner's investigative authority here will be looked to by other jurisdictions when they are asked to interpret similar statutory provisions in their own laws concerning the scope of the investigative authority of state securities regulators. Such a decision stands to have an adverse impact on state securities regulators' ability to evaluate and pursue investigations into violations of their securities laws and protect investors as they are charged to do under their respective laws. This is especially true considering the similarities between the Act and the securities laws of the other states.

ARGUMENT

I. THE TRIAL COURT WAS CORRECT IN FINDING THAT THE COMMISSIONER HAD THE AUTHORITY TO ISSUE THE SUBPOENA

A. The Securities Commissioner has broad investigative authority

The South Carolina Securities Commissioner ("Securities Commissioner" or "Commissioner") has broad authority to investigate any violations or potential violations of the Act. S.C. CODE ANN. § 35-1-602(a)(1). The Act explicitly grants the Commissioner the power to "conduct public or private investigations within or outside of this State which the Securities Commissioner considers necessary or appropriate to determine whether a person has violated, is violating, or is about to violate this chapter or a rule adopted or order issued under this chapter." *Id.* The Act also explicitly provides the Commissioner with the power to issue investigative subpoenas. *See* § 35-1-602(b) ("[T]he Securities Commissioner or its designated officer may administer oaths and affirmations, subpoena witnesses, seek compulsion of attendance, take evidence, require the filing of statements, and require the production of any records that the Securities Commissioner considers relevant or material to the investigation.").

Section 35-1-602 of the Act, authorizing the Commissioner to conduct investigations and subpoena information, is nearly identical to Section 407 of the Uniform Securities Act of 1956, which provides: "the [Commissioner] in his discretion (1) may make such public or private investigations within or outside of this state as he deems necessary to determine whether any person has violated or is about to violate any provision of this act or any rule or order hereunder." UNIF. SEC. ACT § 407 (1956). The Uniform Securities Act of 2002 includes a grant of similarly broad investigative authority. *See* UNIF. SEC. ACT § 602 (2002) ("the administrator may: (1) conduct public or private investigations within or outside of this State which the administrator considers necessary or appropriate to determine whether a person has violated, is violating, or is about to violate this [Act] or a rule adopted or issued under this [Act], or to aid in the enforcement of this [Act] or in the adoption of rules and forms under this [Act]."). At least 41 other states have based their securities laws on a version of the Uniform Securities Act. 12A JOSEPH C. LONG, BLUE SKY LAW, § 12:1 (2014).[1]

The South Carolina General Assembly granted the Commissioner expansive authority to conduct investigations into potential violations of the Act, including giving the Commissioner subpoena authority. Such a broad grant of authority is necessary to ensure investors remain protected. People engaging in conduct that may violate state securities statutes such as the Act often go to great lengths to avoid detection and employ increasingly complicated schemes to fleece investors. Without its wide-ranging investigative authority, the Commissioner would be less likely to discover such activity,

[1] Many of the states that have not adopted a version of the Uniform Securities Act have statutes that grant their respective securities regulators similarly broad investigative authority. *See, e.g.,* ARIZ. REV. STAT. ANN. § 44-1822; CAL. CORP. CODE § 25531; FLA. STAT. §497.149; 815 ILL. COMP. STAT. 5/11.

and the Commissioner's ability to effectively investigate violations of the Act would be severely hampered. A decision limiting the Commissioner's authority to fully investigate potential violations of the Act stands to put South Carolina investors at a greater risk of suffering from fraudulent practices than investors in neighboring states.

Even if the authority of the Commissioner were not evident in the plain reading of the statute, case law has recognized that the state securities laws are remedial statutes that are meant to be interpreted broadly. The United States Supreme Court has instructed that remedial legislation such as the securities statutes should be broadly construed to effectuate their purpose. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Other jurisdictions also have recognized the necessity of a broad reading of the securities statutes to promote investor protection. *See, e.g., Carrington v. Arizona Corp. Comm'n*, 18 P.3d 97, 99 (Ariz. 2001); *King v. Pope*, 91 S.W.3d 314, 324 (Tn. 2002).

B. Appellant is subject to the Commissioner's investigative authority

As discussed above, the Commissioner's investigative authority, like the investigative authority of other state securities regulators across the country, is broad. The trial court correctly found that Appellant is subject to that authority. Appellant maintains that it is not subject to the investigative authority of the Commissioner because it neither offered nor sold securities in South Carolina. Appellant's Final Brief at 7-10. Appellant has confused the Commissioner's authority to investigate violations and potential violations of the Act, with the Commissioner's authority to take enforcement action for violations of the Act.

The investigatory powers of an administrative agency are such that an agency "can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not." *U.S. v. Morton Salt Co.*, 338 U.S. 632, 642-43 (1950).

Further, the Commissioner need not establish subject matter jurisdiction prior to completing its investigation. *See, e.g., SEC v. Wall Street Transcript Corp.*, 422 F.2d 1371 (2nd Cir. 1970); *FTC v. Texaco, Inc.*, 555 F.2d 862 (D.C. Cir. 1977). In fact, requiring the Commissioner to prove subject matter jurisdiction prior to completing its fact-finding investigation would be unworkable and frustrate the Commissioner's investor protection mission. *See Commonwealth of Virginia ex rel State Corp. Comm. v. Woodbury*, Case No. SEC-1998-033, Report of Alexander F. Skirpan, Jr., Hearing Examiner (Aug. 13, 1998), Judgment Order (Sept. 30, 1998) (adopting Hearing Examiner Recommendations) ("[I]t is simply unworkable for the Division to be forced to prove jurisdiction before completing its fact-finding investigation.").

Further, the subpoena issued to Appellant is similar to a subpoena issued to a third-party service provider seeking information related to the telephone or internet usage—or any other relevant information maintained by the service provider—of an investigation's target. These materials are routinely sought in securities investigations, and such information greatly assists state securities regulators in carrying out their investor protection mission. Accepting appellant's position would stymy virtually all of the Commissioner's investigations and stands to harm investors.

Appellant also contends that it is not subject to the Commissioner's investigative authority because the securities issued by CertusBank or Certus Holdings (collectively "Certus")—separate banking entities that are the subject of the underlying investigation—are exempt from the Act. Appellant's Final Brief at 8. In making the argument, Appellant relies on § 35-1-201 of the Act. This section provides:

> The following securities are exempt from the requirements of Sections 35-1-301 through 35-1-306 and 35-1-504: . . .

> (3) a security issued by and representing or that will represent an interest in or a direct obligation of, or be guaranteed by: . . . a banking institution organized under the laws of the United States; a member bank of the Federal Reserve System; or a depository institution a substantial portion of the business of which consists or will consist of receiving deposits or share accounts that are insured to the maximum amount authorized by statute by the Federal Deposit Insurance Corporation, the National Credit Union Share Insurance Fund, or a successor authorized by federal law or exercising fiduciary powers that are similar to those permitted for national banks under the authority of the Comptroller of Currency pursuant to Section 1 of Public Law 87-722 (12 U.S.C. Section 92a) ....

S.C. CODE ANN. § 35-1-201. Assuming that Appellant is correct and that securities issued by Certus as a national bank are exempt from certain provisions of the Act, namely § 35-1-301 through § 35-1-306 and § 35-1-504, Appellant's attempt to evade the authority of the Commissioner still must fail.

The sections of the Act on which Appellant relies to assert it is exempt from the Commissioner's authority govern the registration of securities issued by Certus and the filing of certain advertising materials with the Commissioner. *See* S.C. CODE ANN. § 35-1-301 (securities registration requirement); S.C. CODE ANN. § 35-1-302 (notice filing); S.C. CODE ANN. § 35-1-303 (securities registration by coordination); S.C. CODE ANN. § 35-1-304 (securities registration by qualification); S.C. CODE ANN. §35-1-305 (securities registration filings); S.C. CODE ANN. § 35-1-306 (denial, suspension, or revocation of securities registration); S.C. CODE ANN. § 35-1-504 (filing of sales and advertising literature). Certus, however, is not exempt from the anti-fraud provisions of the Act, which apply to the offer or sale of *any* security, regardless of whether the security is exempt from registration. *See* S.C. CODE ANN. § 35-1-501 ("It is unlawful for a person, in connection with the offer, sale, or purchase of a security, directly or indirectly: (1) to

employ a device, scheme, or artifice to defraud; (2) to make an untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading; or (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person."); *see also* UNIF. SEC. ACT § 402, Official Comment (1956) (explaining the exemptions from the Act's registration requirements are not exemptions from the Act's antifraud provisions); *Barnes v. Sunderman*, 453 N.W.2d. 793, 796-97 (N.D. 1990) (explaining there are no exemptions from the anti-fraud provisions); *Russell and E.D.S. Energy Development Services, Inc. v. French & Associates, Inc. et al.*, 709 S.W.2d 312, 314 (Tex. App. 1986) ("Although the security was not required . . . to be registered, that exemption does not preclude the applications of the anti-fraud provisions of the Act."); *MacCollum v. Perkinson, et al.*, 913 P.2d. 1097, 1104 (Ariz. Ct. App. 1996) ("The securities fraud statute, however, includes the sale of even those securities that are exempt from the registration requirements."); *New Mexico Life Insurance Guaranty Ass'n, et al. v. Quinn & Co., Inc., et al.*, 809 P.2d 1278, 1287 (N.M. 1991) (explaining that registration exemptions do not equate to exemptions from anti-fraud provisions). Because the securities issued by Certus are not exempt from the anti-fraud provisions of the Act, and because the Commissioner has been granted broad investigative authority, the trial court correctly ordered Appellant's compliance with the subpoena.

C. The trial court applied the correct analysis as to the enforceability of an administrative subpoena

An administrative subpoena is enforceable if "the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably

relevant." *U.S. v. Morton Salt*, 338 U.S. at 650. The Act grants the Commissioner broad authority to investigate violations and potential violations of the Act, including the ability to issue subpoenas, and, as explained above, the subpoena at issue here was well within the Commissioner's authority. *See*, *supra*, Part I A-B.

Federal courts have enforced administrative subpoenas when the information requested is "reasonably relevant" to a lawful investigation. *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1089 (D.C. Cir. 1992) (quoting *FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977)). State courts have reached similar conclusions. *See, e.g., Pope & Talbot, Inc. v. Smith*, 340 P.2d 960, 966 (Or. 1959) ("The inquiry must be relevant to a lawful investigatory purpose and must be not broader than the needs of the particular investigation."); *Dolomite Energy, LLC v. Commonwealth of Kentucky Office of Fin. Institutions*, 269 S.W.3d 883, 886-87 (Ky. Ct. App. 2008) (holding subpoena valid if "the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant"); *Application of Dairymen's League Co-op. Ass'n.*, 274 A.D. 591, 595 (N.Y. App. Div. 1948) (refusing to vacate a subpoena unless person subpoenaed can show that the requested documents "are utterly irrelevant to any proper inquiry").

As the Commissioner explained in his Memorandum of Law in Support of the Securities Commissioner's Application for an Order Requiring Compliance with a Subpoena, the information sought in the subpoena is "reasonably relevant" to his lawful investigation of Certus, as the information sought relates to the relationships and interconnectedness of Certus and Appellant. R. at 288.

After applying the correct analysis, the trial court correctly ordered Appellant to comply with the Commissioner's subpoena, as it was within the Commissioner's authority and was reasonably relevant to the Commissioner's investigation of Certus.[2]

II. THE TRIAL COURT CORRECTLY REJECTED APPELLANT'S PREEMPTION ARGUMENT

Relying heavily on *Cuomo v. The Clearing House Association, LLC, et al.*, 557 U.S. 519 (2009), Appellant has essentially argued that the National Bank Act, 12 U.S.C. § 21, *et seq.*, and Office of the Comptroller of the Currency ("OCC") regulations preempt the Commissioner's securities fraud investigation of Certus because such an investigation is an improper exercise of visitorial powers reserved solely to the OCC. Appellant's argument is without merit, and it was correctly rejected by the trial court.

A. Appellant is not a nationally chartered bank subject to the regulation of the OCC under the National Bank Act

Appellant is not a bank subject to the National Bank Act nor is Appellant subject to oversight by the OCC. Certus, however, is a nationally chartered bank. Appellant's attempt to assert that the Commissioner is preempted from requesting information is wholly inapplicable. Appellant attempts to argue that by subpoenaing information about its relationship and dealings with Certus that the Commissioner is attempting to investigate activities at Certus that the Commissioner is preempted from investigating due to Certus' status as a national bank. Any claim that Certus may have that it is not subject to the investigative authority of the Commissioner is a claim that only Certus can assert. Appellant has no standing to resist the Commissioner's subpoena on the basis of National Bank Act preemption.

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[2] Appellant has never argued that the subpoena is too indefinite.

B. The Commissioner is not attempting to assert visitorial authority over Appellant or Certus

As explained, Appellant has no standing to resist the Commissioner's subpoena on the grounds that the National Bank Act and OCC Regulations preempt the Commissioner from conducting his investigation. Further, the Commissioner is not preempted from conducting its investigation in any event. Appellant points to the Supreme Court's holding in *Cuomo v. Clearing House* for the proposition that the Commissioner cannot investigate the activities of Certus. Appellant's reliance on *Cuomo* is misplaced.

At issue in *Cuomo* was the validity of an OCC regulation that preempted state supervisory authority over national banks. *Cuomo*, 557 U.S. at 524. In *Cuomo*, the New York Attorney General sent "letters to several national banks making a request "in lieu of subpoena" that they provide certain non-public information about their lending practices." *Id.* The OCC regulation at issue preempted states from exercising visitorial powers over national banks. *Id.* The OCC's regulation had defined visitorial powers to include the examination of a bank, inspection of a bank's books and records, or regulation and supervision of a bank's banking activities. *Id.* After a careful analysis regarding the distinction between a sovereign's exercise of visitorial powers and a sovereign's power to enforce its laws, the court concluded that the OCC's regulation was overly broad in that it prevented a state from enforcing its laws upon a national bank. *Id.* at 529-531. After finding that the National Bank Act and the OCC regulation did not prevent states from enforcing valid state laws against national banks, the Court found that the requests regarding the national banks' lending practices made by the New York

Attorney General were an exercise of visitorial powers, not its law enforcement authority. *Id.* at 535-536.

The Supreme Court's reasoning in *Cuomo* is inapplicable here because in issuing a subpoena to Appellant, the Commissioner is not exercising visitorial powers over Appellant or over Certus. While *Cuomo* limits a state's use of certain investigatory methods to the extent they amount to an exercise of visitorial authority over a national bank, it does not altogether prohibit a state from investigating violations of valid state laws. As the Supreme Court of Mississippi has found, "any inquiry into the operation of a national bank is not automatically a 'visitorial power' that is prohibited under [the National Bank Act]." *Miss. Dept. of Revenue v. Picko Fin., Inc.*, 97 So.3d 1203, 1209 (Miss. 2012) (quoting *Peoples Bank of Danville v. Williams*, 449 F.Supp 254, 259-260 (W.D.Va. 1978)). Further, "the exclusively federal power to 'visit' national banks is not the power to oust all state regulation of those entities." *Wells Fargo Bank, N.A. v. Boutris*, 419 F.3d 949, 964 (9th Cir. 2005).

The Commissioner's anti-fraud investigation into Certus relates to potential violations of South Carolina's securities laws that may have occurred at a national bank. The Commissioner's investigation is wholly unrelated to banking activities, unlike the request made by New York in *Cuomo* seeking information regarding the lending practices of certain national banks. Instead, the Commissioner's subpoena is related to securities that may have been offered or sold by the bank and not an exercise of any visitorial authority. *See Picko*, 97 So.3d at 1209 (finding that the Mississippi Department of Revenue's subpoena related to the enforcement of a valid state tax was not an exercise of visitorial authority). The Commissioner's authority to investigate violations of and

enforce South Carolina's securities laws is clear and is not preempted by the National Bank Act. *See Alder v. Bank of America, N.A.*, No. CV 4866, 2014 WL 3887224, at * 3 (S.D.N.Y. July 17, 2014) ("The NBA thus preempts only those state laws that "prevent [] or significantly interfere[] with the exercise by [a] national bank of its powers" or otherwise "have a discriminatory effect of national banks" vis-à-vis state banks." (citing 12 U.S.C. § 25b(b)(1))).

As explained above, Appellant has no standing to assert preemption under the National Bank Act, and even if it could, the Commissioner's authority to investigate potential securities law violations at a national bank is not an improper exercise of visitorial powers as Appellant attempts to argue. Further, if the Court were to adopt Appellant's view of the National Bank Act, the investor protection goals of state securities laws would be severely frustrated. Accepting Appellant's position would insulate national banks—and their service providers and consultants if Appellant is also shielded from the subpoena—from the investigative authority of the Commissioner. Allowing national banks to be essentially immune to the state securities laws could result in significant harm to investors in the securities of these institutions. While national banks are subject to a significant federal regulatory regime, that regulatory framework is designed with respect to banking activity. If the Court accepts Appellant's position, there would be a significant regulatory gap as the federal banking regulators are not equipped, nor authorized, to enforce state securities laws designed to protect investors.

CONCLUSION

For the reasons stated above, the trial court's order should be affirmed.

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CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the *Amicus Curiae* Brief of the North American Securities Administrators Association, Inc. complies with Rule 211(b), SCACR.

[SIGNATURE PAGE FOLLOWS]

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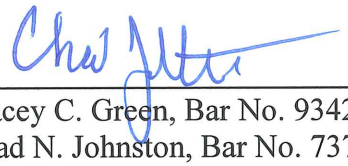

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PROOF OF SERVICE

This is to certify that I, a paralegal with the law firm Willoughby & Hoefer, P.A., have caused to be served this day one (1) copy of a the **Motion for Leave to File an *Amicus Curiae* Brief** and ***Amicus Curiae* Brief of the North American Securities Administrators Association, Inc.** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

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