

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WISCONSIN

JOHN J. CALNIN, et al.,
Plaintiffs,

Case No. 05-C-694

WALLACE J. HILLIARD,
Defendant

JOHN F. BUTZ, et al.,
Plaintiffs,

Case No. 05-C-784

WALLACE J. HILLIARD,
Defendant.

(Consolidated with 05-C-694)

GREG J. DECLEENE, et al.,
Plaintiffs,

Case No. 05-C-958

WALLACE J. HILLIARD,
Defendant.

(Consolidated with 05-C-694)

The REVOCABLE LIVING TRUST OF ROY E.
DOWNHAM OF JANUARY 30, 1979, et al.,
Plaintiffs,

Case No. 05-C-1092

WALLACE J. HILLIARD,
Defendant.

(Consolidated with 05-C-694)

GREGORY J. LARSEN,
Plaintiffs,

Case No. 05-C-1148

WALLACE J. HILLIARD,
Defendant.

(Consolidated with 05-C-694)

**PLAINTIFFS' PROPOSED FINDINGS OF FACT IN SUPPORT
OF MOTION FOR SUMMARY JUDGMENT**

Plaintiffs submit the following proposed findings of fact supporting their motion for summary judgment pursuant to Fed. R. Civ. P. Local Rule 56.2(a). The factual matters supported by reference to the Amended Complaint are admitted solely for the purposes of this motion. Additional factual references are to the affidavits filed in support of the motion or to other pleadings and documents on file with the Court as indicated. Pursuant to Fed. R. Civ. P. Civil Local Rule 56.1, please be advised that any factual assertion set forth in the accompanying affidavits and proposed findings of fact will be accepted by the Court as being true unless you submit your own affidavits or other admissible documentary evidence contradicting the factual assertions.

PARTIES

1. Plaintiffs are prominent Green Bay area residents, with the exception of Stephen Schonke who resides in Maryland.

2. Plaintiffs, John J. and Yvonne M. Calnin, are married individuals who are citizens of the State of Wisconsin and reside at 104 W. Parkridge Ave., Appleton, WI 54911-1119.

3. Plaintiffs, Greg J. and Ann M. DeCleene, are married individuals who are citizens of the State of Wisconsin and reside at 1701 Sunnyside Lane, De Pere, WI 54115.

4. Plaintiff, Flanagan Brothers, Inc., is a Wisconsin Corporation with its principal office located at 400 Clark Street, Bear Creek, Wisconsin 54922. It is owned by Ryan Downs and David Flanagan.

5. The Plaintiff, the Alfred H. and Jeane K. Fleck Revocable Trust is a trust formed pursuant to a trust agreement created and existing under the laws of the State of Wisconsin.

6. The Plaintiffs, Alfred H. and Jeane K. Fleck, are married individuals who are citizens of the State of Wisconsin and reside at 320 N. Adams Street, Suite A-1169, Green Bay,

WI 54301. They are the trustees of the Alfred H. and Jeane K. Fleck Revocable Trust and are authorized to pursue or defend any claim in favor of or against said trust.

7. The Plaintiffs, Thomas J. and Sara Hahn, are married individuals who are citizens of the State of Wisconsin and reside at 606 E. Vine Court, Sturgeon Bay, WI 54235.

8. The Plaintiff, the Kenneth and Lucille Jossart Revocable Trust 1-24-94 is a trust formed pursuant to a trust agreement created and existing under the laws of the State of Wisconsin.

9. The Plaintiffs, Kenneth L. and Lucille C. Jossart, are married individuals who are citizens of the State of Wisconsin and reside at 2226 Dollar Road, De Pere, WI 54115. They are the trustees of the Kenneth and Lucille Jossart Revocable Trust 1-24-94 and are authorized to pursue or defend any claim in favor of or against said trust.

10. The Plaintiff, the David W. and Yvonne M. Krutz Revocable Trust, is a trust formed pursuant to a trust agreement created and existing under the laws of the State of Wisconsin.

11. The Plaintiffs, David W. and Yvonne M. Krutz, are married individuals who are citizens of the State of Wisconsin and reside at 2596 County Road ZZ, De Pere, WI 54115. They are the trustees of the David W. and Yvonne M. Krutz Revocable Trust and are authorized to pursue or defend any claim in favor of or against said trust.

12. The Plaintiffs, David G. Perret, Sr. and Kathryn M. Perret, are married individuals who are citizens of the State of Wisconsin and reside at 2885 Manitowoc Road, Green Bay, WI 54311.

13. The Plaintiffs, David W. and Janice F. Schonke, are married individuals who are citizens of the State of Wisconsin and reside at 2459 Sunrise Court, Green Bay, WI 54302-4251.

14. The Plaintiff, Stephen F. Schonke, is an individual who is a citizen of the State of Maryland and resides at 714 Hammond Branch Road, #301, Odenton, MD 21113.

15. The Plaintiffs, Paul E. and Dawn M. Soletski, are married individuals who are citizens of the State of Wisconsin and reside at 1370 Sonata Court, Green Bay, WI 54311.

16. Plaintiff, Daniel D. Whetter, is an individual who is a citizen of the State of Wisconsin and resides at 4803 Point Comfort Lane, Green Bay, WI 54311.

17. The Plaintiffs, Donald W. and Rita Zellner, are married individuals who are citizens of the State of Wisconsin and reside at 2927 Trillium Trail, Brussels, WI 54235.

18. Defendant, Wallace J. Hilliard, resides at 2610 Bulrush Lane, Naples, FL 34105.

JURISDICTION AND VENUE

19. The Court has jurisdiction over the lawsuit under the Securities Exchange Act of 1934, 15 U.S.C. §78aa, and under Sections 1331 and 1337 of the United States Judicial Code, 28 U.S.C. § 1331, 1337 because federal questions are involved. Specifically, Plaintiffs bring this action pursuant to 15 U.S.C. § 78 and 17 C.F.R. § 240.10b.

20. The Court has supplemental jurisdiction under 28 U.S.C. § 1367 over Plaintiffs' state statutory claims: (1) Wisconsin statutory securities laws: Wis. Stat. §§ 100.18; 551.21; 551.31; and 551.41 (2) Florida statutory securities laws: Fla. Stat. §§ 517.301; 517.07; and 517.12. The Court has supplemental jurisdiction over these claims because they are so related to the claims within the Court's original jurisdiction that they form part of the same case or controversy under Article 3 of the United State Constitution.

STATEMENT OF UNDISPUTED FACTS

Allegations

21. Hilliard and Rudy Dekkers (“Dekkers”) formed Florida Air Holdings, LLC on December 7, 2000. (Decl. of Joseph W. LaFramboise, Exs. A and DD, hereinafter, “Decl. of JWL”).

22. Florida Air Holdings, Inc. (“FAH”) was formed in March 2001, and thereafter acquired the assets of Florida Air Holdings, LLC. (Decl. of JWL, Ex. A-2).

23. Shortly after forming FAH, Hilliard acquired all the shares of Sunrise for \$750,000.00 by purchasing such shares from the Sunrise Liquidating Trust. The only asset that Hilliard acquired from Sunrise was a Federal Aviation Regulation (“FAR”) Part 121 Commuter Air Carrier Operating Certificate (“Certificate”) that had been suspended due to inactivity due to Sunrise’s bankruptcy. If the U.S. Department of Transportation (“DOT”) approved the certificate, FAH would be able to operate commuter airlines and establish routes between Florida cities. (Decl. of JWL, Ex. A-1).

24. FAH operated Sunrise as a subsidiary and Sunrise never received approval to operate a commuter airline. (Decl. of JWL, Ex. C).

25. Sunrise initiated the approval process Certificate on January 15, 2001. (Decl. of JWL, Ex. D).

26. After delays and multiple supplemental filings, the DOT finally issued an “Order to Show Cause” on February 8, 2002 tentatively approving the Certificate unless cause was shown indicating that the application should not be approved. (Decl. of JWL, Ex. E).

27. Following the Order to Show Cause, the Federal Aviation Administration (“FAA”) notified the DOT that there were pending regulatory sanctions against one of Hilliard’s

companies, Plane 1. The "Order Vacating Show Cause Order" indicates an explanation was requested concerning the resolution of the pending regulatory sanctions against Plane 1 on February 13, 2002. (Decl. of JWL, Ex. B).

28. An explanation of Plane 1's civil penalties was received by the DOT more than two months later, on May 30, 2002. (Decl. of JWL, Ex. B, pg. 2).

29. The DOT withdrew its tentative approval of the Part 121 Certificate reinstatement on July 10, 2002 and cited the unresolved FAA allegations against Plane 1 as a significant contributing factor. (Decl. of JWL, Ex. B).

30. Communications from Hilliard to the Plaintiffs indicated that the Plaintiffs were purchasing an airline that would begin scheduled commuter service soon. (Decl. of JWL, Ex. F through F-9; Ex. A-1, pg. 2).

31. The "Executive Summary" material on page 1 indicated that "Sunrise Airlines (under FAA Part 121 Rules) will provide scheduled passenger service in key, underserved Florida markets . . . scheduled . . . to begin this summer." (Decl. of JWL, Ex. A-1).

32. Hilliard failed to disclose the Plane 1 FAA regulatory allegations and the violations committed by Plane 1 to the Plaintiffs when they invested. (Decl. of JWL, Ex. L).

33. The development of a commuter airline with scheduled service was essential to the business plan of FAH and was forecasted as occurring in September of 2001. (Decl. of JWL, Ex. G).

34. Hilliard owned 100% of Plane 1. (Decl. of JWL, Ex. H).

35. The FAA issued a Notice of Proposed Civil Penalties to Hilliard's company, Plane 1, in the amount of \$90,000.00 on May 9, 2001. (Decl. of JWL, Ex. I).

36. According to Hilliard, he originally self-reported these potential violations to the FAA. (Decl. of JWL, Ex. J).

37. Hilliard was therefore aware of the violations prior to the FAA issuing the Notice of Proposed Civil Penalties to Plane 1. (Decl. of JWL, Ex. J).

38. The DOT only became aware of the proposed civil penalties against Plane 1 five days following the issuance of the Show Cause Order tentatively approving the Certificate. (Decl. of JWL, Ex. C).

39. In the Order Vacating Show Cause Order, the DOT withdrew its tentative approval of the Part 121 Certificate for Sunrise by stating that “shortly after issuance of our Show Cause Order, we received information unknown to us earlier that indicated that, in May 2001, the FAA had issued a Notice of Proposed Civil Penalty (“NPCP”) to Plane 1 alleging that Plane 1 violated the FAR by operating as an air carrier without holding the required FAA operating authority to do so. These allegations, if true are serious.” (Decl. of JWL, Ex. C).

40. While Sunrise was attempting to gain approval from the DOT, Hilliard was actively involved in sales activities to raise money for FAH. (Decl. of JWL, Ex. K).

41. Hilliard failed to disclose the regulatory problems with Plane 1 which could have affected the business plans for FAH to operate a commuter air carrier to the Plaintiffs. (Decl. of JWL, Ex. L).

42. Hilliard did not resolve the FAA allegations against Plane 1 during the application process of Sunrise. The U.S. Attorney’s Office in Florida filed a lawsuit on April 5, 2004, alleging that Plane 1 was operating a charter air service without the proper authority. (Decl. of JWL, Ex. M).

43. Hilliard executed a Stipulated Order admitting to 26 violations of FAA regulations and agreed to a fine of \$285,000.00 on behalf of Plane 1. This Stipulated Order is dated March 25, 2005 and is the final outcome of the proposed sanctions issued against Plane 1 on May 9, 2001. (Decl. of JWL, Ex. N).

44. M&I Bank, Northeast, loaned FAH \$3,640,000.00 to purchase six aircraft. (Decl. of JWL, Ex. O, p. 2 (Ex. A)).

45. As of March 31, 2002, M&I Bank, Northeast, had loans outstanding of approximately \$2,700,000.00 to Plane 1 and \$1,800,000.00 to Hoffman Aviation, Inc. The FAH loan was \$3,640,000.00 and Hilliard executed an unlimited personal guaranty in favor of M&I Bank, Northeast for all of these loans. (Decl. of JWL, Ex. O, p. 4-10 (Ex. B)).

46. A December 31, 2001 letter from David Schlitz to Hilliard outlines problems with the loans, and indicated that the Bank did not want to have a continuing business relationship with either Hilliard or FAH and Hilliard readily admitted that the loans were in default. (Decl. of JWL, Ex. O, pp. 3-4 (Ex. A)).

47. On March 31, 2002, M&I Bank entered into a Forbearance Agreement with Hilliard, FAH, Dekkers, Hoffman Aviation, Inc., and Plane 1 that provided Hilliard and these companies time to obtain refinancing for these loans. The airplanes owned by FAH serviced as collateral for the defaulted loans subject to the Forbearance Agreement. (Decl. of JWL, Ex. O, pp. 4-10 (Ex. B)).

48. Hilliard did not disclose the loan defaults or forbearance agreements to prospective investors. (Decl. of JWL, Ex. P).

49. Hilliard admitted that he would have wanted to know the relationship that a corporation had with its bank, and that this information would be important to making an

investment decision, and that it would be something “important” to know if investing in a company. (Decl. of JWL, Ex. P, pg. 79, lines 15-25, and pg. 80, lines 1-9).

50. At the end of 2001, Sunrise had approximately \$300,000.00 in payroll taxes outstanding for the periods ended March 31, 2001; June 30, 2001; September 30, 2001; and December 31, 2001. (Decl. of JWL, Ex. Q).

51. The DOT was also concerned with payroll tax withholding failures of \$12,500.00 relating to a prior position held by the Chief Financial Officer of FAH, Mike Holtzaple. (Decl. of JWL, Ex. R).

52. The IRS directly contacted Hilliard concerning these payroll taxes. (Decl. of JWL, Ex. S).

53. A letter dated June 1, 2002 was sent to prospective investors describing the transaction for the purchase of Discover Air on page 2. The acquisition was subject to a comprehensive due diligence. (Decl. of JWL, Ex. T).

54. Although the Executive Summary indicated that “Discover is currently generating revenue in excess of \$400,000.00 per month . . . providing a revenue stream to the corporation, while Sunrise completes its Department of Transportation (“DOT”) approval process for a Part 121 scheduled passenger service to begin this summer,” Discover Air incurred substantial losses throughout 2002. (Decl. of JWL, Ex. A-1 and U at ¶3).

55. A lien was filed against Discover in June 2002 for failure to pay debts associated with fuel purchases. (Decl. of JWL, Ex. V).

56. Hilliard also represented that FAH had everything necessary to begin flying except the capital. (Decl. of JWL, Ex. F through F-9; Ex. A-1, pg. 2).

57. FAH's financial projections for 2002 included income projected after attaining the Certificate. (Decl. of JWL, Ex. G, pg. 26; Ex. A-1, pg. 32).

58. Page 30 of the Executive Summary states: "All the pieces are in place for successful launch of Sunrise Airlines." (Decl. of JWL, Ex. A-1).

59. The DOT withdrew their tentative support of the Sunrise authority to tentatively operate scheduled air service. (Decl. of JWL, Ex. B).

60. Hilliard did not contribute the DAG hangar, a valued at \$400,000. (Decl. of JWL, Ex. X, pgs. 114 and 116).

61. Hilliard did not contribute \$1,000,000.00 in cash. (Decl. of JWL, Ex. X, pg. 112).

62. Hilliard also never owned the airplanes for which he is claiming a \$1.1 Million equity contribution. (Decl. of JWL, Ex. X, pg. 118).

63. Hilliard contacted prospective investors via the phone and by mail. (Decl. of JWL, Ex. K, pg. 148).

64. Hilliard's material misrepresentations and omissions occurred in connection with the sale and purchase of FAH stock. (Decl. of JWL, Ex. K and L).

65. The loans of FAH and Hilliard affiliated companies, Huffmann Aviation and Plane 1, were in default as of December 31, 2001 and continued to be in default through and subject to a Forbearance Agreement effective March 31 2002. (Decl. of JWL, Exs. O and FF).

66. Hilliard was the guarantor on approximately \$4.2 Million in loans between Plane 1 and Huffman Aviation which were also in default. (Decl. of JWL, Ex. O).

67. The total loan defaults of FAH, Huffmann Aviation, and Plane 1 reached approximately \$8,000,000. (Decl. of JWL, Ex. O).

68. Hilliard executed the Forbearance Agreement with M&I Bank on March 31, 2002 and used the airplanes of FAH to secure such loans. (Decl. of JWL, Ex. O).

69. Therefore, Hilliard was aware of the potential violations even prior to the Notice of Proposed Civil Penalty issued by the FAA. Since the violations occurred during 1999, Hilliard was aware at all times of these potential violations before any investors invested in FAH but neglected to disclose them. (Decl. of JWL, Ex. J and P).

70. On Page 5 of the Executive Summary, it is noted that 63% of the \$13,000,000.00 or \$8,190,000.00 was spent to turn Sunrise into a turn key airline. (Decl. of JWL, Ex. A-1, pg.5).

71. FAH's outstanding payroll taxes concerned the DOT because they impacted the ability of the management to effectively run a financially fit airline. The DOT's concern regarding CFO Mike Holtzapple's prior problems regarding payroll taxes demonstrates that the ability to effectively handle the financial management of FAH could potentially affect FAH's business plan for the DOT approval for scheduled air service. (Decl. of JWL, Ex. R).

72. When FAH and Discover Air merged in May of 2002, Discover Air was already in default on vendor contracts. Discover Air was unable to even pay fuel bills and eventually had a lien filed against it in June of 2002. Discover Air incurred approximately \$1.3 Million in losses from May to December of 2002. (Decl. of JWL, Exs. T, A-1, pg. 1; Ex. U at ¶3; Ex. V).

73. The prospective investor letter Hilliard provided to investors claimed Hilliard contributed cash and assets valued at \$4 Million. (Decl. of JWL, Ex. Y).

74. Hilliard admitted in deposition testimony that he did not contribute such assets and only supplied Sunrise Airline stock. (Decl. of JWL, Ex. X).

75. Hilliard did not contribute assets valued at \$4 Million as the prospective investor letter for that stock claimed. Hilliard did not contribute the DAG hanger valued at \$400,000, \$1.1 Million in airplane equity, or \$1 Million in cash. (Decl. of JWL, Ex. X).

76. At the time of the sale and purchase of FAH stock by Stephen Schonke, his net worth was under \$1 million and he had not earned more than \$200,000.00 in the previous two years prior to the transaction. (Decl. of JWL, Ex. Z).

77. Hilliard knew Rudi Dekkers and loaned him \$900,000 for the benefit of Huffmann Aviation, a company involved in training pilots. (Decl. of JWL, Ex. BB).

78. Plane 1 Leasing, Inc. was created and owned by Hilliard in order to lease planes. (Decl. of JWL, Ex. CC).

79. The Plaintiffs identified as Parties in the Document all invested in FAH. (Decl. of JWL, Ex. W).

80. At the time of the sale and purchase of FAH stock by Thomas J. Han, his net worth was under \$1 million and he had not earned more than \$200,000 in the previous two years prior to the transaction. (Decl. of JWL Ex. EE).

81. Judge Sue Bischel, through her holding in Case No. 05-CV-1277 from the Brown County Circuit Court, granted summary judgment to a Plaintiff, situated similarly to Plaintiffs in this case, against Wallace J. Hilliard finding that Wallace J. Hilliard omitted material facts. (Decl. of JWL, Ex. AA).

Dated this 4th day of May, 2007.

LIEBMANN, CONWAY, OLEJNICZAK & JERRY, S.C.

By: /s/ Joseph W. LaFramboise

George Burnett

Joseph W. LaFramboise

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