

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MAR 23 2004

JAMES R. LARSEN, CLERK  
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RICHLAND, WASHINGTON

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

IN RE RIVER PARK SQUARE  
PROJECT BOND LITIGATION.

NO. CS-01-0127-EFS

ORDER DENYING IN PART AND  
GRANTING IN PART WALKER  
PARKING CONSULTANTS/ENGINEERS'  
MOTION FOR SUMMARY JUDGMENT  
RE: WSSA CLAIMS

On January 28, 2004, the Court held a motion hearing in the above-captioned matter. The Court heard oral argument on Walker Parking Consultants/Engineers' Motion for Summary Judgment RE: WSSA Claims, (Ct. Rec. 1117). Patrick Risken appeared for Walker Parking Consultants/Engineers ("Walker"). Alain Baudry appeared on behalf of the Plaintiffs. Walker argued the Court should dismiss Plaintiffs' Washington State Security Act ("WSSA") claims for seller (primary) and control person (secondary) liability. After reviewing the motions, memoranda, submitted materials, applicable case law, and hearing oral argument, the Court is fully informed. At the hearing, the Court **denied** Walker's motion for summary judgment on seller liability. The Court took the issue of secondary liability **under advisement**. For the reasons stated on the record and herein, the Court **denies in part and grants in part** Walker's motion for summary judgment on seller and

1 control person liability. This order supplements and memorializes the  
2 Court's oral ruling.

### 3 I. FACTUAL BACKGROUND

4 Walker is a professional services corporation which provides  
5 parking engineering services, revenue projections, and financial  
6 feasibility studies to businesses and government entities. In 1996,  
7 Walker entered into a contract with the City of Spokane ("City") to  
8 perform a parking feasibility analysis for the River Park Square  
9 ("RPS") mall garage in Spokane, Washington. The content of the study  
10 is a matter of dispute between the parties. Walker argues it provided  
11 revenue projections based upon information received from both the City  
12 and the RPS Developers. Plaintiffs argue that the Walker report  
13 contained unreasonable and untested assumptions. Plaintiffs argue  
14 that Walker, by virtue of its alleged ongoing business dealings with  
15 the RPS Developers, failed to disclose its conflict of interest. The  
16 parties do not dispute that Walker was not directly involved in any of  
17 the negotiations or actual sale of the bonds at issue. The Walker  
18 report was ultimately attached to the Official Statement used to sell  
19 the RPS bonds.

### 20 II. STANDARD FOR SUMMARY JUDGMENT

21 Summary judgment will be granted if the "pleadings, depositions,  
22 answers to interrogatories, and admissions on file, together with the  
23 affidavits, if any, show that there is no genuine issue as to any  
24 material fact and that the moving party is entitled to judgment as a  
25 matter of law." FED. R. CIV. P. 56(c). When considering a motion for  
26 summary judgment, a court may not weigh the evidence nor assess

1 credibility; instead, "the evidence of the non-movant is to be  
2 believed, and all justifiable inferences are to be drawn in his  
3 favor." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A  
4 genuine issue for trial exists only if "the evidence is such that a  
5 reasonable jury could return a verdict" for the party opposing summary  
6 judgment. *Id.* at 248. In other words, issues of fact are not  
7 material and do not preclude summary judgment unless they "might  
8 affect the outcome of the suit under the governing law." *Id.* There  
9 is no genuine issue for trial if the evidence favoring the non-movant  
10 is "merely colorable" or "not significantly probative." *Id.* at 249.

11 If the party requesting summary judgment demonstrates the absence  
12 of a genuine material fact, the party opposing summary judgment "may  
13 not rest upon the mere allegations or denials of his pleading, but . .  
14 . must set forth specific facts showing that there is a genuine issue  
15 for trial" or judgment may be granted as a matter of law. *Anderson*,  
16 477 U.S. at 248. This requires the party opposing summary judgment to  
17 present or identify in the record evidence sufficient to establish the  
18 existence of any challenged element that is essential to that party's  
19 case and for which that party will bear the burden of proof at trial.  
20 See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Failure to  
21 contradict the moving party's facts with counter affidavits or other  
22 responsive materials may result in the entry of summary judgment if  
23 the party requesting summary judgment is otherwise entitled to  
24 judgment as a matter of law. See *Anderson v. Angelone*, 86 F.3d 932,  
25 934 (9th Cir. 1996).

26 **III. SELLER LIABILITY UNDER RCW § 21.20.430(1)**

Walker argues that the Court should grant summary judgment on  
ORDER ~ 3

1 Plaintiffs' direct WSSA Seller Liability claims because they are not  
2 sellers. RCW 21.20.430(1) provides, in pertinent part, "[a]ny person,  
3 who offers or sells a security in violation . . . [of the WSSA] . . .  
4 is liable to the person buying the security. . . ." Walker argues  
5 that it did not sell RPS bonds to any Plaintiff or to any other  
6 person. Further, Walker alleges it had no discussions or contact at  
7 any time with any person contemplating purchasing RPS bonds. Finally,  
8 Walker did not know to whom the RPS bonds would be sold, and did not  
9 participate in that portion of the transaction. Walker reasons that  
10 since it did not traffic the RPS bonds, summary judgment is  
11 appropriate on Plaintiffs' seller liability claims.

12 In *Haberman v. WPPSS*, 109 Wash. 2d 107 (1987), the Washington  
13 Supreme Court held that "a defendant is liable as a seller under RCW  
14 21.20.430(1) if his acts were a substantial contributive factor in the  
15 sales transaction." *Id.* at 131. The Washington Supreme Court named  
16 three factors important in the consideration of whether the alleged  
17 conduct constitutes a substantial contributive factor:

18 (1) the number of other factors which contribute to the sale  
19 and the extent of the effect which they have on producing  
20 it, (2) whether the defendant's conduct has created a force  
21 or series of forces which are in continuous and active  
22 operation up to the time of the sale, or has created a  
23 situation harmless unless acted upon by other forces for  
24 which the actor is not responsible, and (3) lapse of time.

25 *Id.* The court expressly adopted the substantial contributive factor  
26 analysis to avoid the strict privity requirement that existed under  
federal law. The result is to extend liability to "those parties who  
have the attributes of a seller and thus who policy dictates should be  
subject to liability under RCW 21.20.430(1), but who would escape  
primary liability for want of privity." *Id.* at 132.

1       After the United States Supreme Court declined to adopt the  
2 substantial contributive factor test in *Pinter v. Dahl*, 486 U.S. 622  
3 (1988), the Washington Supreme Court clearly expressed the continuing  
4 vitality of the *Haberman* analysis. Specifically, in *Hoffer v. State*  
5 *of Washington*, 113 Wash. 2d 148 (1989), the Washington Supreme Court  
6 stated it found the substantial contributive factor test "persuasive  
7 in the context of WSSA even if the Supreme Court does not in the  
8 federal setting." *Id.* at 152. The Court held that WSSA should be  
9 "more broadly construed" than the federal statute because "it  
10 endeavors to protect investors, not just the integrity of the  
11 marketplace." *Id.*

12       Accordingly, the Court must evaluate whether Walker's preparation  
13 and submission of its report was a substantial contributive factor in  
14 the sale of RPS bonds to the Plaintiffs. The Court must weigh three  
15 factors in making this determination. *Haberman*, 109 Wash. 2d at 131.  
16 First, the Court must evaluate "the number of other factors which  
17 contributed to the sale and the extent of the effect which they have  
18 on producing it." *Id.* Under this first prong, the Court is asked to  
19 evaluate the record to determine a ratio measuring the effect of  
20 Walker's conduct as compared to all other Defendants. The goal of  
21 this process is to establish how much Walker's actions pushed the  
22 sales transaction forward. Under the second prong, the Court is asked  
23 to determine whether Walker's conduct "has created a force or series  
24 of forces which are in continuous and active operation up to the time  
25 of the sale, or has created a situation harmless unless acted upon by  
26 other forces for which the actor is not responsible." *Id.* Finally,  
the Court must consider any lapse of time.

1 The Washington Supreme Court acknowledged that the process  
2 outlined above "is necessarily a question of fact." *Id.* at 132. In  
3 support of its Motion, Walker argues its role in this transaction was  
4 limited to providing the City of Spokane a financial feasibility  
5 analysis ("FFA") as required by its contract. The Court finds that  
6 the substantial contributive factor test contemplates more than  
7 participation in a sales transaction in defining "seller."  
8 Specifically, to grant this motion for summary judgment, the Court  
9 would be required to find as a matter of law no genuine issues of  
10 material fact exist as to the role played by Walker in pushing the RPS  
11 transaction to fruition. Under the *Haberman* analysis, a party that  
12 had a hand in preparing the product for sale can be held liable along  
13 with the merchant. The Court disagrees with Walker's narrow  
14 interpretation of § 21.20.430(1) when it argues liability is limited  
15 "to those entities/individuals who are involved in the actual sales  
16 transaction." (Ct. Rec. 1116, P.8). The Court finds disputed issues  
17 of material fact exist as to whether the Walker report utilized  
18 throughout negotiations and attached to the Official Statement  
19 provided to Plaintiffs constituted a substantial contributive factor  
20 in the ultimate sale of RPS bonds. Accordingly, summary judgment on  
21 seller liability must be **denied**.

#### 22 IV. CONTROL PERSON LIABILITY UNDER RCW 21.20.430(3)

23 RCW 21.20.430(3) provides, in pertinent part:

24 Every person who directly or indirectly controls a seller or  
25 buyer liable under subsection (1) or (2) above, every  
26 partner, officer, director or person who occupies a similar  
function of a seller or buyer, every employee of such a  
seller or buyer who materially aids in the transaction, and  
every broker-dealer, salesperson, or person exempt under the  
provisions of RCW 21.20.040 who materially aids in the

1 transaction is also liable jointly and severally . . ."

2 Above, the Court held genuine issues of material fact remain for  
3 trial on whether or not Walker is a seller under § 21.20.430(1).  
4 Next, the Court must determine whether Walker's relationship relative  
5 to other Defendants in the RPS bond transaction would permit a  
6 reasonable jury to impose secondary or control person liability under  
7 RCW 21.20.430(3). The Court finds it could not.

8 Walker is a professional services corporation which entered into  
9 a contract with the City to provide an FFA. After completing the City  
10 contract, Walker provided revised projections to the Developers and  
11 other Defendants. Walker authorized its revised projections to be  
12 attached to the Official Statement provided to the Plaintiffs. The  
13 parties do not dispute that Walker was not directly involved in any of  
14 the negotiations or actual sale of the bonds at issue. The Court  
15 finds that Walker was never in a position to control, directly or  
16 indirectly, any of the other Defendants. The Court further finds the  
17 "partner, officer, director, or other person who occupies a similar  
18 status . . ." provision inapplicable to Walker. In addition, the  
19 Court finds that Walker was not an employee of any of the other  
20 Defendants. While Walker created an FFA and revised projections,  
21 Walker at all times relevant to the RPS transaction remained an  
22 independent contractor paid by other Defendants to provide a  
23 professional service. Finally, the Court finds Walker was not a  
24 broker-dealer, salesman, or a person exempt under RCW 21.20.040.

25 While the intent of § 21.20.430(3) is to impose secondary  
26 liability on parties that either control or materially aid in a  
fraudulent securities transaction, the entity must fit within the

1 class defined by the statute. The Court finds Walker is not among the  
2 Defendants secondarily liable for WSSA violations. Finding that no  
3 reasonable jury could find Walker is within the statutorily defined  
4 class, the Court **grants** Walker's Motion as to secondary liability.  
5 Accordingly, For the reasons stated on the record and herein,

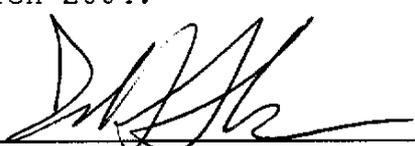
6 **IT IS HEREBY ORDERED:**

7 1. Walker Parking Consultants/Engineers' Motion for Summary  
8 Judgment RE: WSSA Claims, (Ct. Rec. 1117), is **DENIED in part (Primary**  
9 **or Seller Liability) and GRANTED in part (Secondary or Control Person**  
10 **Liability).**

11 **IT IS SO ORDERED.**

12 The District Court Executive is directed to enter this Order and  
13 to furnish copies to counsel.

14 **DATED** this 23<sup>rd</sup> day of March 2004.

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EDWARD F. SHEA  
United States District Judge

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