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
Appellate Case No. 2014-001652

Alan Wilson, Securities Commissioner
of South Carolina,

Respondent,

v.

Integrated Capital Strategies, LLC,

Appellant.

APPELLANT'S FINAL BRIEF

James M. Griffin
Margaret N. Fox
LEWIS, BABCOCK & GRIFFIN, L.L.P.
1513 Hampton Street
Columbia, South Carolina 29201
T: (803) 771.8000
F: (803) 733.3541

Attorney for Appellant

Alan Wilson, Securities Commissioner
Tracy Meyers, Deputy Securities Commissioner
Ian P. Weschler, Assistant Attorney General
SECURITIES DIVISION
1000 Assembly Street
Columbia, South Carolina 29201
T: (803) 734-9916

Attorney for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

STATEMENT OF ISSUES ON APPEAL

1. DID THE TRIAL COURT ERR IN FINDING THAT THE ATTORNEY GENERAL HAD JURISDICTION OVER APPELLANT?

2. DID THE TRIAL COURT ERR IN FINDING THAT THE SUBPOENA AT ISSUE SHOULD BE ENFORCED?

3. DID THE TRIAL COURT ERR IN CONSIDERING A DOCUMENT APPELLEE SUBMITTED IN CAMERA AND FILED UNDER SEAL WITHOUT ALLOWING APPELLANT TO VIEW THE DOCUMENT?

STATEMENT OF THE CASE

On April 9, 2014, the Securities Division of the Office of the Attorney General of South Carolina ("Attorney General") issued a subpoena to Appellant Integrated Capital Strategies, LLC ("ICS") pursuant to the South Carolina Uniform Securities Act, S.C. Code Ann. § 35-1-101, *et seq* (the "Act"). The subpoena requested documents as part of the Attorney General's investigation into the offer and sale of securities by CertusHoldings, Inc. ("CertusHoldings") and CertusBank N.A. ("CertusBank") in and from South Carolina. By letter dated May 6, 2014, ICS objected to the subpoena on several grounds. (R. 302-303). Central to its objection was the premise that CertusBank and CertusHoldings are regulated by federal law pursuant to the National Bank Act, 12 U.S.C. § 21, *et seq* , and the Bank Holding Company Act, 12 U.S.C. § 1841, *et seq* , respectively. Thus, the Attorney General lacked authority to investigate either entity. [1]

[1] Additionally, CertusBank is a depository institution subject to regular examination by the Office of the Comptroller of the Currency. The Bank Service Company Act provides that whenever a depository institution regularly examined by an appropriate federal banking agency causes services authorized under the same to be performed for itself, by contract or otherwise, the performance of those services shall be "*subject to regulation and examination by such agency to the same extent as if such services were performed by the depository institution itself on its own premises* " 12 U.S.C § 1867(c)(1).

On May 23, 2014, the Attorney General filed an Application and Memorandum in Support ("MIS") for an Order Requiring Compliance with the Subpoena in the Richland County Court of Common Pleas. (R. 277-306). On the same day, the lower court issued a Rule to Show Cause why ICS should not be ordered to produce documents responsive to the subpoena. The Rule to Show Cause instructed ICS to file a responsive brief before June 3, 2014 and set a hearing on the matter for June 10, 2014. (R. 307-308). Thereafter, ICS timely filed a Response in Opposition ("RIO") to the Application for an Order Requiring Compliance. (R. 309-324). The hearing was held before the lower court and subsequently, on June 25, 2014, the lower court entered an Order Requiring Compliance with a Subpoena ("Order"). (R 4-16). ICS moved for reconsideration of the Order on July 10, 2014 and such motion was denied on July 31, 2014 by the trial Court. (R 17-18).

ICS filed a Notice of Appeal to this Court on July 30, 2014 [2] requesting this Court reverse the Order. (R.45-82). By letter dated August 7, 2014, this Court requested ICS and the Attorney General serve and file a memorandum addressing the issue of appealability of the Order. On August 15, 2014, ICS timely filed its Memorandum. On September 19, 2014, this Court again requested the Attorney General file its memorandum addressing the issue of appealability. Thereafter the Attorney General filed his Return to ICS' Memorandum. By letter dated October 24, 2014, the parties received notice the appeal would proceed.

[2] Following the trial court's denial of ICS' Motion for Reconsideration, ICS amended its notice of appeal and filed the same on August 15, 2014.

FACTS

Appellant ICS is a corporation organized under the laws of Delaware with its principal place of business in Charlotte, North Carolina. ICS is neither organized under nor has its principal place of business in South Carolina.

ICS' Member-Managers ("Members") founded CertusHoldings (formerly Blue Ridge Holdings, Inc.), a Delaware corporation with its principal place of business in Atlanta, Georgia. CertusHoldings is a holding company for CertusBank and is subject to the jurisdiction of the Federal Reserve pursuant to the Bank Holding Company Act CertusBank is a nationally chartered bank with more than thirty (30) branches in North Carolina, South Carolina, Georgia, and Florida. CertusBank was initially headquartered in Charlotte, North Carolina and later moved its headquarters to Greenville, South Carolina.

Neither CertusHoldings nor CertusBank are regulated by State law. Moreover, the relationship among CertusHoldings, CertusBank and ICS is governed by the laws of the United States of America and the State of New York. The Operating Agreement executed between CertusBank and the Office of the Comptroller of the Currency ("OCC") authorized CertusBank to engage ICS to perform contractual services. At the time the Operating Agreement was executed, the founders of CertusBank were Members of ICS and principal negotiators of the underlying transactions that led to the founding of CertusBank. ICS'Members founded and served as executives of CertusBank. The Stock Purchase Agreement ("SPA") between CertusHoldings and the company's investors similarly provides that CertusBank could engage ICS to perform services. The SPA is governed by the laws of the State of New York. (R. 83-276).

STANDARD OF REVIEW

A court's exercise of personal jurisdiction over a party "will not be disturbed on appeal unless wholly unsupported by the evidence or manifestly influenced or controlled by error of law." Indus. Equip. Co. v. Frank G. Hough Co., 218 S.C. 169, 173, 61 S.E.2d 884, 885 (1950); see also, Bargesser v. Coleman Co., 230 S.C. 562, 567, 96 S.E.2d 825, 827 (1957) (holding the exercise of personal jurisdiction over a party will not be disturbed on appeal unless unsupported by the evidence or influenced by error of law); Sullivan v. Hawker Beechcraft Corp., 397 S.C. 143, 150, 723 S E.2d 835, 839 (Ct App. 2012) Because this is a question of law, the Court should review the lower court's ruling enforcing the subpoena for an error of law.

ARGUMENT

I. ICS WAS NOT PROPERLY SERVED WITH THE SUBPOENA; THUS, THE ATTORNEY GENERAL DOES NOT HAVE JURISDICTION OVER ICS.

ICS was not properly served with the subpoena. Therefore, the Attorney General does not have jurisdiction over the matter.

The Attorney General contends he validly served the subpoena pursuant to S.C. Code Ann. § 35-1-611 (Supp. 2013). (R. 283; 35:21-36:14) South Carolina's Uniform Securities Act is codified in Chapter 1, Title 35 of the South Carolina Statutes. The Chapter begins by stating: "It is unlawful for a person, in connection with the offer, sale or purchase of a security, directly or indirectly: (3) to engage in an act, practice, or course of business that operates or would operate as a fraud or deceit upon another person." S.C. Code Ann. § 35-1-501(2). S C. Code Ann. § 35-1-611 then specifies service of process requirements pertaining to proceedings under this Chapter.

It provides that an entity selling or offering securities in South Carolina may sign and file a consent to service of process "appointing the Securities Commissioner the person's agent for service of process in a noncriminal action or proceeding against the person . . . ." § 35-1-611(a). However, if an entity falling under the Act has *not* consented to service of process under subsection (a), then the "act, practice or course of business constitutes the appointment of the Securities Commissioner as the person's agent for service of process . . . ." § 35-1-611(b).

Service under subsections (a) and (b) may be effectuated by providing a copy of the process to the Office of the Securities Commissioner § 35-1-611(c). However, service under this subsection "is not effective unless:"

> (1) the plaintiff, which may be the Securities Commissioner, promptly sends notice of the service and a copy of the process, *return receipt requested*, to the defendant or respondent at the address set forth in the consent to service of process or, if a consent to service of process has not been filed, at the last known address, or takes other reasonable steps to give notice; and
>
> (2) the plaintiff files an affidavit of compliance with this subsection in the action or proceeding on or before the return day of the process, if any, or within the time that the court, or the Securities Commissioner in a proceeding before the Securities Commissioner, allows.

Id. (emphasis added).

As an initial matter, the South Carolina Uniform Securities Act does not apply to ICS. ICS was incorporated in Delaware and has its principal place of business in Charlotte, North Carolina. ICS has never offered for sale nor sold any securities in South Carolina and has never registered to do so. As a result, there is no evidence that ICS has "engage[d] in an act, practice or course of business prohibited or made actionable . . . ."

The Act does not apply. See infra, Part II (discussing the inapplicability of the Act to ICS). Therefore, service on ICS could not have been properly effectuated pursuant to S.C. Code Ann. § 35-1-611.

Assuming, *arguendo*, that the Attorney General has evidence that would tend to bring ICS under the purview of § 35-1-611, the Attorney General's service did not comply with the Act. The subpoena was not served pursuant to subsections (a) or (b), nor does the Attorney General contend he complied with the same. (R. 283). (containing no argument regarding subsections (a) or (b)). Rather, the Attorney General argued and the trial Court found that the Attorney General complied with subsection (c), and thus properly effectuated service of the subpoena. (R. 35:21-36:14; 7-8).

However, this finding is incorrect. To comply with subsection (c), the Attorney General was required to "send[] notice of the service and a copy of the process, return receipt requested" to ICS. A return receipt, as required by the statute, once executed illustrates the document was received by the party and sets forth the name of the party accepting the document. However, as evidenced in the cover letter accompanying the subpoena and in the affidavit of compliance filed by the Attorney General, the subpoena was served via Federal Express. (R. 292, 299). Thus, the Attorney General failed to comply with the service provisions contained in § 35-1-611(c), and therefore, service was improper. See Langley v. Graham, 322 S.C. 428, 428-432, 472 S.E 2d 259, 260-261 (Ct. App. 1996); (R. 302-303; 320-322; 32:13-35:13).

It follows the Attorney General does not have jurisdiction over ICS and it was error for the lower court to hold otherwise. [3]

II. THE TRIAL COURT ERRED IN FINDING THAT THE SUBPOENA AT ISSUE SHOULD BE ENFORCED BECAUSE NO OFFER OR SALE OF SECURITIES TOOK PLACE IN SOUTH CAROLINA AND THE SOUTH CAROLINA SECURITIES COMMISSION HAS LIMITED INVESTIGATIVE AUTHORITY.

A. No offer or sale of securities took place in South Carolina.

The Attorney General has no basis or authority to conduct the investigation at issue. The Securities Division of the Office of the Attorney General is charged with enforcing the South Carolina Uniform Securities Act.

S.C. Code Ann. § 35-1-201(3)(B) exempts from the requirements of S.C. Code Ann. §§ 35-1-301 through 35-1-306 and 35-1-504:

> a security issued by and representing or that will represent an interest in or a direct obligation of, or be guaranteed by... (B) 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 . . . .

[3] The Attorney General also cites South Carolina's long-arm statute, S.C. Code Ann. § 36-2-803, as a basis for jurisdiction. The long-arm statute allows local South Carolina courts to have jurisdiction over an out-of-state resident in certain situations. Here, the issue is a national bank's sale of securities which had no relation to South Carolina. It is clear the Attorney General does not have the authority to investigate this issue. Moreover, the Attorney General's citation to South Carolina's long-arm statute as a basis for jurisdiction is inapposite and circumvents precedent of the United States Supreme Court. See infra, Cuomo v. Clearing House Ass'n, 557 U.S. 519, 536 (2009). Thus, the South Carolina long-arm statute is not a proper basis for jurisdiction over ICS. Moreover, the manner in which the Attorney General attempted to serve ICS is not authorized under the State's long-arm statute.

Section 35-1-201(3)(B) exempts CertusBank's securities from the Uniform Securities Act. CertusBank is a national bank with its deposits fully insured by the FDIC. Thus, the Attorney General simply does not have jurisdiction over CertusBank's securities. Moreover, the subpoena was issued to ICS pursuant to S.C. Code Ann. § 35-1-101, *et seq* First, ICS has never offered for sale or sold any securities in South Carolina. Nor have CertusHoldings or CertusBank Second, Assuming, *arguendo*, that CertusHoldings or CertusBank offered and sold securities in the State of South Carolina, such transactions would be exempt from the purview of the South Carolina Uniform Securities Act pursuant to Section 35-1-201(3)(B).

As a basis for authority, the Attorney General loosely argues that Certus (referring to both CertusBank and CertusHoldings) "offered and sold securities to at least twenty-nine South Carolina residents." (R. 281-282). It further states, "[A]s Certus is headquartered in Greenville, South Carolina, numerous statements in connection with the offer and sale of securities were made from South Carolina " Id. at 1. However, this contention is incorrect Again, neither CertusHoldings nor CertusBank have ever offered or sold any securities in South Carolina.[4] Additionally, the Attorney General provided no factual basis, nor does one exist, for the contention that "numerous statements in connection with the offer and sale of securities were made from South Carolina." Id.

The Attorney General's authority is limited under the Act to conduct relating to the offer or sale of securities in South Carolina. See S.C. Code Ann. § 35-1-301 (sale of

[4] At the hearing, the Attorney General presented the lower court with a list of purported South Carolina residents owning stock in CertusBank. This list was filed under seal, and despite his representation that he would provide the list to ICS, the Attorney General has not done so ICS was therefore denied the opportunity to challenge this claim. See infra, Section III.

securities in this State); S.C. Code Ann. §§ 35-1-401(a), 403(a) (broker dealers and investment advisers who transact business in the State); S.C. Code Ann. § 35-1-501 (anti-fraud provisions relating to the offer, sale, or purchase of a security within the State). "An 'offer' or 'offer to sell' includes every attempt or offer to dispose of, or solicitation of an offer to buy, a security or interest in a security for value. A 'sale' includes every contract of sale of or disposition of a security or interest in a security for value." Biales v. Young, 315 S.C. 166, 168, 432 S.E.2d 482, 484 (1993) (citing S.C. Code Ann. § 35-1-20(10)(a)-(b)). Moreover, if no value is given in a transaction and no affirmative investment decision is made, there can be no offer or sale of securities. See Register v. Cameron & Barkley Co., 467 F. Supp. 2d 519, 533 (D.S.C. 2006) ("Instead of giving up some tangible and definable consideration, participants earned stock through labor for the employer. The notion that the exchange of labor suffices to constitute the type of investment which the Securities Acts were intended to regulate was rejected by the Supreme Court . . . .").

Here, none of these actions took place. (R. 302; 30:5-32 12). Except with respect to certain employees of CertusBank, the stockholders of CertusHoldings acquired their stock through a private placement offering that took place outside of South Carolina pursuant to the SPA.[5] The only possible connection between CertusHoldings and South Carolina is that CertusHoldings granted restricted shares to certain employees of CertusBank who may reside in South Carolina. ICS did not sell these shares to CertusHoldings' shareholders nor did the shareholders pay for the shares. The referenced

[5] The SPA directs that New York law shall govern disputes arising from the issuance of CertusHoldings' securities. The parties to the SPA further agreed to submit to the jurisdiction of the United States District Court for the Southern District of New York for all legal disputes relating to their investment. (R. 83-276).

shares were given to certain CertusBank employees as incentive compensation. Further, the rights under the shares are restricted. Thus, there was no offer nor sale of securities as defined by the Act. See S.C. Code Ann. § 35-1-20(10)(a)-(b) (requiring value to be given or offered to be given for an action to constitute an offer or sale of securities); see also Register, 467 F. Supp. 2d at 533.

There has been *no* offer or sale of securities in South Carolina by ICS, CertusHoldings, or CertusBank. There is correspondingly no basis for the Attorney General's investigation of ICS by subpoena or otherwise. Absent any information to support his contention that there was an offer and sale of securities in South Carolina, which does not exist, there is no compelling reason for the Attorney General to attempt to submit ICS to the courts of South Carolina through a subpoena or any other measure.

B. The South Carolina Securities Division does not have the same investigative authority as the United States Securities and Exchange Commission.

The fact that ICS, CertusHoldings, and CertusBank[6] have never offered nor sold securities in South Carolina moots much of the Attorney General's argument. As for the remainder, the Attorney General argues the federal courts' interpretation of the Securities Act provisions provide guidance when interpreting the Act. (R. 284, 287). In making this argument, the Attorney General improperly conflates the Federal powers of the Securities and Exchange Commission ("SEC") with the State powers of the South Carolina Securities Division. Id.

[6] The Securities Commissioner argues that "ICS, while closely related to Certus, cannot assert any claims on Certus' behalf" and vice versa. (R. 286). ICS is not attempting to assert claims on the behalf of CertusBank and CertusHoldings. Instead, ICS is clarifying to the Court the manner in which the Attorney General seeks to improperly investigate CertusBank and CertusHoldings through ICS.

Case law supports the notion that if there are federal law securities provisions similar to state law provisions, interpretation of the federal laws can be used to interpret the state laws. Case law does *not* support the notion, however, that a state securities division or state Attorney General has the same authority and powers as the Federal SEC. The Attorney General's arguments essentially suggest this. (R. 85). ("The Court may take guidance from federal courts' interpretation of [provisions related to the enforcement of administrative subpoenas in South Carolina]. Accordingly, [] the Attorney General's authority to issue subpoenas is broad."). ICS does not contest that the Attorney General's powers are broad. However, his powers are not so broad as to include actions that are in no way involved with South Carolina.

As a final catch-all argument, the Attorney General argues that it should not even consider subject matter jurisdiction when it decides this subpoena enforcement action. (R. 87). In support of its claim, the Attorney General cited to cases where the issue was whether certain actions were subject to SEC regulation at all. See Id. (citing SEC v. Brigadoon Scotch Distributing Co., 480 F.2d 1047, 1053–54 (2nd Cir. 1973) ("[T]he appellants contend that the SEC has no regulatory power over them" . . . "Appellants raise serious questions about whether their activities are subject to regulation by the SEC.")). Here, the issue involves a state Securities Commission, not the federal SEC South Carolina and its Attorney General have limited territorial jurisdiction. The Attorney General lacks authority to investigate ICS' actions which did not take place in the State of South Carolina. It is important for the Court to determine, as a threshold matter, whether the South Carolina Attorney General has the power to investigate CertusBank and CertusHoldings through ICS as it purports to do. This question would

have to be answered in the affirmative—which ICS submits would be erroneous—before the Court should reach the issues of relevance and definiteness of the subpoena.

In Cuomo v. Clearing House Ass'n, 557 U.S. 519 (2009), the attorney general for the State of New York requested certain national banks to informally provide non-public information about their practices. This action was challenged by the OCC and a banking trade group. The United States Supreme Court held the attorney general had jurisdiction to initiate litigation to enforce state consumer protection laws against national banks. It further held, however, that the attorney general did *not* have jurisdiction to informally request documents via letter or subpoena from national banks. Therefore, the Court enjoined the attorney general from moving forward with his informal request. Here, the South Carolina Attorney General seeks to investigate a national bank's practices through a subpoena issued to ICS. This action has been expressly prohibited by the United States Supreme Court. See Cuomo, 557 U.S. at 536. This portion of Cuomo described is directly analogous to the facts of this case. (R. 34:12-35:3).

III. BECAUSE ICS WAS NOT ALLOWED TO EXAMINE A HIGHLY RELEVANT DOCUMENT THE COURT INSPECTED IN CAMERA AND FILED UNDER SEAL, THE COURT VIOLATED ICS DUE PROCESS RIGHTS.

During the hearing in this matter, the Attorney General presented the trial court with a list of alleged CertusBank stockholders residing in the State of South Carolina. First, it should be noted that ICS questions the accuracy of the document because CertusBank does not have any stockholders who reside in South Carolina. However, ICS was unable to refute the accuracy of the list because this document was never provided to ICS. Instead, it was submitted to the Court to be inspected in camera and filed under seal. (R. 23:1-5). Despite the Attorney General's agreement to provide ICS with a copy

of the document, ICS never received the list. In fact, the Attorney General thereafter refused to produce the list to ICS. (R. 41). Thus, ICS has never had an opportunity to review nor rebut the information necessarily relied on in the Order.

At the heart of the jurisdictional and enforcement issue presented is whether the Act applies to ICS in the manner requested by the Attorney General. Though the Order does not make specific findings about the document, notably, the information contained therein necessarily affected the findings and conclusions in the Order. This was done to the detriment of ICS and in violation of its due process rights. See Application of Eisenberg, 654 F.2d 1107, 1112 (5th Cir. 1981) ("Our adversarial legal system generally does not tolerate ex parte determinations on the merits of a civil case. . . . the right granted a party by the due process clause to a full and fair hearing encompasses the individual's right to be aware of and refute the evidence against the merits of his case."); Vining v. Runyon, 99 F.3d 1056, 1057–58 (11th Cir. 1996) ("Although a judge freely may use *in camera, ex parte* examination of evidence to prevent the discovery or use of evidence, consideration of *in camera* submissions to determine the merits of litigation is allowable only when the submissions involve compelling national security concerns or the statute granting the cause of action specifically provides for *in camera* resolution of the dispute.") (emphasis in original).

Because ICS was never given an opportunity to review the document and the information contained in the document formed a basis of the Trial Court's Order, the lower court's ruling should be reversed as a result.

CONCLUSION

For the reasons stated, this Court should reverse the Order of the lower court.

Respectfully submitted,

By: _____

James M. Griffin
Margaret N. Fox
LEWIS, BABCOCK & GRIFFIN, L.L.P.
1513 Hampton Street
Columbia, South Carolina
T: (803) 771.8000
F: (803) 733.3541
jmg@lbglegal.com
mnf@lbglegal.com

Attorneys for ICS

April 14, 2015
Columbia, South Carolina

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
Appellate Case No. 2014-001652

Alan Wilson, Securities Commissioner
Of South Carolina.,

Respondent,

v.

Integrated Capital Strategies, LLC,

Appellant.

PROOF OF SERVICE

I, Jaime Harmon, the undersigned employee of Lewis, Babcock & Griffin L.L.P, attorney for Appellant Integrated Capital Strategies, LLC, do hereby certify that I have served a copy of the foregoing Appellant's Final Brief, by mailing a copy of the same by U.S. Mail to the following address on April 14, 2015:

Alan Wilson, Securities Commissioner
Tracy Meyers, Deputy Securities Commissioner
Ian P. Weschler, Assistant Attorney General
Securities Division
1000 Assembly Street, Room 519
Columbia, SC 29201

Jaime Harmon

Columbia, South Carolina
April 14, 2015