

**IN THE UNITED STATES BANKRUPTCY COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA**

IN RE:)
)
Kenneth LaRue)
)
and) Case No. 07-14107
) Chapter 7
)
Dana LaRue)
)
Debtors.)

MOTION TO VACATE ORDER REOPENING BANKRUPTCY CASE,
MOTION TO VACATE AMENDED SCHEDULES
AND BRIEF IN SUPPORT

COMES NOW the Oklahoma Department of Securities (Department), a creditor, and moves to vacate the reopening of this Chapter 7 bankruptcy case and the amended bankruptcy schedules filed by Debtors. On December 17, 2010, Debtors Kenneth and Dana LaRue (Debtors) filed the *Motion by Debtors to Reopen Chapter 7 Bankruptcy (Motion to Reopen)* in order to allow them to add a debt to their bankruptcy schedules that is owed co-jointly to the Department and to Douglas Jackson, in his capacity as court-appointed receiver for the benefit of claimants and creditors of Marsha Schubert and Schubert and Associates (Receiver). Neither the Department nor Receiver learned of the *Motion to Reopen* until January 11, 2011, despite being listed as recipients on Debtors' certificate of service dated December 20, 2010. On the same date the Department learned of the *Motion to Reopen*, the *Order To Reopen Chapter 7 Bankruptcy Case (Order)* was issued. On January 19, 2011, Debtors filed their amended creditor matrix and schedules.

Reopening this case for the purpose of allowing Debtors to amend their schedules to include the debt owed to the Department and Receiver is an exercise in futility and the order should be vacated. The debt at issue is excepted from discharge pursuant to Sections 523(a)(3) and (a)(19) of the Bankruptcy Code, and therefore, the Debtors can obtain no relief by belatedly adding this debt to their schedules. Reopening will result merely in the unnecessary waste of judicial resources and further cost in time and expense to the Department and Receiver.

In support hereof, the Department states as follows:

1. Between 2001 and 2004, Marsha Schubert, individually and doing business as Schubert and Associates (Schubert), operated a "Ponzi Scheme" in which she promised that funds received from participants would be invested, but instead used the funds to pay purported profits to other participants. *Oklahoma Dept. of Sec. ex rel. Faught v. Blair*, 2010 OK 16, ¶¶2-4, 231 P.3d 645, as corrected (Apr. 6, 2010), reh'g denied (Apr. 12, 2010).
2. In October 2004, the Department sued Schubert in state court, the Receiver was appointed, and an order was entered against Schubert for violations of the Oklahoma securities laws. Schubert subsequently entered guilty pleas in both federal and state criminal cases to charges in connection with the fraudulent scheme and was convicted accordingly. *Oklahoma Dept. of Sec. ex rel. Faught v. Blair*, 2010 OK 16, ¶5, 231 P.3d 645, as corrected (Apr. 6, 2010), reh'g denied (Apr. 12, 2010).
3. In May 2005, the Department and the Receiver sued Debtors and other persons who received cash and/or other property from Schubert that were the proceeds of the Ponzi Scheme (Relief Defendants) and for which the Relief Defendants gave inadequate

or no consideration (Oklahoma County Case). *Oklahoma Dept. of Sec. ex rel. Faught v. Blair*, 2010 OK 16, ¶¶6-7, 231 P.3d 645, as corrected (Apr. 6, 2010), reh'g denied (Apr. 12, 2010).

4. In December 2006, upon the Department and Receiver's motion for summary judgment, the Oklahoma County Court determined that Debtors had been unjustly enriched by Schubert's violations of the Oklahoma securities laws and ordered Debtors to disgorge the net proceeds of that fraud (Initial State Court Judgment). *Oklahoma Dept. of Sec. ex rel. Faught v. Blair*, 2010 OK 16, ¶7, 231 P.3d 645, as corrected (Apr. 6, 2010), reh'g denied (Apr. 12, 2010).

5. In January 2007, Debtors appealed the Initial State Court Judgment and certiorari was subsequently granted by the Oklahoma Supreme Court. *Oklahoma Dept. of Sec. ex rel. Faught v. Blair*, 2010 OK 16, ¶1, 231 P.3d 645, as corrected (Apr. 6, 2010), reh'g denied (Apr. 12, 2010).

6. In November 2007, Debtors filed this Chapter 7 bankruptcy case. *See In re: Kenneth Roscoe LaRue, II and Dana Kay LaRue*, United States Bankruptcy Court for the Western District of Oklahoma, 08-14107, Docket Document No.1, Debtors' Chapter 7 Voluntary Petition.

7. Debtors listed the Initial State Court Judgment and the Oklahoma County Case in response to Question 4 of their Statement of Financial Affairs, however, they stated that they had made payment to the Receiver on the judgment in the amount of \$31,104.80 and that the Oklahoma County Case was not ongoing, though no such payment had been made and the case was on appeal. *See In re: Kenneth Roscoe LaRue, II and Dana Kay LaRue*, United States Bankruptcy Court for the Western District of Oklahoma, 08-14107,

Docket Document No.1, Debtors' Chapter 7 Voluntary Petition, Statement of Financial Affairs, Question 4.

8. Debtors did not list the Initial State Court Judgment anywhere in their schedules, nor did they list the Department or Receiver in their matrix of creditors. *See In re: Kenneth Roscoe LaRue, II and Dana Kay LaRue, United States Bankruptcy Court for the Western District of Oklahoma, 08-14107, Docket Document No.1, Debtors' Chapter 7 Voluntary Petition and Docket No. 3, Matrix.*

9. In May 2008, the Debtors received a discharge of their pre-petition debts pursuant to Section 727 of the Bankruptcy Code. *See In re: Kenneth Roscoe LaRue, II and Dana Kay LaRue, United States Bankruptcy Court for the Western District of Oklahoma, 08-14107, Docket Document No. 35, Order Discharging Debtors.*

10. Debtors' bankruptcy was an "asset" case and the bar date for filing proofs of claim was June 30, 2008. *See In re: Kenneth Roscoe LaRue, II and Dana Kay LaRue, United States Bankruptcy Court for the Western District of Oklahoma, 08-14107, Docket Document No. 29, Notice to File Proof of Claim.*

11. In October 2008, the Trustee filed her final accounting indicating that she had made the final distribution of estate assets. *See In re: Kenneth Roscoe LaRue, II and Dana Kay LaRue, United States Bankruptcy Court for the Western District of Oklahoma, 08-14107, Docket Document No. 42, Chapter 7 Trustee's Final Account and Application for Final Decree and Discharge of Trustee.*

12. Debtors' bankruptcy case was closed in December 2008. *See In re: Kenneth Roscoe LaRue, II and Dana Kay LaRue, United States Bankruptcy Court for the Western District of Oklahoma, 08-14107, Docket entry dated December 16, 2008, Final Decree.*

13. In February 2010, the Oklahoma Supreme Court issued its opinion regarding Debtors' appeal of the Initial State Court Judgment affirming that the Department and Receiver have standing to seek recovery of funds transferred to innocent investors in a Ponzi scheme, but reversing and remanding to the Oklahoma County trial court for reconsideration of the amount to be disgorged under a new standard for recovery. *Oklahoma Dept. of Sec. ex rel. Faught v. Blair*, 2010 OK 16, 231 P.3d 645, as corrected (Apr. 6, 2010), reh'g denied (Apr. 12, 2010).

14. On May 10, 2010, the Receiver filed an Application for Scheduling Conference in the Oklahoma County Case and advised counsel for Debtors that the Receiver and the Department were pursuing their claims against Debtors. *See* Exhibit 1, Application for Scheduling Order. The Scheduling Conference was subsequently held and a Scheduling Order was entered in the Oklahoma County Case. *See* Exhibit 2, Scheduling Order.

15. On August 23, 2010, the Department and Receiver filed a second motion for summary judgment against Debtors in the Oklahoma County Case. *See* Exhibit 3, Motion for Summary Judgment (without exhibits).

16. Debtors did not respond to the motion for summary judgment and did not appear at the hearing held on October 1, 2010. *See* Exhibit 4, Journal Entry of Judgment.

17. On October 1, 2010, the District Court again entered judgment against Debtors for unjust enrichment by receipt of proceeds of the Schubert Ponzi Scheme. Debtors were ordered to disgorge and/or repay to the Department and Receiver the amount of \$33,305.95 (State Court Judgment), including pre-judgment interest. *See* Exhibit 4, Journal Entry of Judgment.

18. In December 2010, Debtors, upon being served with an order to appear at a hearing on assets as part of the Department and Receiver's collection efforts, advised the Department that they believed the State Court Judgment had been discharged in their bankruptcy. This was the first time that the Department and the Receiver became aware of Debtors' bankruptcy.

19. After reviewing the bankruptcy docket, the Department advised Debtors that the State Court Judgment had not been discharged and that the Receiver and Department intended to pursue their collection efforts.

20. On December 17, 2010, Debtors appeared for their asset hearing, but Debtors indicated their counsel would be filing a motion to reopen this bankruptcy case. Debtors showed counsel for the Department and the Receiver a copy of what they intended to file, but did not leave a copy for the Department or Receiver. Neither the Department nor the Receiver received a notice of any subsequent filing by the Debtors.

21. On January 11, 2011, having received no notice of any filing by the Debtors, the Department's counsel reviewed the docket for this case and discovered that the *Motion to Reopen* had been filed and that the *Order* reopening the case had already been issued. The Department noted that Debtors had listed counsel for the Department and the Receiver on the certificate of service, but maintains that such service was never received by any of the Department, the Receiver or their counsel. *See* In re: Kenneth Roscoe LaRue, II and Dana Kay LaRue, United States Bankruptcy Court for the Western District of Oklahoma, 08-14107, Docket Document No. 43, Motion to Reopen Case.

22. On January 19, 2011, Debtors filed their *Amended Creditor Matrix and Schedules (Amended Schedules)*. Debtors listed the State Court Judgment in the Amended

Schedules. *See* In re: Kenneth Roscoe LaRue, II and Dana Kay LaRue, United States Bankruptcy Court for the Western District of Oklahoma, 08-14107, Docket Document No. 46, Amended Creditor Matrix and Schedules.

Brief in Support

Debtors' bankruptcy has been closed for over two years. Debtors now hope to avoid a determination of whether the State Court Judgment is dischargeable by attempting to bring the judgment within the umbrella of their general discharge. Failure to give notice to the Department and the Receiver about their bankruptcy in the first place and their *Motion to Reopen* in the second place, appears to be a recurring problem for these Debtors – that in the best light suggests extreme sloppiness and in a darker light, an intent to deceive.

Section 727(b) of the Bankruptcy Code provides that Debtors, in connection with their discharge granted in May 2008, received a discharge of all of their pre-petition debts. However, Section 727(b) specifically excludes debts excepted from discharge under Section 523.

The *Order* reopening this Chapter 7 bankruptcy case should be vacated and the *Amended Schedules* should be withdrawn. The State Court Judgment is non-dischargeable pursuant to Sections 523(a)(3) and (a)(19) of the Bankruptcy Code. The reopening of the case is meaningless as the relief desired by the Debtors will not result.

I. Equity Demands that Both Sides Have the Opportunity to Proceed in the Bankruptcy Court.

The Department recognizes that this Court has discretion to reopen a case to allow a debtor to add creditors to their schedules, however, the Tenth Circuit has held that simply adding a debt to the bankruptcy schedules does not automatically bring that debt within the

general discharge. *Graham v. Davidson*, 930 F.2d 922 (10th Cir. 1991)(unpublished). The *Graham* court further determined that amending the schedules was irrelevant to the ultimate issue of whether the debt was dischargeable and that it would be unfair to allow the debtors to assert discharge where the creditor was deprived of his right to object to the discharge in the bankruptcy court. *Id.* at *2.

The bankruptcy courts do not have exclusive jurisdiction in determining most non-dischargeability actions; rather their jurisdiction is concurrent with that of state and federal courts. 11 U.S.C. § 523(c). *In re Otto*, 311 B.R. 43, 46-48 (Bankr. E.D. Penn 2004). When the Oklahoma Supreme Court decision underlying the Initial State Court Judgment was remanded to the Oklahoma County Court, the Receiver notified Debtors in May 2010 that the Receiver and the Department intended to pursue their claims. Debtors could have advised the Department and the Receiver of their bankruptcy at that time, but did not. Thereafter, the Department and Receiver filed their second motion for summary judgment, wherein Debtors again failed to give notice of the bankruptcy. Rather, Debtors completely ignored the proceeding, not even filing a response to the motion for summary judgment. Had Debtors advised the Department and Receiver of their bankruptcy, the issues herein could have been properly and expeditiously resolved by the Oklahoma County Court.

Debtors' delay in giving notice of their bankruptcy was unreasonable and caused the Department and Receiver to expend additional resources. It was only after the State Court Judgment was issued and Debtors were ordered to appear for an asset hearing that they moved to reopen this bankruptcy case. Where debtors have shown such disregard of state court proceedings and caused delay and waste of judicial and litigant resources, courts

have refused to allow them to waste additional resources in the bankruptcy courts. *Otto* at 47-48; *In re Tinnenberg*, 57 B.R. 430, 431-432 (Bankr. E.D. N.Y. 1985).

Allowing Debtors to claim applicability of their discharge to the State Court Judgment would be unfair to the Department and Receiver. *Graham* at *2. Because Debtors unreasonably delayed advising the Department and Receiver of their bankruptcy, both laches and equitable estoppel bar the reopening of this case to discharge a debt that had not been disclosed on the bankruptcy schedules. *Watson v. Parker*, 264 B.R. 685, 692-693 (10th Cir. BAP 2001), affirmed by *Watson v. Parker*, 313 F.3d 1267 (10th Cir. 2002).

II. Debtors' Bankruptcy Case Should Not Be Re-Opened to Allow Debtors to Schedule a Debt that is Non-Dischargeable

A. Section 523(a)(3)

Section 523(a)(3) of the Bankruptcy Code provides, in pertinent part, for the non-dischargeability of a debt:

neither listed nor scheduled under section 521(1) of this title, with the name, if known to the debtor, of the creditor to whom such debt is owed, in time to permit – (A) if such debt is not of a kind specified in paragraph (2), (4) or (6) of this subsection, timely filing of a proof of claim, unless such creditor had notice or actual knowledge of the case in time for such timely filing[.]

It is apparent from a review of Debtors' original schedules that they did not list the Initial State Court Judgment or even the potentiality of a debt owed to the Department or the Receiver. Nor did Debtors include the Department or the Receiver in their mailing matrix. The only reference to any debt owed to the Department or the Receiver was in the Debtors' Statement of Financial Affairs, wherein Debtors indicated erroneously that the

debt had been paid. Neither the Department nor the Receiver had notice or actual knowledge of the bankruptcy case to timely file a proof of claim, and in fact, they did not have actual knowledge of the Debtors' bankruptcy until December 2010, two years after the case was closed.

Based simply on the plain language of Section 523(a)(3)(A), the debt embodied in the State Court Judgment is non-dischargeable because the bar date for filing proofs of claim has run and the Department and Receiver have been deprived of their right to participate in the claims process and the opportunity to share in estate assets. *Dawson v. Unruh*, 209 B.R. 246 (10th Cir. BAP 1997); *Graham* at *1-2. Belatedly amending their schedules affords Debtors no relief. *Graham* *1.

B. Section 523(a)(19)

Nor should a bankruptcy case be reopened to allow a debtor to amend their schedules when the debt to be scheduled would be excepted under another provision of Section 523, particularly where another court could have properly determined the exception. *In re Musgraves*, 129 B.R. 119 (Bankr. W.D. Tex 1991); *In re Marshall*, 302 B.R. 711 (Bankr. D. KS 2003); *In re Otto* at 48; *In re Tinnenberg*, at 431-432.

Section 523(a)(19) of the Bankruptcy Code provides, in pertinent part, for the non-dischargeability of a debt that:

(A) is for-(i) the violation of any of the Federal securities laws (as that term is defined in section 3(a)(47) of the Securities Exchange Act of 1934), any of the State securities laws, or any regulation or order issued under such Federal or State securities laws; or (ii) common law fraud, deceit, or manipulation in connection with the purchase or sale of any security; and (B) results from (i) any judgment, order, consent order, or decree entered in any Federal or State judicial or administrative proceeding; (ii) any settlement agreement entered into by the debtor; or (iii) any court or administrative order for damages, fine, penalty, citation,

restitutionary payment, disgorgement payment, attorney fee, cost, or other payment owed by the debtor.

Section 523(a)(19) applies to investors in a Ponzi scheme who received “false profits” even though the investor did not personally commit the violation of the securities laws. *Oklahoma Department of Securities v. Mathews*, 423 B.R. 684 (W.D. Okla 2010) *appeal docketed*, No. 10-6057 (10th Cir. March 8, 2010); see also *Securities and Exchange Commission v. Sherman (In re Sherman)*, 406 B.R. 883 (C.D. Cal 2009), *appeal docketed*, No. 09-55880 (9th Cir. June 10, 2009). The *Mathews* case involved another person who received money in the Schubert Ponzi Scheme so the facts underlying the court’s ruling on the Section 523(a)(19) exception in that case are identical to those underlying the analysis of the State Court Judgment¹. *Mathews* at 686.

The *Mathews* court noted that Department succeeded on its Section 523(a)(19) non-dischargeability claim by establishing two elements: 1) the existence of a debt for the violation of state securities laws and 2) that the debt resulted from a judgment in a state judicial proceeding. *Mathews* at 687-688. The State Court Judgment clearly is a judgment in a state judicial proceeding. As recognized by the *Mathews* court, Schubert’s securities law violation triggered the Section 523(a)(19) exception, the State Court Judgment was for Schubert’s violations of the securities laws, and, in equity and good conscience, Debtors should not be allowed to retain the ill-gotten funds resulting from the Ponzi Scheme. The State Court Judgment is for a violation of state securities laws and is, therefore, non-dischargeable under Section 523(a)(19).

¹ The Department alleged in *Mathews* that Mathews materially aided the Ponzi Scheme through participation in a check kiting scheme and other acts. The Department does not allege that these Debtors participated in the scheme as anything other than innocent investors. However, the *Mathews* court determined that the investor’s knowledge of or participation in the fraudulent scheme was irrelevant to the application of Section 523(a)(19) to the judgment against the Relief Defendant. *Mathews* at 689.

As with the Section 523(a)(3) exception above, Debtors should have given the Department and the Receiver notice of their bankruptcy in connection with the Oklahoma County Proceeding where the applicability of the Section 523(a)(19) exception could have been litigated in an efficient manner, rather than wasting resources by belatedly moving to reopen the long closed bankruptcy. *In re Musgraves* at 121.

Conclusion

The Department respectfully requests that this bankruptcy case be closed and that Debtors be ordered to withdraw their *Amended Schedules* as such schedules serve no purpose. In the event this Court determines that the bankruptcy case should remain open, the Department requests that it be opened for the limited purpose of allowing the Debtors to file an adversary proceeding to determine the dischargeability of the State Court Judgment and that the Debtors be required to file such an adversary proceeding within 30 days or the case will be closed. However, determining the applicability of Section 523 exceptions can be made in connection with the *Motion to Reopen*, making a formal adversary proceeding, and the associated expense, unnecessary. *Dawson v. Unruh*, 209 B.R. 246, 249-250 (10th Cir. BAP 1997).

Gerri Kavanaugh OBA #16732
Amanda Cornmesser OBA #20044
Oklahoma Department of Securities
First National Center, Suite 860
120 N. Robinson
Oklahoma City, Oklahoma 73102
(405) 280-7700
(405) 280-7742 facsimile
Email: acornmesser@securities.ok.gov
gkavanaugh@securities.ok.gov

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2011, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Kimberly J. Brasher
1015 Waterwood Parkway Ste H-1
Edmond, OK 73034
Attorney for Debtors

/s Gerri Kavanaugh

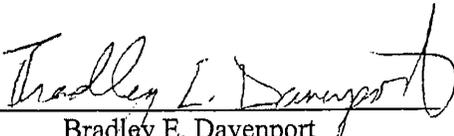
CERTIFICATE OF SERVICE

I hereby certify that on the 10th day of May, 2010, I mailed a true and correct copy of the above and foregoing instrument, postage pre-paid to:

G. David Bryant
Lisa Wilcox
Kline, Kline, Elliott & Bryant, P.C.
720 N.E. 63rd Street
Oklahoma City, OK 73105

Kenneth Young, *Pro Se*
Leslie Young, *Pro Se*
6020 NW 85th
Oklahoma City, OK 73132

Gerri Kavanaugh, OBA 16732
Amanda Cornmesser, OBA 20044
First National Center, Suite 860
120 N. Robinson
Oklahoma City, OK 73102
Attorneys for Plaintiff, Oklahoma Dept. of Securities



Bradley E. Davenport

Rev. 4/3/09

Gurich/Robertson/Swinton/Parrish

IN THE DISTRICT COURT OF OKLAHOMA COUNTY-- STATE OF OKLAHOMA

Dept of Securities
Plaintiff,
v.
Matthews
Defendant.

CASE NO. 07-2005-3796

SCHEDULING ORDER

THIS ORDER is entered this 27 day of June, 2010; Counsel have discussed discovery needed, the complexity of the case, and their caseload in arriving at this agreed Scheduling Order.

IT IS ORDERED THAT THE FOLLOWING MUST BE COMPLETED WITHIN THE TIME FIXED:

1. **JOINDER OF ADDITIONAL PARTIES and AMENDMENT TO THE PLEADINGS:** Filed only with leave of Court Or written consent of opposing parties. (12 O.S. § 2015)
2. **DISCOVERY:** Completed/answered by Pretrial unless otherwise agreed and approved by the Court.
3. **FINAL LIST OF WITNESSES AND EXHIBITS:** Preliminary witness/exhibit lists shall be exchanged no later than **60 days** prior to the Pretrial; Final exchange--**30 days** prior to Pretrial; Additional witness/exhibits **shall be stricken** by the Court, absent extraordinary circumstances. Exhibits, including **demonstrative** exhibits, must be exchanged **10 days** prior to trial. Failure to comply with this paragraph will result in the **exclusion of witness/exhibits at trial.**
4. **ALL MOTIONS INCLUDING DISPOSITIVE MOTIONS:** Filed **60 days** prior to Pretrial.
5. **MOTIONS IN LIMINE:** Served no later than **5 days** prior to trial; Set for hearing/decided no later than the **Friday before trial**, unless otherwise directed by the Court.
6. **RULINGS ON OBJECTIONS TO TRIAL DEPOSITIONS (Local Rule 18):** Parties shall provide Designation of Deposition Testimony to opposing parties no later than **40 days** before trial; Objections shall be served no later than **30 days** before trial; Set for hearing/decided no later than **20 days** before trial.
7. **OBJECTION TO EXPERT TESTIMONY :** Objections to expert witnesses shall be included in the Pretrial Conference Order; The Court will set a briefing schedule and a *Daubert* hearing date at the Pretrial.
8. **MEDIATION:** Completed by Pretrial Conference, unless otherwise approved by the Court.
9. **PRETRIAL CONFERENCE DATE & TIME:** Pretrial October 21, 2010 @ 3:45pm
10. **JURY:** NON-JURY: X If not already paid, party requesting jury trial **shall pay jury fee [28 O.S. §152.1.]** ESTIMATED TIME FOR TRIAL: 2-3 (days/weeks)
11. **TRIAL DATE:** TO BE SET AT PRETRIAL CONFERENCE/
12. **REQUESTED JURY INSTRUCTIONS:** File a complete set with verdict forms **on Friday by Noon** before the first day of trial; Email your set to the Court's bailiff, unless otherwise directed by the Court.
13. **TRIAL BRIEF/PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW:** At Court's request.
14. **MEDICAL EXAMINATION OF** _____ **SHALL BE COMPLETED NO LATER THAN** _____.
15. **PARTY/COUNSEL REQUESTING THE MEDICAL EXAMINATION SHALL PROVIDE A COPY OF THE REPORT TO ALL PARTIES/COUNSEL WITHIN 10 DAYS FOLLOWING THE EXAM OR BY** _____.
16. **PRETRIAL CONFERENCE ORDER:** Agreed to & delivered to the Court at Pretrial along with 1 copy for the Court. **DO NOT FILE** individual or unsigned original Pretrial Conference Orders with the Court Clerk.

IT IS FURTHER ORDERED: Failure to comply with the requirements set forth in paragraphs 4, 5, 6, & 7 waives the legal issue or objection. This schedule may be modified only upon written motion in compliance with Local Rule 20, for good cause shown and by Order of this Court prior to the dates scheduled. Failure to comply with this Order may result in sanctions pursuant to Rule 5 (J) of the Rules of the District Courts. **FAILURE TO APPEAR AT PRETRIAL CONFERENCE MAY RESULT IN THE ENTRY OF A DEFAULT JUDGMENT OR DISMISSAL ORDER, AT THE COURT'S DISCRETION, WITHOUT FURTHER NOTICE TO THE PARTIES.**

JUDGE OF THE DISTRICT COURT

Manda (C) 230-7715
Attorney for Plaintiff(s)/Phone #
Armeda (C) 230-7715
Print name/OBA #

Attorney for Defendant(s)/Phone #
Print name/OBA #

EXHIBIT
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A copy of this ORDER was delivered to counsel of record/pro se party on the 27 day of June, 2010.

Bradley C. Davenport
Deputy Court Clerk

Christina Taylor
Deputy Court Clerk

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF SECURITIES)
ex rel. IRVING L. FAUGHT, Administrator, et al.,)
)
Plaintiffs,)
v.)
)
ROBERT W. MATHEWS, et al.,)
)
Defendants.)

Case No. CJ-2005-3796

HEARING SET FOR
OCTOBER 1, 2010
@ 9:00 A.M.

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
AUG 23 2010
PATRICIA PRESLEY, COURT CLERK
DEPUTY

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS,
K. R. AND DANA LARUE, AND BRIEF IN SUPPORT**

Plaintiffs, Douglas L. Jackson, in his capacity as Court-Appointed Receiver for the benefit of creditors and claimants of Marsha Schubert and Schubert and Associates, and the Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator, move the Court for summary judgment against Defendants, K.R. and Dana LaRue ("Defendants LaRue"), pursuant to Rule 13 of the Rules for District Courts of Oklahoma, Okla. Stat. Ann. tit. 12, Chapter 2, Appendix 1. There is no dispute that Defendants LaRue have received funds from Marsha Schubert d/b/a Schubert and Associates ("Schubert") for which they gave no reasonably equivalent value and which represent an unreasonably high dividend. Furthermore, there is no dispute that the funds Defendants LaRue received represent a benefit to them and came at the expense or to the detriment of others who were drawn into the Schubert Ponzi scheme. Based on the undisputed facts and legal authority set forth herein, summary judgment should be granted in favor of Plaintiffs and against Defendants LaRue.

**STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE IS NO GENUINE ISSUE**

1. Schubert operated a fraudulent scheme in violation of federal and state laws including the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. Ann. tit. 71, §§1-

EXHIBIT
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101 through 1-701 (Supp. 2003), and the Oklahoma Securities Act (Predecessor Act), Okla. Stat. Ann. tit. 71 §§1-413, 501, 701-703 (1991 & Supp. 2003). See Order of Permanent Injunction, Exhibit "A", *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator v. Marsha Schubert, et al.*, CJ-2004-256; Marsha Schubert's federal plea agreement, Exhibit "B", *United States of America v. Marsha Kay Schubert*, CR 05-078; Marsha Schubert's state guilty plea, Exhibit "C", *State of Oklahoma v. Marsha Kay Schubert*, CF-2004-391, wherein Schubert stated as the factual basis for her plea that she obtained money in a "Ponzi" scheme in which she promised that the funds would be invested but instead, used the funds to pay prior investors (¶24, p. 4).

2. Schubert's fraudulent scheme began as early as April 2000, and continued until October 2004. See Affidavit of Dan Clarke, Exhibit "D", ¶¶4 and 5. Schubert, promising large financial returns, accepted funds in excess of Two Hundred Million Dollars (\$200,000,000.00) for purported investment (Schubert Investment Program). See Affidavit of Dan Clarke, Exhibit "D", ¶5. Schubert did not make the investments that she represented that she would make, but instead, used most of the money to make distributions to other persons ("Ponzi" scheme). See Affidavit of Dan Clarke, Exhibit "D", ¶7 and Schubert's State Guilty Plea, Exhibit "C", ¶24. Approximately 87 persons lost in excess of Nine Million Dollars (\$9,000,000.00) in the Ponzi scheme (short investors). See Affidavit of Dan Clarke, Exhibit "D", ¶8. Over 150 persons made approximately Six Million Dollars (\$6,000,000.00) in the Ponzi scheme (Relief Defendants). See Affidavit of Dan Clarke, Exhibit "D", ¶9.

3. At all times material hereto, Schubert owned and/or controlled several bank accounts including account number 34-7477 at Farmers & Merchants Bank (F&M Bank) in Crescent, Oklahoma (hereinafter "Schubert F&M account"), account number 35-9424 at

F&M Bank (hereinafter "Kattails account"), the Richard Schubert farm account at BancFirst in Kingfisher, Oklahoma (farm account) and a Schubert and Associates account at BancFirst in Kingfisher, Oklahoma (hereinafter "Schubert BancFirst account"). See Affidavit of Dan Clarke, Exhibit "D", ¶¶3 and 4. The majority of the proceeds obtained through the Schubert Investment Program were deposited into the Schubert F&M account where the proceeds were commingled with the proceeds of bank loans and Marsha Schubert's personal funds, such as commissions and royalty checks. A portion of the proceeds was deposited in the Kattails account, the farm account or the Schubert BancFirst account and commingled with other funds in those accounts. See Affidavit of Dan Clarke, Exhibit "D", ¶6. All of the funds deposited into the Schubert F&M account, the Kattails accounts, the farm account and the Schubert BancFirst accounts shall hereinafter be referred to as the "Commingled Funds".

4. Between December 27, 2001 and January 13, 2004, Schubert transferred a total of \$25,804.80 directly to Defendants LaRue by eleven (11) checks drawn on the Schubert F&M and BancFirst Accounts as follows:

<u>DATE</u>	<u>AMOUNT</u>
December 28, 2001	\$3,000.00
January 11, 2002	\$1,500.00
February 8, 2002	\$1,000.00
June 18, 2002	\$3,000.00
August 13, 2002	\$1,804.80
October 16, 2002	\$2,500.00
February 28, 2003	\$1,000.00
June 11, 2003	\$5,000.00
September 12, 2003	\$1,500.00
November 5, 2003	\$4,000.00
January 13, 2004	<u>\$1,500.00</u>
TOTAL	\$25,804.80

At the times of these payments, Defendants LaRue had not invested in the Schubert Investment Program. See Affidavit of Dan Clarke, Exhibit "D", ¶11; see also Accountant's

Compilation Report prepared by BKD LLP for transactions pertaining to Defendants LaRue, Exhibit "E"; *see also* checks and cashier's checks supporting the compilation report, Exhibit "F".

5. On or about May 12, 2004, Defendant K.R. LaRue wrote a check to Schubert in the amount of \$9,000 that became a part of the Commingled Funds. *See* Affidavit of Dan Clarke, Exhibit "D", ¶12; *see also* a copy of check number 1029, dated 5/12/04, on the account of Kenneth LaRue II, amount \$9,000, Exhibit "G".

6. Schubert did not make the investments she represented she would make on behalf of Defendants LaRue, but instead used the money to pay fictitious profits to other persons in furtherance of the Ponzi scheme. *See* Affidavit of Dan Clarke, Exhibit "D", ¶7.

7. Between August 27, 2004 and September 22, 2004, Schubert paid a total of \$5,300 to Defendants LaRue by two checks drawn on the Schubert F&M account. *See* Affidavit of Dan Clarke, Exhibit "D", ¶13; *see also* activity sheet and accountant's compilation report prepared by BKD, LLP for transactions pertaining to Defendants LaRue, Exhibit "E"; *see also* two checks, Exhibit "H"; *see also* an excerpt of Defendants LaRues' Supplemental Responses to Interrogatory numbers 18 and 19, Exhibit "I".

8. The funds referenced in paragraphs 4 and 7 above were paid to Defendants LaRue from the Commingled Funds. *See* Affidavit of Dan Clarke, Exhibit "D" at ¶14.

9. Defendants LaRue gave nothing of reasonably equivalent value for the amount they received from Schubert that was over and above the amounts Defendants LaRue paid to Schubert (the "Net Amount"). The Net Amount totaled \$22,104.80. *See* Affidavit of Dan Clarke, Exhibit "D", ¶15.

10. The fictitious rate of return that Defendants LaRue actually received, bearing in mind there was no actual investment of their funds, equated to 246%. See Affidavit of Carol Gruis, Exhibit "J", at ¶ 11.

ARGUMENTS AND AUTHORITIES

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE IS NO SUBSTANTIAL CONTROVERSY AS TO MATERIAL FACTS

The summary judgment procedure authorized by Rule 13 of the Rules of the District Courts of Oklahoma provides a method to dispose of cases where no genuine issue exists for any material fact, or where only a question of law is involved. When a party demonstrates to the court that no controversy exists as to any material facts, and the moving party is entitled to judgment as a matter of law, the Court has a duty to enter summary judgment in favor of that party. Rule 13, Rules for the District Courts of Oklahoma, Okla. Stat. tit. 12, Ch.2, App. (Rule 13); *Valley Vista Development Corp., Inc. v. City of Broken Arrow*, 1988 OK 140, 766 P.2d 344; *Flanders v. Crane Co.*, 1984 OK 88, 693 P.2d 602.

II. DEFENDANTS LARUE WERE UNJUSTLY ENRICHED AT THE EXPENSE OF THE SHORT INVESTORS IN THE PONZI SCHEME

Defendants LaRue were unjustly enriched by the Net Amount they received from the Commingled Funds. The Supreme Court of Oklahoma has held that "a right to recovery through unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another." See *McBride v. Bridges*, 1950 OK 25, 215 P.2d 830; *N.C. Corff Partnership, LTD., et al. v. Oxy USA, Inc.*, 1996 OK CIV APP 92, 929 P.2d 288, 295. The facts of this case pertaining to Defendants LaRue satisfy all of the elements of a cause of action for unjust enrichment.

Specifically, Defendants LaRue received a pecuniary benefit through the Net Amount paid to them from the Commingled Funds (\$22,104.80). The short investors, that is, those who did not receive the return of their principal investment amounts, in whole or in part, lost over \$9,000,000 in the Ponzi scheme. Defendants LaRue received \$22,104.80 in Commingled Funds at the expense of and to the detriment of others who participated in the Schubert Investment Program.

III. THE PROFITS DEFENDANTS LARUE RECEIVED ARE NOT INSULATED FROM EQUITY BECAUSE THEY WERE NOT RECEIVED IN SATISFACTION OF AN ANTECEDENT DEBT

In the Oklahoma Supreme Court's recent decision on the appealed summary judgments previously entered in this case, *Oklahoma Department of Securities, et al. v. Blair, et al.*, 2010 OK 16, the Court ruled the Plaintiffs are acting within their right to seek recovery from persons who received money in a Ponzi scheme - persons such as Defendants LaRue. See 2010 OK 16, at ¶¶30 and 38. The Oklahoma Supreme Court held that whether a profit in a Ponzi scheme constitutes unjust enrichment is a mixed question of fact and law. *Id.* at ¶21. *Blair* directs this Court to focus, not on the Ponzi scheme as a whole, but on the significance or consequence of the transactions between the investors and Schubert and whether "reasonably equivalent value" was exchanged for the profit received by the investors. *Id.* at ¶¶26-27.

In *Blair*, the Oklahoma Supreme Court adopted the reasoning laid out in a line of cases embodied by *Carrozzella & Richardson*, 286 BR 480, 488-490 (D.Conn. 2002), wherein the court declined to allow recovery of Ponzi scheme proceeds where the Ponzi schemer's payment of the funds served to extinguish an antecedent debt. *Blair* at ¶¶26-27. Courts following this line of cases look at whether the "investor received the funds for

satisfaction of an antecedent debt and if the funds received by the investor were based upon a reasonable contractual interest.” *Blair* at ¶26. See *Carrozzella & Richardson* at 490-491 (investors loaned money to promoter in exchange for reasonable interest rates); *Lustig v. Weisz & Associates (In re Unified Commercial Capital)*, 2002 WL 32500567, *8 (W.D.N.Y. 2002), (the contracted for annual interest rate of 12% on a loan was reasonable in the mid 1990s); *Balaber-Strauss v. Sixty-Five Brokers (In re Churchill Mortgage Investment Corp.)*, 256 B.R. 664, 681-682 (S.D.N.Y. 2000) (brokers who provided services to debtor gave value in exchange for commissions paid); and *Solow v. Reinhardt (In re First Commercial Management Group, Inc.)*, 279 B.R. 230,239 (N.D. Ill. 2002)(brokers provided a service to the Ponzi schemer that was of reasonably equivalent value to the commissions paid).

However, the *Carrozzella and Richardson* court recognized a difference where there is no antecedent debt to be extinguished:

Regardless of the Debtor’s business, legitimate or otherwise, so long as the Debtor received ‘reasonably equivalent value’ in exchange for the transfer of property, there has been no diminution in the Debtor’s estate and the remaining creditors have not been damaged by the transfer. Had the insolvent Debtor simply given away money without an extinguishment of underlying debt, the situation would be different.

Carrozzella & Richardson at 491. See also *Rieser v. Hayslip (In re Canyon Systems Corp.)*, 343 B.R. 615, 645-646 (S.D. Ohio 2006)(no reasonably equivalent value exchanged for implausibly high return); and *Bayou Superfund v. WAM Long/Short Fund II (In re Bayou Group, LLC)*, 362 B.R. 624, 635 (S.D.N.Y. 2007)(distinguished cases involving contractual right to interest and determined that investors had no contractual right to fictitious profits).

Defendants LaRue did not loan Schubert money or otherwise contract with Schubert for a particular interest rate that would create an antecedent debt for the use of their money.

Rather, these investors gave Schubert money with the expectation that they would reap the profits produced through her conduct of options and/or day trading. The hope for profits in an investment enterprise that may not result in profits does not create an antecedent debt.

IV. THE NET AMOUNT RECEIVED BY DEFENDANTS LARUE WAS AN UNREASONABLY HIGH DIVIDEND AND AN "ARTIFICIALLY INFLATED" PROFIT AND CANNOT BE INSULATED FROM EQUITY

The *Blair* Court determined that equitable recovery against an "innocent investor" must be based upon that investor's receipt of an "unreasonably high dividend" or an "artificially inflated" profit on his or her investment. *Id.* at ¶¶ 29, 30 and 56. In addition, the Court stated that "[i]nnocent investors ignorant of the Ponzi scheme may not hide behind their ignorance when unreasonably high dividends are paid to them and then claim that their high dividends are insulated from equity." *Id.* at ¶ 56.

Under the facts of this case, any money received over the return of the investors' principal investment would be an artificially high dividend. This is so because these investors gave Schubert money with the expectation that they would reap the profits produced through her conduct of options and/or day trading. In this case, there were no profits to share. The payments made by Schubert were "simply payments of non-existent profits". See *Lustig v. Weisz & Associates (In re Unified Commercial Capital)*, 2002 WL 32500567, *8 (W.D.N.Y. 2002), wherein the court recognized a distinction between investors who contract for a reasonable rate of interest and those who expect to share in the "hoped for" profits of an enterprise. That court said:

If a person invests money with the understanding that he will share in the profits produced by his investment, and it turns out that there are no profits, it is difficult to see how that person can make a claim to receive any more than the return of his principal investment. The false representation by the Ponzi schemer that he is paying the investor his share of the profits, which are

nothing more than funds invested by other victims, cannot alter the fact that there are no profits to share.

Id. Likewise, the *Blair* court held that Plaintiffs “may seek relief against Ponzi investors who received profits that are artificially high dividends.” *Blair* at ¶30.

The *Blair* court adopted the *Unified Commercial Capital* distinction between investors who expect to share in “hoped for” profits and those who expect to receive a contracted for reasonable rate of interest. *Blair* at ¶¶ 27, 30, and 56. The Court went on to hold that Plaintiffs “may seek relief against Ponzi investors who received profits that are artificially high dividends” but may not seek relief against “innocent Ponzi-scheme investors who received their investment with a reasonable interest thereon.” *Blair* at ¶30. Defendants Martin were expecting only to share in “hoped for” profits.

Finally, in a case such as this, there are no comparable market indicators upon which this Court could rely to establish a “reasonable” dividend. Because options trading and day trading are so highly speculative and dependent on the trader’s luck and skill at timing market fluctuations, it would be impossible to compare one trader’s returns to another’s in determining a reasonable investment profit. As previously explained, these investors were merely hoping to share in the profits of a scheme, of which there were none. They did not contract for a commercially reasonable rate of interest. The Court should not step in to restructure the investment agreement or contract, particularly in a situation such as this where the speculative nature of the fictitious enterprise would prohibit the formulation of an obvious, equitable and objective rate of return.

With respect to Defendants LaRue, it is undisputed that they paid \$9,000.00 into the Schubert Investment Program and the money was never invested on their behalf. It is also undisputed that Defendants LaRue received \$31,104.80 from the Commingled Funds that would appear to create a net fictitious profit of \$22,104.80. It is unreasonable to believe that those funds would legitimately generate a return of \$22,104.80. *See* Affidavit of Carol Gruis, Exhibit "J", at ¶ 10-11. That would equate to an "artificially inflated" rate of return of 246%. *See* Affidavit of Carol Gruis, Exhibit "J", at ¶ 10-11. The funds that Defendants LaRue received constitute an "unreasonably high dividend" under the standard recently created in *Blair*.

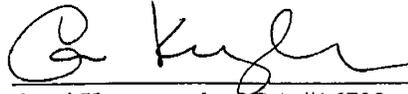
CONCLUSION

Plaintiffs are entitled to summary judgment against Defendants LaRue pursuant to the Oklahoma case law cited above that recognizes a cause of action for unjust enrichment. Similarly, Plaintiffs are entitled to summary judgment upon application of the standard recently created by the Oklahoma Supreme Court in *Blair*. Defendants LaRue received \$22,104.80 in funds that must be characterized as an "unreasonably high dividend", if the money received before they invested could be characterized as a dividend at all. This financial benefit to Defendants LaRue came to them at the expense of others, who lost money through their participation in the Schubert Investment Program. Equity and good conscience demands that the Court not allow this unjust enrichment to stand.

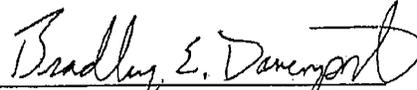
The material facts pertaining to Plaintiff's unjust enrichment cause of action against Defendants LaRue are undisputed. Therefore, this Court should grant summary judgment in

favor of Plaintiffs and against Defendants LaRue in the amount of \$22,104.80, plus pre-judgment interest and post-judgment interest at the statutory rate(s), and costs of this action.

Respectfully submitted,



Gerri Kavanaugh, OBA #16732
Amanda M. Cornmesser, OBA #20044
Melanie Hall, OBA #1209
Oklahoma Department of Securities
120 North Robinson, Suite 860
Oklahoma City, OK 73102
(405) 280-7700 PH (405) 280-7742 FAX
*Attorneys for Plaintiff, Oklahoma Department
of Securities*



Bradley E. Davenport, OBA #18687
GUNGOLL, JACKSON, COLLINS, BOX & DEVOLL, P.C.
3030 Chase Tower
100 N. Broadway Ave.
Oklahoma City, Oklahoma 73102
(405) 272-4710 phone/(405) 272-5141 fax
davenport@gungolljackson.com
*Attorneys for Plaintiff/Receiver, Douglas L.
Jackson*

CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2010, I mailed a true and correct copy of the above and foregoing instrument, postage pre-paid to:

G. David Bryant
Julie Brower
Kline, Kline, Elliott & Bryant, P.C.
720 N.E. 63rd Street
Oklahoma City, OK 73105
Attorneys for Defendants, K.R. and Dana LaRue



Brenda London

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

OCT - 1 2010

PATRICIA PRESLEY, COURT CLERK
by _____
DEPUTY

OKLAHOMA DEPARTMENT OF SECURITIES)
ex rel. IRVING L. FAUGHT, Administrator, et al.,)

Plaintiffs,)

v.)

Case No. CJ-2005-3796

ROBERT W. MATHEWS, et al.,)

Defendants.)

JOURNAL ENTRY OF JUDGMENT

NOW on the 1st day of October, 2010, the *Motion for Summary Judgment* relative to K.R. and Dana LaRue (Defendants LaRue), came on for hearing. The Department appeared by and through its attorneys, Amanda Cornmesser and Gerri Kavanaugh. The Plaintiff Receiver appeared by and through his attorney, Bradley Davenport. Defendants LaRue failed to oppose the Motion.

Based on the briefs filed, the arguments of counsel, and being fully advised in the premises, this Court finds as follows:

1. There is no genuine issue of material fact pertaining to Plaintiffs' unjust enrichment cause of action against Defendants LaRue; and,
2. Plaintiffs' *Motion for Summary Judgment* against Defendants LaRue should be and hereby is granted.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED, that summary judgment is entered against Defendants LaRue on Plaintiffs' unjust enrichment cause of action, and Defendants LaRue are ordered to disgorge and/or repay to Plaintiffs the amount of

EXHIBIT
4

\$22,104.80, prejudgment interest in the amount of \$11,126.15, post-judgment interest at the statutory rate, and costs of the action in the amount of \$75.00.

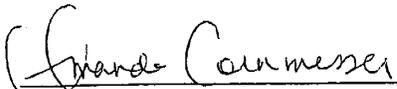
IT IS FURTHER ORDERED that Defendants LaRue shall disgorge and/or repay the sums of money set forth above, including interest to Plaintiff/Receiver, Douglas L. Jackson.

Date: Oct. 1, 2010

PATRICIA G. PARRISH

Honorable Patricia G. Parrish
Judge of the District Court

Approved as to Form:



Amanda Cornmesser, OBA #20044
Gerri Kavanaugh, OBA #16732
Melanie Hall, OBA #1209
Oklahoma Department of Securities
120 N. Robinson, Suite 860
Oklahoma City, OK 73120
(405) 280-7700 phone/(405) 280-7742
Attorneys for Plaintiff, Oklahoma Dept. of Securities



Bradley E. Davenport, OBA #18687
GUNGOLL, JACKSON, COLLINS, BOX & DEVOLL, P.C.
3030 Chase Tower
100 N. Broadway Avenue
Oklahoma City, OK 73102
(405) 272-4710 phone number
(405) 272-5141 facsimile number
Attorney for Plaintiff/Receiver, Douglas L. Jackson

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing instrument was mailed this 1st day of October, 2010, with postage prepaid, to:

G. David Bryant
Julie Brower
Kline, Kline, Elliott & Bryant, P.C.
720 N.E. 63rd Street
Oklahoma City, OK 73105
Attorneys for Defendant K.R. & Dana LaRue

Kenneth Young, *Pro Se*
Leslie Young, *Pro Se*
6020 NW 85th
Oklahoma City, OK 73132


Amanda Cornmesser