IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

OKLAHOMA DEPARTMENT OF SECURITIES ex rel, IRVING L. FAUGHT, Administrator; and DOUGLAS L. JACKSON, in his capacity as the court appointed receiver for the investors and creditors of Schubert & Associates and for the assets of Marsha Schubert, individually, and doing business as Schubert & Associates, and for Schubert &Associates,

Plaintiffs/Appellees,

vs.

WADE TOEPFER; R. KURT BLAIR; WENDY B. BLAIR; NEIL SHEEHAN; and ROBERT RAINS,

Defendants/Appellants,

and

Robert W. Mathews; Marvin L. Wilcox; Pamela J. Wilcox; Detria J. Owens; Kathleen Gibson; Shirley Mercer; Frank Ward; Alice Sue Ward; Ben J. Allen; Sharon A. Allen; Michael Rogers; Bob E. Hudson; Janice Fagg; Edward G. Staton; Kenneth LaRue; Ella Carr; Martin W. Mathews; Beth Armer, individually and as Trustee for the Beth Armer Revocable Trust; Shanna Kinslow; Roy E. Landwehr; Vicki L. Landwehr; Scott A. Wilcox; Ryan E. Landwehr; Lindsey Landwehr; John Pumphrey; Carolyn Pumphrey; Justin R. Tarrant; Jeffrey L. Wilcox; Jacquelyn Bounds; Steven R. Espolt; Phillip Yenzer; Glenda Yenzer; Loyd R. Jones; Richard Brandon Schubert; Hillary Michelle Schubert; Garrett Lee Schubert; Jack D. Simpson; Sue J. Simpson; Robert J. Owens; Chad Johnson; Sonny Harmon; Rodney J. Martin; Wanda Martin; K.R. Larue; Dana Larue; Kenneth Young; Leslie A. Young; AlexanderYoung; Dean Cue; Claudette Cue, Theresa Pittman; Danile Jackson; Crystal Jackson; Jerald Wayne Drake; Regina Kraus; Larry E. Berry; Robert E. Proctor, if living, individually, and as Trustee for the Proctor Family Revocable Trust, and if deceased, his unknown successors; Bobby Proctor; individually and as Trustee for the Proctor Family

FILED
SUPREME COURT
STATE OF OKLAHOMA
MAY - 2 2007
MICHAEL S. RICHIE
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Case No. 104,004

DEFENDANTS/APPELLANTS' PETITION FOR CERTIORARI

Revocable Trust; Sandra K. Phillips; Elnora Viehaus; Chester J. Weems; Becky Drake; Curtis R. Sanders; Paul Lee; Danny Gregory; Martha Gregory; Linda K. Jindra; Josephine Ward; Kerry Long; Raymond C. Laubach; Gary L. Scott; James W. Powell; Billie A. Vincent; Ted A. Payne; Joyce E. Payne; Sean Winn; Trey A. Roehrig; Angela D. Ewers; Brenda L. Enos; Olin R. Rising; J.M. Miller; Willis Luber; Carol A. Lindley; Maudie L. Cook; Bill Harris; Rebecca Honeyman; Todd A. Ward; William Etheridge; Christopher LaRue; Viola M. Estes; Brian Reinhardt; Tony A. Reinhardt; James Wyatt; Thelma Wyatt; Arthur Platt; Bette McClure; Phillip Matthews; Brad Pollard; Allen Griffith; Linda Elliott; Linda Stewart; Chelsea Venable; Gayle Venable; Jamie Walker Glover; Richard LeBoeuf; E.E. Tackett; Timothy W. Rains; Krista Rains; Michael L. Mallory; Renyssa Wines; Mike Bostick; Don Poindexter; Anita Tarralbo; Kirsten Allard; Micke Richey; Shawna Allen; Timothy Jackson; Julia Jackson; Betty Lamb; Bill McCutchen; Brandi Pollard; Craig Simmons; Bill D. Horn; Jack McNally; Laura Payne; Manuel Segura; Kenneth R. Williams; Bertha L. Copper; West Price; Tricia Price; Tawnay A. Merchant; Margaret Hooley; Janet L. Lawhon; May Frates; Bob Prestridge Jr.; Gerald D. Knight; Jim Copeland; Monte Phillips; Vincent H. Scott; Tracy Tarrant; Ellen Clay Benner; Brian Owens; Lloyd Avery; Denise Meloy; Gary L. Bounds; Donald D. Hall; Kevin I. Carnes; Cecil Williams; Jeffrey Palmer; Mark Richards; Melinda Hobbs; Jodi Sharp; and Beverly Kegin,

Defendants.

DEFENDANTS/APPELLANTS' PETITION FOR CERTIORARI

SUPREME COURT RULE 1.179 (a)

(1) **Judgment Sought to be Reviewed**:

Defendants/Appellants seek a Writ of Certiorari from the Oklahoma Supreme Court to review the judgment entered on April 13, 2007, by the Court of Civil Appeals of the State of Oklahoma ("COCA"), Division I, which affirmed the trial court's granting of summary judgment

in favor of Appellees. See copy of COCA's opinion in Appendix attached. Appellants have not filed a Petition for Rehearing with the COCA, nor is such a request for rehearing a requirement before petitioning for certiorari, pursuant to Supreme Court Rule 1.178(b)(1).

(2) **Outline of Reasons for Review:**

The COCA has decided a "question of substance not heretofore determined by the Supreme Court" (Sup. Ct. Rule 1.178(a)(1)).

The COCA's judgment recited that the Oklahoma Supreme Court had not "expressly answered" the issues of whether "an action may be maintained under the Oklahoma Uniform Securities Act ("Act") against innocent victims of a Ponzi scheme" and whether the Oklahoma Department of Securities ("ODS") and Douglas L. Jackson ("Receiver") "have a legal or equitable right to third party assets." (App. pp. 8 and 9). The COCA, in this case of first impression, construed 71 O.S. 2001 §1-603 to grant the ODS the authority to sue onon-violators of the Act, innocent investors in a securities fraud scheme. Moreover, the COCA held that under §1-603, a trial court may appoint a receiver and order disgorgement under the Act against innocent investors. (App. p. 10 and 16).

Concerning whether ODS may maintain an action against innocent victims, the COCA's de novo construction of §1-603 ignores certain key portions of this section, particularly subsection A, which provides as follows:

> A. **If the Administrator believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act** or a rule adopted or order issued under this act or constituting a dishonest or unethical practice or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this act or a rule adopted or order issued under this act or a dishonest or unethical practice, **the Administrator** may, prior to, concurrently with, or subsequent to an administrative proceeding, **maintain an action in the district court of**

> **Oklahoma County** or the district court of any other county where service can be obtained **to enjoin the act, practice, or course of business and to enforce compliance with this act** or a rule adopted or order issued under this act. (Emphasis supplied)

The second provision that the COCA fails to consider is the introductory phrase of subsection B, which provides as follows:

> B. **In an action under this section** and on a proper showing, the court may: . . .
>
> 3. Order such other relief as the court considers appropriate. (Emphasis supplied)

Section 1-603 permits or allows the ODS to bring an action against any person that is engaging or has engaged in a violation of the Act. When the ODS brings an action against a violator of the Act then the trial court may fashion such relief as the trial court deems appropriate.

It is a basic canon of statutory construction that statutory subsections cannot be read in isolation, but must be read in context with the entire statute. *State ex rel. Department of Human Services v. Colclazier,* 1997 OK 134, 950 P.2d 824, 827. Accordingly, as §1-603(A) specifically limits enforcement and disgorgement against violators and §1-603(B) only applies to actions brought pursuant to §1-603(A), subsection (B)(3) is necessarily restricted to violators of the Act.

It is undisputed that the Appellants have not violated the Act or a predecessor act. In fact, nowhere in the evidence presented to the lower court does the ODS or the Receiver allege wrongdoing or violations committed by the Appellants. Clearly, neither the ODS nor the Receiver whom the trial court appointed under §1-603, can maintain an action against these Appellants under the provisions of the Act.

The COCA has decided the foregoing question of substance in a way not in accord with applicable decisions of this Court.

Although this Court has never decided the first impression issues of whether the ODS may maintain an action under the Act against innocent victims of a Ponzi scheme and whether the ODS and a Receiver have a legal or equitable right to third party assets, this Court has decided other applicable cases which would indicate that the COCA's judgment is not in accord with those decisions.

For instance, in *Marley v. Cannon,* 1980 OK 147, 618 P.2d 401, 405, the Oklahoma Supreme Court found that the ODS, which was established by statute, may only employ the powers granted by statute and cannot expand those powers by its own authority. The lawsuit maintained by the ODS fails to meet the essential element of showing that the Appellants are violators of the Act which is required to maintain this type of action under the Act. As a result, the ODS is operating outside its statutory authority.

Concerning the Receiver, the COCA relied upon §1-603 and the court order appointing the Receiver as the authority for the Receiver's standing to seek disgorgement from these innocent investors of a securities fraud. (App. pp. 16 and 17). Essentially, the COCA finds that by the virtue of being appointed Receiver in the Logan County proceeding, the Receiver becomes a creditor of the Estate of Marsha Schubert. Fundamental receivership law does not support this finding. It is axiomatic that a court appoints a receiver to hold property and funds coming into the receiver's possession by the same right and title as those who may hold claims against the estate. The Receiver derives the right to receivership property from the entity which has been placed in receivership. *Farrimond v. State ex rel. Fisher,* 2000 OK 52, 8 P.3d 872, 875. Thus, the Receiver holds the property for only the Estate of Marsha Schubert and cannot hold an antagonistic position as creditor against the Estate.

What the COCA has sanctioned by this opinion is that the Receiver can make his own determination concerning who is made whole and who is required to disgorge any received proceeds among the innocent investors in the fraudulent scheme perpetrated by Marsha Schubert. This is contrary to Oklahoma law. A court-appointed receiver acts in a fiduciary capacity and may not favor one party over another party in litigation. *Witt v. Jones,* 1925 OK 149, 233 P. 722. The Receiver exceeded his authority and breached his fiduciary duty by bringing this action against these innocent investors.

Moreover, the COCA's analysis of *Scholes v. Ames,* 850 F.Supp. 707 (N.D.Ill. 1994) and *Chosnek v. Rolley,* 688 N.E.2d 202 (Ind. App. 1997), is inaccurate as those cases involve a separate legally distinct entity pursuing claims it individually holds, which are not held by the individual wrongdoer that perpetrated the scheme through the use of a legally distinct entity. Therefore, the COCA ignores the distinction between legally distinct entities in receivership and a wrongdoer who is a sole proprietorship, such as Marsha Schubert.

In *Scholes v. Lehmann,* 56 F.3d 750 (7 th Cir. 1995), the Court expressly found that because the wrongdoer had operated through *legally distinct entities* from the wrongdoer the Receiver for these *legally distinct entities* could maintain disgorgement actions for the *legally distinct entities*. The Court's rationale was that the appointment of the receiver for these *legally distinct entities* removed the wrongdoer from the premises resulting in the *legally distinct entities* being cleansed from the actions of the wrongdoer. Specifically, in *Scholes* the Court noted that it was unaware of any cases allowing a receiver for a sole proprietorship to recover an alleged fraudulent conveyance. *Id.* at p. 755. This is an important distinction because a sole proprietorship is not a *legally distinct entity* from the wrongdoer/sole

proprietor. Here, there is no separate *legally distinct entity* from the wrongdoer, Marsha Schubert. There cannot be a cleansing by the appointment of a receiver in this case. The trial court appointed the Receiver to marshal and administer the assets of Schubert's Estate. As such, the Receiver stands in the same shoes as Schubert and cannot seek disgorgement from these innocent Appellants.

STATEMENT OF FACT OF MATERIAL MATTERS IN SUPPORT OF ALLOWANCE OF WRIT OF CERTIORARI

The ODS and the Receiver sought disgorgement from the Appellants under a claim of unjust enrichment. Beginning in 2000 and continuing until mid-October 2004, Marsha Schubert ("Schubert") accepted money from investors, and represented to those investors that Schubert would legally invest their money. This statement was substantiated by the fact that Schubert was a registered representative and was employed by a major broker investment firm. Instead, some of the money received from the investors was used to commit Schubert's fraudulent investment scheme.

After an investigation by the ODS, they discovered that Schubert did not provide regular and authentic monthly or quarterly account statements. Schubert did make payments to some investors, however, this money was not from investments but from other investors' money. As is evident, Schubert was perpetuating a fraud on the investors through a Ponzi scheme.

As discussed above, there are no provisions in the Act which authorize the ODS and the Receiver to bring an unjust enrichment action against innocent investors. Additionally, no Oklahoma case law allows such an action against innocent investors. As innocent investors,

the Appellants are entitled to protections under the Act rather than persecution. *See, Mayfield v. H.B. Oil & Gas,* 1987 OK 106, 745 P.2d 732, 734.

This Court should grant *certiorari* to answer the first impression issues of whether ODS may maintain an action under the Act against innocent victims of a Ponzi scheme and whether the ODS and the Receiver have a legal or equitable right to third party assets. The COCA's judgment, if allowed to stand, is in direct opposition to the basic public purpose of the ODS - to protect all innocent investors. *See, Mayfield v. H.B. Oil & Gas*, *id.*

Further, COCA's judgment, if allowed to stand, would in effect give carte blanc to the ODS to expand its authority beyond its enacted statutory scheme and bring any type of action the ODS deems furthers its public purpose. Pursuant to 71 O.S. Supp. 2003 §1-601, the ODS is an administrative agency that was created by statute and as such is limited in its powers to those expressly granted by the Legislature. Administrative agencies may only exercise powers particularly granted to that agency by statute and the agency cannot unilaterally enlarge those powers. *Matador Pipelines, Inc. v. Oklahoma Water Resources Board,* 1987 OK 65, 742 P.2d 15, 17. To give a state agency such unfettered discretion not only violates the law and the spirit of the law - but also leads to arbitrary and oppressive acts – to the point of an abuse of power by a state entity created for the very purpose of protecting innocent investors from fraudulent securities schemes. The Legislature has not charged the ODS with the responsibility of determining which innocent investors should be made whole and which innocent investors should be made to disgorge. Rather, the Legislature has charged the ODS with the duty to bring actions against violators of the Act.

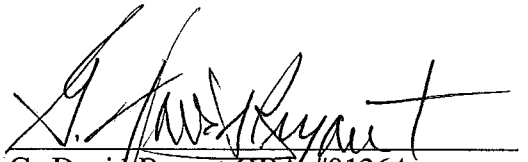
To maintain an unjust enrichment claim, ODS and the Receiver had to demonstrate that they had a legal or equitable right to the property they were seeking to recover before equity may be invoked to recover on their unjust enrichment claim. *Consolidated Cut Stone Co. v. Seidenbach,* 1941 OK 173, 114 P.2d 480, 485. The property which the Receiver and ODS are attempting to recover does not belong to the Estate of Marsha Schubert. Rather, the property belongs to third-party investors which include the Appellants.

The Receiver was appointed as a receiver for a sole proprietor's estate, in this case, the wrongdoer's estate. As such, he cannot prove an unjust enrichment claim as a matter of law. Pursuant to Oklahoma law, the Receiver stands in the shoes of the debtor, and holds the property only by the same right and title as the person for whose property he is the receiver. *Wilkins v. Gannon,* 1935 OK 783, 49 P.2d 78. Therefore, the Receiver cannot in equity make a claim of unjust enrichment against these Appellants.

CONCLUSION

The Legislature's enactment of securities legislation had a twofold purpose, which was to prevent stockbrokers and promoters from perpetrating frauds on unsuspecting investors and to protect those unsuspecting investors who are too inexperienced to protect themselves. *Brock v. Hines,* 1924 OK 133, 223 P. 654, 655. To carry out this legislation, ODS was created to protect inexperienced investors and not to bring actions against innocent investors. Appellants respectfully request this Court to accept certiorari to construe the law and determine whether, in this instance, ODS and the Receiver have the authority to bring a disgorgement action against these Appellants, innocent investors to a Ponzi scheme.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the Petition for Certiorari was mailed this 2nd day of May, 2007 by depositing it in the U.S. Mails, postage prepaid to:

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THIS OPINION HAS BEEN RELEASED FOR PUBLICATION
BY ORDER OF THE COURT OF CIVIL APPEALS

IN THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

DIVISION I

FILED
COURT OF CIVIL APPEALS
STATE OF OKLAHOMA

APR 13 2007

MICHAEL S. RICHIE
CLERK

OKLAHOMA DEPARTMENT OF SECURITIES ex rel, IRVING L. FAUGHT, Administrator; and DOUGLAS L. JACKSON, in his capacity as the court appointed receiver for the investors and creditors of Schubert & Associates and for the assets of Marsha Schubert, individually, and doing business as Schubert & Associates, and for Schubert & Associates,

Plaintiffs/Appellees,

vs.

Case No. 104,004

WADE TOEPFER; R. KURT BLAIR; WENDY B. BLAIR; NEIL SHEEHAN, and ROBERT RAINS,

Defendants/Appellants,

and

Robert W. Mathews; Marvin L. Wilcox; Pamela J. Wilcox; Detria J. Owens; Kathleen Gibson; Shirley Mercer; Frank Ward; Alice Sue Ward; Ben J. Allen; Sharon A. Allen, Michael Rogers; Bob E. Hudson; Janice Fagg; Edward G. Staton; Kenneth LaRue; Ella Carr, Martin W. Mathews; Beth Armer, individually and as Trustee for the Beth Armer Revocable Trust; Shanna Kinslow; Roy E. Landwehr; Vicki L. Landwehr; Scott A. Wilcox; Ryan E. Landwehr; Lindsey Landwehr; John Pumphrey; Carolyn Pumphrey; Justin R. Tarrant; Jeffrey L. Wilcox; Jacquelyn Bounds;

Steven R. Espolt; Phillip Yenzer; Glenda Yenzer;)
Loyd R. Jones; Richard Brandon Schubert;)
Hillary Michelle Schubert; Garrett Lee Schubert;)
Jack D. Simpson; Sue J. Simpson; Robert J.)
Owens; Chad Johnson; Sonny Harmon; Rodney J.)
Martin; Wanda Martin; K.R. Larue; Dana Larue;)
Kenneth Young; Leslie A. Young; Alexander)
Young; Dean Cue; Claudette Cue, Theresa)
Pittman; Danile Jackson; Crystal Jackson; Jerald)
Wayne Drake; Regina Kraus; Larry E. Berry;)
Robert E. Proctor, if living, individually, and as)
Trustee for the Proctor Family Revocable Trust,)
and if deceased, his unknown successors; Bobby)
Proctor; individually and as Trustee for the)
Proctor Family Revocable Trust; Sandra K.)
Phillips; Elnora Viehaus; Chester J. Weems;)
Becky Drake; Curtis R. Sanders; Paul Lee;)
Danny Gregory; Martha Gregory; Linda K.)
Jindra; Josephine Ward; Kerry Long; Raymond)
C. Laubach; Gary L. Scott; James W. Powell;)
Billie A. Vincent; Ted A. Payne; Joyce E. Payne;)
Sean Winn; Trey A. Roehrig; Angela D. Ewers;)
Brenda L. Enos; Olin R. Rising; J.M. Miller;)
Willis Luber; Carol A. Lindley; Maudie L. Cook;)
Bill Harris; Rebecca Honeyman; Todd A. Ward;)
William Etheridge; Christopher LaRue; Viola M.)
Estes; Brian Reinhardt; Tony A. Reinhardt, James)
Wyatt; Thelma Wyatt; Arthur Platt; Bette)
McClure; Phillip Matthews; Brad Pollard; Allen)
Griffith; Linda Elliott; Linda Stewart; Chelsea)
Venable; Gayle Venable; Jamie Walker Glover;)
Richard LeBoeuf; E.E. Tackett; Timothy W.)
Rains; Krista Rains; Michael L. Mallory; Renyssa)
Wines; Mike Bostick; Don Poindexter; Anita)
Tarralbo; Kirsten Allard; Micke Richey; Shawna)
Allen; Timothy Jackson; Julia Jackson; Betty)
Lamb; Bill McCutchen; Brandi Pollard; Craig)

Simmons; Bill D. Horn; Jack McNally; Laura Payne; Manuel Segura; Kenneth R. Williams; Bertha L. Copper; West Price; Tricia Price; Tawnay A. Merchant; Margaret Hooley; Janet L. Lawhon; May Frates; Bob Prestridge, Jr.; Gerald D. Knight; Jim Copeland; Monte Phillips; Vincent H. Scott; Tracy Tarrant, Ellen Clay Benner; Brian Owens; Lloyd Avery; Denise Meloy; Gary L. Bounds; Donald D. Hall; Kevin I. Carnes; Cecil Williams; Jeffrey Palmer; Mark Richards; Melinda Hobbs; Jodi Sharp; and Beverly Kegin,

Defendants.

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA

HONORABLE PATRICIA G. PARRISH, TRIAL JUDGE

AFFIRMED

Amanda Cornmesser,
Gerri Stuckey,
Oklahoma City, Oklahoma,

For Plaintiff/Appellee,
Department of Securities,

Bradley E. Davenport,
GUNGOLL, JACKSON, COLLINS,
BOX & DEVOLL, P.C.,
Enid, Oklahoma,

For Plaintiff/Appellee,
Douglas L. Jackson,

Lisa Mueggenborg,
G. David Bryant,
KLINE, KLINE, ELLIOTT
& BRYANT, P.C.,
Oklahoma City, Oklahoma,

For Defendants/Appellants.

OPINION BY CAROL M. HANSEN, Presiding Judge:

¶1 In this action seeking recovery on the basis of unjust enrichment, Appellants, who were defendants in the trial court, seek our review of the trial court's summary judgment granted in favor of Appellees, Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (Department) and Douglas L. Jackson (Receiver).[1]

BACKGROUND AND FACTS

¶2 This case arises from a "Ponzi" scheme[2] operated from approximately January 2000 through October 2004 by Marsha Schubert of Crescent, Oklahoma. Schubert was a registered agent of a registered investment broker-dealer, doing business as Schubert and Associates, an unincorporated association. Schubert acted for clients in placing investments in legitimate accounts with recognized national brokerage houses. Independently of those investments, she additionally accepted investments directly as Schubert and Associates, which allegedly were to be invested in "option contracts" or "day trading." Instead, she used funds from later Schubert and Associates investors to pay out to earlier investors as fictitious profits.

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[1] The appeal is submitted without appellate briefing in accordance with the accelerated procedure under Rule 1.36, Oklahoma Supreme Court Rules, 12 O.S. Supp. 2003, Ch.15, App.

[2] Named for Charles Ponzi, who offered to repay loans at 150% within 90 days, but instead used successive loans to repay earlier lenders until the scheme was discovered. *Adams v. Moriarty*, 2005 OK CIV APP 105, 127 P.3d 621; citing *Cunningham v. Brown*, 265 U.S. 1, 44 S.CT. 424, 68 L.Ed. 873 (1924).

¶3 Schubert was found criminally liable for this conduct by both state and federal authorities. She was sentenced to imprisonment and to pay restitution to investors who lost money on the scheme. Eighty seven victims were identified in the federal criminal proceeding with an alleged total loss of approximately $9,100,000.00. Department, alleging securities violations by Schubert, also brought a civil action on October 14, 2004, in Logan County, where Schubert resided and conducted her business. Department asked for injunctive relief and petitioned to have a receiver appointed for Schubert and Schubert and Associates.[3]

¶4 The district court in Logan County appointed Receiver, and later amended the order to direct that he also serve as "receiver for the benefit of claimants and creditors of Marsha Schubert and Schubert and Associates". The amended order expressly authorized Receiver, *inter alia,* to "institute actions ... against paid investors ... that the Receiver deems necessary to recover assets and to protect the interests of and promote equity among the investors." The amended order defined "assets" to include the "proceeds of the investment program described in the Petition (Schubert Investment Program) by which certain participants were unjustly enriched or received fraudulent transfers."

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[3] Such action is authorized under 71 O.S. 2001 §406.1 (Oklahoma Securities Act) and its subject matter counterpart section in the replacement Oklahoma Uniform Securities Act of 2004, 71 O.S. Supp. 2004 §1-603, eff. July 1, 2004.

¶5 Receiver joined Department in bringing the present action in Oklahoma County.[4] There were 158 named defendants, five of whom are the Appellants here.[5] The record indicates defendants may have collectively received as much as $6,000,000.00 from Schubert, paid with Schubert and Associates funds received from other investors. The *Petition* alleged the defendants, who were not themselves charged with securities violations, received investor assets "in excess of any funds they transferred to Marsha Schubert and/or Schubert and Associates" ... "either as purported returns on non-existent investment or as gifts, in the nature of homes, vehicles, personal property, and cash." The alleged value each defendant gave Schubert, if any, and the circumstances under which they received funds from Schubert, vary.

¶6 The *Petition* asserted claims against the defendants on grounds of unjust enrichment, fraudulent transfer and equitable lien "against all real property and personal property purchased with unearned investor assets" received by the defendants. Eventually, just before argument on Department's motion for summary

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[4] The majority of defendants did not reside in Logan County. Venue was contested in the trial court but is not at issue here.

[5] The trial court directed the filing of final judgments in accordance with 12 O.S. §994(A). The trial court has also granted summary judgment against other defendants and they have appealed in Appeals No. 104,161 and No. 104,262. Appeal No. 104,262 was consolidated with Appeal No. 104,304.

judgment, which was joined by Receiver, they proceeded only on the unjust enrichment theory. That is the theory on which the trial court granted summary judgment. Judgment was granted against Appellants individually, with each "ordered to disgorge[6] and/or repay to [Receiver] the amount" the motions for summary judgment alleged each received from commingled Schubert or Schubert and Associates bank accounts.

¶7 The motions for summary judgment against Appellants alleged each opened an investment account with AXA Advisors, with Schubert acting as investment advisor, and transacted certain purchases, sales and withdrawals in those accounts. The motions further alleged all monies received into Appellants' AXA accounts were accounted for in statements provided by AXA, but that each Appellant also received additional sums from commingled Schubert bank accounts without supporting statements. Evidentiary materials attached to the motions for summary judgment generally support the allegations. The additional sums received by each Appellant from Schubert are the sums the trial court ordered Appellants to pay to Receiver.

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[6] "Disgorgement" generally is equitable relief whereby the court orders one in possession of funds to which they are not legally entitled to "disgorge" themselves of the funds. *See e.g., State ex rel. Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, 617 P.2d 1334. "Disgorgement is said to occur when a 'defendant is made to 'cough up' what he got, neither more nor less." *Warren v. Century Bankcorporation, Inc.*, 1987 OK 14, 741 P.2d 846.

ISSUES

¶8 Appellants jointly filed their *Petition in Error* and now seek our review of the trial court's summary judgments against them. They question whether "an action may be maintained under the Oklahoma Uniform Securities Act[7] against innocent victims of a Ponzi scheme" and whether Department and Receiver "have a legal or equitable right to third party assets."

STANDARD OF REVIEW

¶9 We review a grant of summary judgment *de novo*, that is, a non-deferential reexamination of the trial court's ruling, because the determination is whether a party is entitled to judgment as a matter of law. *Cranford v. Bartlett*, 2001 OK 47, 25 P.3d 918. We examine the pleadings and evidentiary materials to determine if there is a substantial controversy as to any material fact, with inferences and conclusions arising from the evidentiary materials viewed in a light most favorable to the non-moving party. *Id.*, at 920. In making that determination, neither this Court, nor the trial court, may weigh the evidence. *Id.*

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[7] The Oklahoma Uniform Securities Act of 2004, 71 O.S. Supp. 2004 §§ 1-101 *et seq.*, eff. July 1, 2004. The predecessor act, which was in effect during the majority of the time Schubert's Ponzi scheme was in operation, is the Oklahoma Securities Act, 71 O.S. 2001 §§ 1 *et seq.*

STANDING AND CLAIMS OF DEPARTMENT

¶10 The questions posed by Appellants have not been expressly answered by Oklahoma appellate courts, but our Supreme Court has recognized implicit equitable jurisdiction under the former Oklahoma Securities Act[8] to order disgorgement from violators of the Act when that relief was not explicitly authorized by the Act. In *State ex rel. Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, 617 P.2d 1334, an action brought by Department, the Oklahoma Supreme Court recognized the power of Oklahoma's district courts, once the court's equity jurisdiction had been invoked, to "fashion appropriate remedies", including "the power to require 'disgorgement' of unlawful profits in appropriate cases." The Court held that while Oklahoma securities statutes did not provide for equity jurisdiction as did the Federal Securities Exchange Act of 1934, 15 U.S.C. §§ 78a through 78kk, equity jurisdiction was conferred on Oklahoma district courts in securities matters by virtue of Article 7, §7 of the Oklahoma Constitution and 12 O.S. 1971 §10.[9]

¶11 The *Southwest Mineral* Court explained its rationale for finding equity jurisdiction in securities cases:

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[8] Note 7, *supra.*

[9] Section 10, which abolished the distinction between actions at law and suits in equity, is essentially restated at 12 O.S. 2001 §2002.

> A reading of the Oklahoma Securities Act makes it clear that one of its purposes is to protect the uninformed from manipulative and deceptive practices when dealing in securities. Given this purpose, we do not believe it was the intention of the Legislature to allow those guilty of manipulative practices to profit from their illegal action. Thus, ... District Courts in the State of Oklahoma may require those violating the Securities Act to disgorge themselves of their unlawful profits.

¶12 In the time since *Southwest Mineral*, the Legislature has expressly authorized jurisdiction in the district courts to take equitable action in securities cases. In §406.1 of the Oklahoma Securities Act, district courts, upon "a showing of a violation of the [Act]," were empowered to impose an "appropriate legal or equitable" remedy, including ordering "restitution to investors." In §1-603 of the successor Oklahoma Uniform Securities Act of 2004, district courts can, among other things, order injunctive relief, declaratory judgment or "other appropriate or ancillary relief, which may include" an order of rescission, restitution, or disgorgement directed to a person that has engaged in an act, practice, or course of business constituting a violation of this act or the predecessor act." Additionally, under §406.1 of the former Act, the court could impose "other relief the court deems just" and in the successor §1-603, "other relief as the court considers appropriate."

¶13 It is clear from the foregoing that courts may order equitable action, to include disgorgement, against one who has violated the Securities Act. The question remains whether similar action may be taken against one who, although not in violation of the

Act, has directly and pecuniarily benefitted from such violation. We hold that, under our laws, disgorgement may be ordered in securities cases against those other than actual violators of the Act, where such relief is appropriate under the facts and circumstances of the case. Under §1-603, Department is the proper party to bring such an action.[10]

¶14 We note first, as set out above, where Department has initiated an action invoking the authority of §1-603, the relief available in the district court is not exclusive to that expressly set forth in that section. Section 1-603 makes that clear where it provides the court may order injunctive relief, declaratory judgment, or "other appropriate or ancillary relief, *which may include"* certain specified actions. (Emphasis added). In §1-603(B)(3), the court is given discretion to "[o]rder such other relief as the court considers appropriate." This expansive authority granted by the Legislature is consistent with the Supreme Court's holding in the *Southwest Mineral* case, 617 P.2d at 1337, that district courts hold inherent powers to grant ancillary equitable relief beyond the specific relief provided by statute.[11]

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[10] The effect of our holding is to affirm Department's standing to bring this action. "Standing is the legal right of a person to challenge the conduct of another in a judicial forum. ... When standing is placed in issue in a case, the question is whether the person whose standing is challenged, is a proper party to request adjudication of a particular issue and not whether the issue itself is justiciable." *State ex rel. Cartwright v. Oklahoma Tax Com'n*, 1982 OK 146, 653 P.2d 1230.

[11] *See also, Marley v. Cannon*, 1980 OK 147, 618 P.2d 401 (the equitable jurisdiction of a (continued...)

¶15 The rationale for giving our courts discretion in fashioning relief where there have been violations of securities acts is found in this statement of the Supreme Court in *Southwest Minerals*:

> To say that other equitable remedies were not available to the Administrator in appropriate cases would be to thwart the very purpose of the Act, which is, as stated above, *to protect the uninformed from manipulative and deceptive practices when dealing in securities*. (Emphasis added.)

¶16 We recognize the subjects of disgorgement in *Southwest Minerals* had themselves violated the Securities Act, however, we believe the reasoning there is no less applicable here where the circumstances so strongly invoke the purpose of the Securities Act – to protect the uninformed from manipulative and deceptive practices. We do not find this an improper expansion of Department's power, as argued by Appellants, but the recognition of Department's implicit authority to carry out its duties in accordance with §1-603 to ensure the purposes of the Securities Act are met. Department has "by implication and in addition to the powers expressly given by statute, such powers as are necessary for the due and efficient exercise of the powers expressly granted, or such as may be fairly implied from the statute granting the

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[11] (...continued)
district court is not dependent upon specific statutory authorization).

express powers." *Marley v. Cannon*, 1987 OK 147, 618 P.2d 401, citing *Oklahoma Tax Commission v. Fortinberry Co.*, 1949 OK 75, 201 Okla. 537, 207 P.2d 301.

¶17 In examining the authority of Department to seek disgorgement here, we must consider whether such action might usurp the private right of action, under §1-509 of the Uniform Securities Act,[12] given those who lost money in Schubert's Ponzi scheme. In construing our securities laws, which were adapted from uniform acts that were in turn patterned after the Federal Securities Exchange Act of 1934, *infra*, we may consider the interpretative history of the federal act. *Southwest Mineral*, 617 P.2d at 1339.

¶18 A question similar to that here was posed to the federal district court in *Securities and Exchange Commission v. Egan*, 856 F.Supp. 401 (N.D.Ill. 1993). In *Egan*, the Securities and Exchange Commission (SEC) sought disgorgement and declaration of a constructive trust[13] against third parties (relief defendants) to whom funds had allegedly been improperly disbursed by a firm who had violated securities laws. The court there found the SEC was not barred by *res judicata* from seeking

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[12] 71 O.S. 2001 §408 is the authority for private civil liability under the predecessor Act.

[13] "The proper basis for impressing a constructive trust is to prevent unjust enrichment." *Estate of Wellshear, In re*, 2006 OK CIV APP 90, 142 P.3d 994, citing *G & M Motor Co. v. Thompson*, 1977 OK 142, 567 P.2d 80.

equitable disgorgement even though the relief defendants had paid to settle similar litigation brought by the trustee in bankruptcy.

¶19 In explaining its reasoning, the *Egan* Court stated:

> SEC's standing to obtain the equitable remedies that are now at issue stems from its duty to advance the *public* interest, something that is really separate and apart from (although it may frequently concur with) the interests of injured investors. (Emphasis in original).

¶20 The *Egan* Court, at 401, further noted that although disgorgement is often defined as an equitable remedy designed to deprive a wrongdoer of his unjust enrichment:

> ... the deterrence purpose is not dependent on that status – for it is just as important to discourage illegal conduct by taking the proceeds of that illegality from those who have given no current value for the ill-gotten gains that have been turned over to them (even though they themselves have not directly engaged in illegal activity).

¶21 Additionally, and even more applicable to Appellants' arguments here, the *Egan* Court, addressing the relief defendants' assertion a constructive trust was available only to "convey the property back to the *injured owner*" (emphasis in original), noted:

> That situation is certainly present in most cases, but the use of the equitable remedy must be equally available to protect the public interest spoken of earlier in this opinion. If that were not the case, the interests of the beneficiary of the violation in retaining the unjust enrichment would gain preference over the public interest.

¶22 In concluding the SEC was "entitled to obtain disgorgement" from the relief defendants, who had not themselves been accused of violation of securities laws, the *Egan* Court relied on the Federal Seventh Circuit Court of Appeals' holding that:

> A court can obtain equitable relief from a non-party against no wrongdoing is alleged if it is established that the non-party possesses illegally obtained profits but has no legitimate claim to them.

SEC v. Cherif, 933 F.2d 403, note 11 (7th Cir. 1991).[14]

STANDING AND CLAIMS OF RECEIVER

¶23 In view of our holdings that an action may be maintained under the Oklahoma Uniform Securities Act "against innocent victims of a Ponzi scheme", that Department has standing to bring such an action, and that Department has an equitable right to third party investor assets, a determination of similar issues as to Receiver will not affect the ultimate outcome of this case. Neither Department nor Receiver have argued they are each entitled to receive the full amount of the trial court's judgment, and the judgment could be paid to Department rather than to Receiver, with the proceeds ultimately going to the receivership estate. Nonetheless,

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[14] *See also,* S.E.C. v. Colello, 139 F.3d 674 (9th Cir. 1998); *S.E.C. v. Cross Financial Services, Inc.*, 908 F.Supp. 718 (C.D.Cal. 1995); *F.T.C. v. Think Achievement Corp.*, 144 F.Supp.2d 1013 (N.D.Ind. 2000); *S.E.C. v. Antar*, 831 F.Supp. 380 (D.N.J. 1993) and *S.E.C. v. Seibald*, 1997 WL 605114 (S.D.N.Y. 1997).

our conclusions as to Receiver's ability to maintain this action, under the facts here, are the same as for Department, but for different reasons.

¶24 Receiver was appointed as part of Department's action against Schubert and Schubert and Associates brought pursuant to §1-603.[15] Where, as here, there has been a violation of the Act, that section authorizes Department to bring an action in district court where the court may order "appropriate or ancillary relief" to include, *inter alia,* appointment of a receiver or conservator "for the defendant *or* the defendant's assets." (Emphasis added). The Securities Act does not further define nor delimit the authority of a receiver appointed under the Act.

¶25 In the absence of a specific statement as to the powers of a receiver appointed under the Securities Act, we look to the general powers granted receivers pursuant to 12 O.S. 2001 §1554. That section is part of the Code of Civil Procedure chapter on receivers. It provides, in pertinent part:

> The receiver has, under the control of the court, power to bring actions in his own name, as receiver; to take and keep possession of the property, ... to collect debts, ... and generally to do such acts respecting the property as the courts may authorize.

¶26 In its amended order, the Logan County district court ordered Receiver would "continue to serve as Receiver for the Defendants and *over their assets*." (Emphasis

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[15] Section 406.1 of the predecessor Oklahoma Securities Act.

added). As previously noted, the court defined "assets" to include "the proceeds of the investment program described in the Petition (Schubert Investment Program) by which certain participants were unjustly enriched or received fraudulent transfers." Also as noted, the court ordered Receiver to serve as receiver for the benefit of claimants and creditors of Schubert and Schubert and Associates.

¶27 In furtherance of the responsibilities given Receiver by the foregoing order, the court authorized him to:

> ... institute actions, including any actions against participants in the Schubert Investment Program who were unjustly enriched through the "Ponzi" scheme of Marsha Schubert and Schubert and Associates, when the assets transferred were not supported by adequate consideration; against persons who did not invest any amount of money in the Schubert Investment Program, yet received proceeds of the fraudulent scheme; and against brokerage firms and/or other third parties from whom the Receiver deems it necessary to seek disgorgement of the proceeds of the fraudulent scheme, in order to promote equity and a fair distribution among all creditors of Marsha Schubert and/or Schubert and Associates.

¶28 The court expressly provided the powers granted Receiver would not in any way impair or impede the private rights of any Schubert client. The authority and limitations imposed in the Logan County district court order were consistent with the law we discussed above in relation to recovery of fraudulently obtained assets from third parties, and were necessary to fully enable Receiver to carry out his responsibilities as receiver for *the assets* of Schubert and Schubert and Associates.

While Receiver was appointed under the authority of the Securities Act, he enjoyed the general powers "to do such acts respecting the property as the courts may authorize." 12 O.S. 2001 §1554. Here Receiver was given express and specific direction by the district court to take the actions that he did.

¶29 Appellants, and the other defendants, attempted to intervene in the Logan County suit, but their request to intervene was denied and the Supreme Court refused to take original jurisdiction to consider that issue. The Logan County order remains in full effect and provides authority for Receiver's action in this matter.

¶30 In *Johnson v. Studholme*, 619 F.Supp. 1347 (D.Colo. 1985), *aff'd sub nom.* 833 F.2d 908 (10th Cir. 1987), the court found a receiver for a Ponzi scheme could not recover amounts paid to investors where there is no allegation such investors somehow participated in the scheme. However, here, and as recognized in *Wing ex rel. 4NExchange, L.L.C. v. Yager*, 2003 WL 23354487 (D.Utah), "unlike in *Johnson*, the Receiver in this case has been appointed by the court to *marshal and preserve assets for the benefit of... creditors and investors*." (Emphasis added). The court in *Yaeger* held the receiver could assert equitable claims against "profits" made by other innocent investors because he was appointed, as here, "for the benefit of" defrauded investors and creditors.

¶31 In *Scholes v. Ames,* 850 F.Supp. 707 (N.D.Ill. 1994) and *Chosnek v. Rolley*, 688 N.E.2d 202 (Ind.App. 1997), the respective appellate courts held receivers had standing to bring actions to recover funds paid to defendants as part of a Ponzi scheme under facts similar to the present case. Appellants assert these cases are distinguishable because the receivers there acted for corporate entities with identities separate from the main perpetrators of the Ponzi scheme, and here Schubert and Associates was only another name under which Schubert did business. The theory, as expressed in *Scholes*, is that "the wrongdoer [Douglas] must not be allowed to profit from his wrong by recovering property that he had parted with in order to thwart his creditors", but once "[f]reed from his spell [the corporations] became entitled to the return of the moneys – for the benefit not of Douglas but of innocent investors -- that Douglas had made the corporations divert to unauthorized purposes."

¶32 Appellants further assert Receiver would only have the same rights as Schubert to seek recovery from them, and that under the facts here, Schubert, the wrongdoer, should have no such rights. These assertions, however, ignore the law under which receiver was appointed and the authority given by the court. Section 1-603(B)(2)(a) allows appointment of a receiver for the defendant *or the defendant's assets*. This clearly allows a receiver to have bifurcated responsibilities, *i.e.* responsibility for and

over assets detached from the defendant. The court appointed Receiver to serve "for the Defendants and over their assets."

¶33 Under the facts here – with Schubert's long term imprisonment, an order of restitution, and a deficit in the amounts recoverable – she will never profit from her wrong by the ordered disgorgement. Receiver is acting instead in furtherance of the detailed responsibility given by the court "to seek disgorgement of the proceeds of the fraudulent scheme, in order to promote equity and a fair distribution among all creditors of Marsha Schubert and/or Schubert and Associates." The purpose of disgorgement in this case was to "benefit the receivership estate as a whole rather than any individual creditor." *Warfield v. Alainiz*, 453 F.Supp.2d 1118 (D.Ariz. 2006).

UNJUST ENRICHMENT

¶34 We have held Department and Receiver had standing to bring the unjust enrichment claims against Appellants, however, the question remains whether summary judgment was justified as to those claims. We hold that it was. The Oklahoma Court of Civil Appeals defined and discussed unjust enrichment in this way:

> A right of recovery under the doctrine of 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. It arises not only where an expenditure by one person adds to the property of another, but also where the expenditure saves the other from expense or loss.

N.C. Corff Partnership, Ltd. v. OXY USA, Inc., 1992 OK CIV APP 92, 929 P.2d 288 (Quoting from 66 Am.Jur.2d Restitution and Implied Contracts §3 (1973)).

¶35 We have set out the facts above and noted they were supported by the evidentiary materials presented to the trial court. In sum, Appellants invested sums which were accounted for in statements from AXA. They additionally received sums from Schubert which were purportedly profits from option contracts or day trading in securities. It is uncontroverted that such profits did not exist and the additional sums Appellants received were instead fraudulently obtained from other investors with Schubert and Associates. We agree with the assertion by Department and Receiver that Appellants' defense of being "innocent victims" has no merit under the facts here. Appellants are in possession of funds which, in equity and good conscience, belong to other investors.

¶36 We are persuaded by the reasoning of the Federal District Court in *S.E.C. v. Antar*, 831 F.Supp.380 (D.N.J. 1993):

> Unjust enrichment is present here. The nominal defendants should not be allowed to retain funds that are the product of Eddie Antar's securities fraud. Their enrichment came at the expense of defrauded investors. As between the nominal defendants and the victims of fraud, equity dictates that the rights of the victims should control. ... The Court

concludes that the nominal defendants should be ordered to disgorge the illegal profits arising from Eddie Antar's sale of the custodial stock.

¶37 We note that even in those cases where the courts have held innocent investors in a Ponzi scheme are not unjustly enriched when they receive returns on investments in good faith and while ignorant of the scheme, these holdings pertain only "so long as the returns *do not exceed the amount of the original investment.*" (Emphasis added.) *Scholes v. Ames*, 850 F.Supp. at 715; *Chosnek v. Rolley*, 688 N.E.2d at 210. The amounts ordered disgorged by the trial court here were only those in excess of the amounts Appellants invested.

¶38 We hold there are no material facts remaining in controversy and that Department and Receiver were entitled to judgment as a matter of law. Accordingly, the trial court's judgment is AFFIRMED.

BELL, J., concurs, and

BUETTNER, J., dissenting:

¶39 The majority finds the Administrator of the Securities Commission has standing to sue investors in a securities fraud scheme, who have received more money from the perpetrator than they invested, under the theory of unjust enrichment. They rely on 71 O.S.2001 §1-603, and recite that section's grant to the trial court of authority to grant general equitable relief "as the court deems appropriate." 71 O.S.

§1-603(B)(3). However, the majority ignores the introductory phrase of that subsection:

> B. In an action under this section and on a proper showing, the court may:
>
> * * *
>
> 3. Order such other relief as the court considers appropriate. (Emphasis added.)

¶40 Subsection A grants authority to the Administrator to bring an action against violators of the Oklahoma Uniform Securities Act of 2004:

> A. If the Administrator believes that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act[16] or a rule adopted or order issued under this act or constituting a dishonest or unethical practice or that a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this act or a rule adopted or order issued under this act or a dishonest or unethical practice, the Administrator may, prior to, concurrently with, or subsequent to an administrative proceeding, maintain an action in the district court of Oklahoma County or the district court of any other county where service can be obtained to enjoin the act, practice, or course of business and to enforce compliance with this act or a rule adopted or order issued under this act. (Emphasis added.)

¶41 Thus, the majority greatly expands the current scope of the Act, an expansion that should be left to the Legislature.

¶42 Likewise, the Receiver's authority is limited by the language of §1-603(B)(2):

> 2. Order other appropriate or ancillary relief, which may include:

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[16] Title 71, §1-101 *et seq.*

> a. An asset freeze, accounting, . . ., and appointment of a receiver or conservator, that may be the Administrator, for the defendant or the defendant's assets, . . .

¶43 The Receiver was appointed for Shubert and Shubert and Associates. The Receiver could marshal and protect the assets of those entities. The reference to 12 O.S.2001 §1554 Powers of receiver, that a receiver may bring and defend actions in his own name, take and keep possession of the property is still limited by the general notion that the receiver acts as a caretaker for the defendant's property. The statute does not grant authority to assert claims of third parties nor collect assets that do not belong to Shubert or Shubert and Associates. There is simply no authority to grant the Receiver power to bring the unjust enrichment claims of those damaged by the scheme against other participants in Shubert's scheme. It cannot be argued that the unjust enrichment claims are assets of Shubert and Shubert and Associates. Nor can the trial court, by changing the definition of "assets", make property in the hands of third parties the property of Shubert or Shubert and Associates.

¶44 While we are sympathetic to fraud victims, we should not, in the interests of doing justice, sanction conduct outside the authority granted by the Act. If there is a deficiency of remedies available to the Administrator, that deficiency should be corrected by the legislature.

¶45 I respectfully dissent.