

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

NOV 18 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.)

**PLAINTIFFS' MOTION REASSERTING THEIR MOTION FOR SUMMARY
JUDGMENT AGAINST DEFENDANTS MARVIN AND PAMELA WILCOX
AND BRIEF IN SUPPORT**

Plaintiffs, Douglas L. Jackson, in his capacity as court-appointed receiver for the benefit of the creditors and claimants of Marsha Schubert and Schubert and Associates, and the Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator, reassert their motion for summary judgment against Defendants Marvin and Pamela Wilcox (hereinafter, "Defendants" or "Defendants Wilcox"), filed on August 23, 2010 (the "August Summary Judgment Motion"). Said motion was filed pursuant to Rule 13 of the Rules for District Courts of Oklahoma, Okla. Stat. Ann. tit. 12, Ch. 2, App. 1.

Case History

On October 14, 2004, the Administrator of the Oklahoma Department of Securities ("Department") sought and received injunctive relief in the Logan County District Court against Marsha Schubert, individually and doing business as Schubert and Associates, and Schubert and Associates (collectively, the "Enforcement Action

Defendants”) for violations of the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003), and the Oklahoma Securities Act (Predecessor Act), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (1991 & Supp. 2003).

The Logan County Court appointed Douglas L. Jackson (Jackson) to act as receiver (Receiver) for the benefit of claimants and creditors of the Enforcement Action Defendants. The Logan County Court specifically authorized the Receiver to institute actions to recover assets directly traceable to the Enforcement Action Defendants’ fraudulent scheme and to promote equity among the investors.

The Enforcement Action Defendants operated a “Ponzi” investment scheme wherein participants received payments from monies obtained from other investors rather than from the profits of actual investment activities. As a result of the “Ponzi” scheme, 87 people lost approximately \$9,000,000. Of the \$9,000,000 taken from her victims, Marsha Schubert distributed over \$6,000,000 of that money to, or on behalf of, other persons. Such persons received value in excess of any funds they transferred to the Enforcement Action Defendants and were unjustly enriched at the expense of the 87 victims.

In May of 2005, the Department and the Receiver initially brought a suit against over 160 persons who unjustly received funds from the Enforcement Action Defendants (Relief Defendants), including Defendants Wilcox. As to Defendants Wilcox, this Court granted summary judgment and ordered disgorgement in the amount of \$509,505.00 plus interest from the date the order was entered until paid in full. Defendants Wilcox appealed. The Court of Civil Appeals affirmed. Certiorari was granted and the Oklahoma Supreme Court remanded the matter for further proceedings consistent with its

opinion that the Department and the Receiver may seek relief against Ponzi-scheme investors who received profits that are artificially high but may not seek relief from “innocent Ponzi-scheme investors” who received their principal investment amounts with a reasonable return thereon. *Oklahoma Department of Securities, et al. v. Blair, et al.*, 2010 OK 16.

In response to the *Blair* opinion, Plaintiffs filed the August Summary Judgment Motion against Defendants Wilcox with this Court. A hearing was held on October 1, 2010, during which the Court granted partial summary judgment in favor of Plaintiffs. Specifically, this Court found as follows: (1) there is no genuine issue of material fact as to the liability of Defendants Wilcox in connection with Plaintiffs’ unjust enrichment claim; (2) as a result of their participation in the Schubert check kiting scheme, Defendants Wilcox were not innocent investors; therefore, the standard for recovery from Ponzi-scheme investors set forth in *Blair* is not applicable to them; (3) Defendants Wilcox were unjustly enriched by the net amount of all monies paid into and received from the Ponzi and check kiting schemes; and (4) the only remaining fact at issue is the net amount Defendants Wilcox received through the Ponzi and check kiting schemes.

The sole purpose of this motion is to address the amount by which Defendants Wilcox were unjustly enriched. Subsequent to the October 1st hearing, counsel for the Receiver deposed Defendant Pamela Wilcox. In addition, Plaintiffs received further documentation from Defendants Wilcox. Such documentation provides *partial* support for the amounts given to Marsha Schubert by Defendants Wilcox and the amounts received by Defendants Wilcox from Marsha Schubert in each of the years 2002, 2003,

and 2004. The documented transactions relate to checks written from and deposited to the Defendants' NBanC bank account only (NBC Transactions).

As more specifically set forth below, the additional documentation recently provided by Defendants Wilcox clearly shows that an issue of material fact no longer remains as to the amount Defendants Wilcox netted from the Ponzi and check kiting schemes. Therefore, Plaintiffs urge the Court to grant summary judgment against Defendants Wilcox in the amount of \$509,505 (the disgorgement amount originally ordered by this Court).

STATEMENT OF UNDISPUTED MATERIAL FACTS¹

1. From May of 1992 to April of 2004, Marsha Schubert was registered as a broker-dealer agent and an investment adviser representative of AXA Advisors, LLC (AXA). *See* Exhibit "A", Affidavit of Carol Gruis, ¶ 3.

2. Defendants Wilcox maintained two investment accounts at AXA for which Marsha Schubert was the agent of record. *See* Exhibit "A", Affidavit of Carol Gruis, ¶ 6 and Exhibit "B", Marvin Wilcox Transcr. 12:16-23 (Sept. 2006).

3. Defendants Wilcox received monthly statements for their AXA accounts. *See* Exhibit "B" Marvin Wilcox Transcr. 14:11-22 (Sept. 2006).

The Ponzi Scheme

4. Separate and apart from her activities as a registered agent of AXA, Marsha Schubert operated a fraudulent scheme, as Schubert and Associates, in violation of federal and state laws including the Oklahoma Uniform Securities Act of 2004 (Act),

¹ Since the only fact in dispute following the Court's ruling on the August Summary Judgment Motion is the amount Defendants Wilcox netted from the Ponzi and check kiting schemes, Plaintiffs will not repeat herein all other material but undisputed facts in this matter. Plaintiffs incorporate herein by reference those material but undisputed facts set forth in the August Summary Judgment Motion.

Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003), and the Oklahoma Securities Act (Predecessor Act), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (1991 & Supp. 2003). See Exhibit "C", Order of Permanent Injunction, *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator v. Marsha Schubert, et al.*, CJ 2004-256; Exhibit "D", Marsha Schubert's Federal Plea Agreement, *United States of America v. Marsha Kay Schubert*, CR 05-078; Exhibit "E", Marsha Schubert's State Guilty Plea, *State of Oklahoma v. Marsha Kay Schubert*, No. CF-2004-391, wherein Marsha 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).

5. At all times material hereto, Marsha Schubert owned and/or controlled several bank accounts including account number xx-xx77 at Farmers and Merchants Bank (F&M Bank) in Crescent, Oklahoma (hereinafter "Schubert F&M Account"), account number xx-xx24 at F&M Bank (hereinafter "Kattails Account"), the Richard Schubert farm account at BancFirst in Kingfisher, Oklahoma (hereinafter "Farm Account") and a Schubert & Associates account at BancFirst in Kingfisher, Oklahoma (hereinafter "Schubert BancFirst Account"). See Exhibit "F", Affidavit of Dan Clarke, ¶ 3. 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. See Exhibit "F", Affidavit of Dan Clarke, ¶ 6. 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 Exhibit "F", Affidavit of Dan Clarke, ¶ 6. All of the funds

deposited into the Schubert F&M account, the Kattails account, the Farm account and the Schubert BancFirst account shall hereinafter be referred to as the “Commingled Funds”. The accounts into which the Commingled Funds were deposited were used by Marsha Schubert to perpetuate her Ponzi scheme (the “Ponzi Scheme Accounts”). *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 5.

The Check Kiting Scheme

6. Marsha Schubert’s Ponzi scheme was supported by a long-running check kiting scheme. The check kite involved a consistent movement of funds primarily between the accounts of three individuals, including Defendant Marvin Wilcox, and the Ponzi Scheme Accounts. *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 7. The check kiting scheme created a “float” that Schubert utilized to pay purported investment returns. *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 8.

7. In exchange for a check drawn on an account of Defendant Marvin Wilcox, Schubert wrote a check from one of the Ponzi Scheme Accounts, in most cases for a greater dollar amount, payable to Defendant Marvin Wilcox. *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 9.

8. Defendants calculate that, during calendar years 2002 through 2004, checks written to Marsha Schubert from Defendants Wilcox total \$77,069,105 (the “Defendants’ Total Checks Amount”) and disbursements from Marsha Schubert to Defendants Wilcox total \$77,583,050 (the “Defendants’ Total Deposits Amount”), for a preliminary net gain of \$513,945. *See* Exhibit “G”, financial summary submitted by Defendants Wilcox (Defendants’ Financial Summary). As more fully described below,

Defendants Wilcox attempt to reduce their net gain from \$513,945 to \$133,945. See Exhibit "G", Defendants' Financial Summary.

Defendants' \$95,000 Claim

9. Defendants Wilcox claim they remitted the following checks to Marsha Schubert:

<u>DATE</u>	<u>PAYOR</u>	<u>AMOUNT</u>	<u>PAYEE</u>
03-06-02	Marvin L. Wilcox	\$45,000	Schubert & Associates
01-24-03	Redbud Farm	\$50,000	Schubert & Associates

See Exhibit "G", Defendants' Financial Summary; Exhibit "F", Affidavit of Dan Clarke, ¶ 14, and copies of the two checks attached thereto.

10. The two checks were not included in the 2002 and 2003 "checks" figures on Defendants' Financial Summary. See Exhibit "F", Affidavit of Dan Clarke, ¶ 14.

11. The amounts of the two checks listed in paragraph 9 above must be added to the Defendants' Total Checks Amount. See Exhibit "F", Affidavit of Dan Clarke, ¶ 14.

Items Relating to Defendants' F&M Account

12. Defendants Wilcox also claim credit for an additional five checks written to Marsha Schubert totaling \$285,000 that were not included in the 2003 "checks" figure on Defendants' Financial Summary. See Exhibit "G", Defendants' Financial Summary. The net gain to Defendants Wilcox should not be further reduced by \$285,000. See Exhibit "F", Affidavit of Dan Clarke, ¶ 19.

13. Defendants Wilcox opened account number xx-xx73 at F&M Bank on November 6, 2003 (the "Wilcox F&M Account"). See Exhibit "F", Attachment 2 to

Affidavit of Dan Clarke. Between November 9th and November 19th, Marsha Schubert wrote check numbers 6060, 6063, 6067, 6069, and 6073 to Defendant Marvin Wilcox on his NBanC account. *See* Exhibit “F”, Attachment 2 to Affidavit of Dan Clarke.

14. The five checks were then deposited into the Wilcox F&M Account. *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 17.

15. Each of the five checks merely represents a transfer from the NBanC bank account of Defendant Marvin Wilcox to the Wilcox F&M Account. *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 18.

16. The five checks were not deposited into any one of the Ponzi Scheme Accounts and should *not* be added to the Defendants’ Total Checks Amount. *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 19.

17. In November of 2003, there were five checks totaling \$757,700 written from the Wilcox F&M Account payable to Schubert and Associates. These checks were not included in the 2003 “checks” figure on the Defendants’ Financial Summary. *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 20.

18. The amounts of the five checks described in paragraph 17 above, must be added to the Defendants’ Total Checks Amount. *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 21.

Other Items Not Included in Defendants’ Financial Summary

19. In 2002, 2003 and 2004, there were several checks disbursed from the Ponzi Scheme Accounts to Defendants Wilcox that were not included in the yearly “deposits” figures on the Defendants’ Financial Summary. *See* Exhibit “F”, Affidavit of Dan Clarke ¶ 22.

20. For example, in 2003, there were 3 checks totaling \$888,321 disbursed from the Ponzi Scheme Accounts to Defendants Wilcox. The amounts of these checks were not included in the 2003 “deposits” figure on the Defendants’ Financial Summary. *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 23 and copies of the checks attached thereto.

21. The amounts of the checks described in paragraph 20 above, must be added to the Defendants’ Total Deposits. *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 24.

22. Further, 2002 and 2003, there were in excess of 20 wires totaling \$75,952.60 from the Ponzi Scheme Accounts into the Defendants’ AXA accounts. *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 25 and copies of the wires attached thereto.

23. The amounts of these incoming wires were not included in the 2002 and 2003 “deposits” figures on the Defendants’ Financial Summary. *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 26.

24. The amounts of the incoming wires to the Defendants’ AXA accounts must be added to the Defendants’ Total Deposits Amount. *See* Exhibit “F”, Affidavit of Dan Clarke, ¶ 27.

Defendants’ AXA Accounts

25. In excess of \$160,000 was received into the AXA accounts of Defendants Wilcox. *See* Exhibit “A”, Affidavit of Carol Gruis, ¶ 7. All monies received into the AXA accounts of Defendants Wilcox, including their principal investment amounts and the incoming wires from the Ponzi Scheme Accounts, are accounted for through purchases of securities, ordinary market gains and losses, account fees and cash withdrawals by Defendants Wilcox. *See* Exhibit “A”, Affidavit of Carol Gruis, ¶ 8.

Actual Amount of Defendants' Net Gain

26. The amount of the net gain to Defendants Wilcox is at least \$625,518. See Exhibit "F", Affidavit of Dan Clarke ¶ 30.

27. The \$625,518 in fictitious net returns were paid by Marsha Schubert to Defendants Wilcox from the Commingled Funds in the Ponzi Scheme Accounts. See Exhibit "F", Affidavit of Dan Clarke, ¶ 30.

ARGUMENTS AND AUTHORITIES

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT

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. Based on this Court's previous ruling and the *Blair* decision, Plaintiffs are entitled to judgment as a matter of law.

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

Defendants Wilcox were unjustly enriched by the Net Amount they received from the Commingled Funds in the Ponzi Scheme Accounts. 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.” *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. As previously determined by this Court, the facts pertaining to Defendants Wilcox satisfy all of the elements of a cause of action for unjust enrichment.

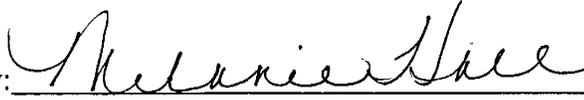
Specifically, Defendants Wilcox received a Net Gain of at least \$625,518 from the Commingled Funds in the Ponzi Scheme Accounts. The short investors, that is, those who did not receive the return of their principal investment amounts, in whole or in part, lost over \$9,000,000 in the Ponzi scheme. Defendants Wilcox received at least \$625,518 at the expense of, and to the detriment of, the short investors.

CONCLUSION

Plaintiffs are entitled to summary judgment against Defendants Wilcox pursuant to the Oklahoma case law that recognizes a cause of action for unjust enrichment. This financial benefit to Defendants Wilcox came to them at the expense of others, who lost money and were unwitting participants in the Schubert Investment Program. Equity and good conscience demands that the Court not allow this unjust enrichment to stand.

The only remaining fact at issue was the amount Defendants Wilcox netted from the Ponzi and check kiting schemes. Using Defendants’ Financial Summary as a starting point, the material facts pertaining to the amount by which Defendants Wilcox were unjustly enriched are now undisputed. Therefore, Plaintiffs ask this Court to grant judgment in their favor against Defendants Wilcox in the amount of \$509,505 (the disgorgement amount originally ordered by this Court) plus pre-judgment and post judgment interest at the statutory rate, and costs of this action.

Respectfully submitted,

By: 

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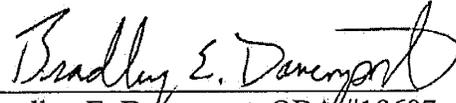
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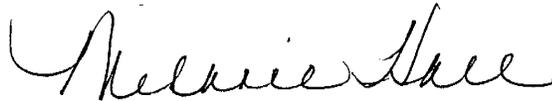


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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing motion was mailed this 18th day of November, 2010, with postage prepaid thereon, to:

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