

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

SEP 24 2010

PATRICIA PRESLEY, COURT CLERK

by \_\_\_\_\_ DEPUTY

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

**PLAINTIFFS' REPLY TO OBJECTION OF DEFENDANTS MARVIN AND  
PAMELA WILCOX TO MOTION FOR SUMMARY JUDGMENT**

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 (Schubert), and the Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator, hereby reply to Defendants Marvin and Pamela Wilcox's (Defendants) objection to Plaintiffs' motion for summary judgment (Objection). Plaintiffs' motion for summary judgment (Motion) should be granted.

**I. There is no genuine issue as to a material fact.**

Defendants do not dispute Plaintiffs' material facts 1-4, 6-11, 15, 17 and 18. Therefore, these facts are deemed admitted. Defendants do attempt to dispute Plaintiffs' material facts 5, 12, 13, 14 and 16, however, Defendants fail to show that evidence is available that justifies a trial on the issues. Furthermore, Defendants do not present other facts as being determinative of the issues.

A party opposing a motion for summary judgment must point to *specific material* facts showing that there is a genuine issue for trial. *See* Rule 13 of the Rules of the

District Courts of Oklahoma. Defendants attach their own deposition testimony, affidavits and “cumulation of net profits” worksheet that they prepared (worksheet), to dispute the Plaintiffs’ claims. However, a nonmovant’s evidence cannot be based on conclusory and self-serving affidavits to preclude summary judgment. *Hall v. Bellmon*, 935 F.2d 1106, 1111. Affidavits that are “merely colorable” or anything short of “significantly probative” are not enough. *Id.* Defendants’ Objection is inadequate to avoid summary judgment.

**A. No probative evidence of alleged accounting discrepancies**

In their Objection, Defendants point to purported accounting discrepancies and claim that their affidavits and worksheets put the net amount of their unjust enrichment in controversy. Defendants’ worksheet is not supported by back-up documentation and only provides “conclusory” figures.

Defendants attach a preliminary investigatory accounting that the Defendants acquired from the Department during discovery and make a stretch to argue that there are “questionable entries” in the accounting. *See* Defendants’ Exhibit No. 4. The margins reflect notations made by the Department’s investigators entering the transactions; however, it is Defendant Pam Wilcox that has written the questions that appear on the exhibit. Since filing this case, Plaintiffs have relied on the accounting prepared by the CPA firm of Baird, Kurtz and Dotson (BKD Report). *See* BKD Report, attached hereto as Exhibit 1. The Plaintiffs have never relied on the accounting attached as Defendants’ Exhibit No. 4 as evidence against the Defendants. In addition to the BKD Report and Dan Clarke’s Affidavit attached as Exhibit G to the Motion, Plaintiffs have attached the Defendants’ own bank statements hereto in support of the BKD Report, and as additional

proof to support the amount of Defendants' unjust enrichment. *See* Defendants' NBC bank statements attached hereto as Exhibit 2.

The conclusory nature of the worksheet created by the Defendants and the undocumented statements contained in paragraphs 4 of their affidavits are not sufficient to defeat a summary judgment motion.

**B. Defendants' partnership with Schubert**

The scope of Defendants' involvement with Schubert goes to the question of their innocence as investors. Defendants deny they were in partnership with Schubert despite filing tax returns wherein they claimed the existence of such a partnership. However, their simple denial of the relationship now, when it is to their benefit to do so, does not support a finding that there was no partnership, when records acknowledged by Defendants during the relevant time period clearly indicate the existence of one.

During the time period that the check exchange scheme and the "Ponzi" scheme were operating, Defendants signed their tax returns declaring that "under penalties of perjury" they had "examined this return and accompanying schedules and statements, and to the best of my knowledge and belief, they are true, correct, and complete." Defendants were charged with reviewing the return and the accompanying schedules, including the Forms K-1, and by signing the returns certified that all information was true and correct. That duty cannot be shifted to the tax preparer. Further, Defendants' denial of their receipt of the related Forms K-1 is disingenuous, as those forms, that were produced to Plaintiffs by Defendants in discovery and attached as part of their signed tax returns, reflect receipt at Defendants' home mailing address. *See* K-1s attached hereto as Exhibit 3. In further support of the existence of a partnership, Defendant Marvin Wilcox signed a

letter to his brokerage firm, AXA Advisors, on July 7, 2004, recognizing that he was partners with Schubert and that he entered the partnership at his own risk. *See* Letter attached as Exhibit 4.

Defendants also argue their “innocence” by claiming they received written notes of account balances from Schubert. Defendants provide no documentary support for their claim. The written notes were in actuality “sticky notes” on which Schubert purportedly wrote a daytrading account balance. *See* Exhibit 5, Marvin Wilcox Transcr. 68:6-11 and Pamela Wilcox Transc. 19:1-25, 20:1.

Plaintiffs maintain that Defendants never saw any record of or relating to a day trading account. Black’s Law Dictionary defines a “record” as:

a written account of some act, transaction, or instrument, drawn up, under authority of law, by a proper officer, and designed to remain as a memorial or permanent evidence of the matters to which it relates.

A reasonable person, particularly a former bank officer, would not conclude that a “sticky note” meets this definition and that a “sticky note” is a true record of legitimate securities activity. Thus, the Defendants’ response does not establish their innocence as investors.

## **II. Plaintiffs are entitled to judgment as a matter of law.**

Plaintiffs contend that the net profits received by Defendants were not in satisfaction of an antecedent debt. Therefore, in accord with holdings in the line of cases adopted by the Oklahoma Supreme Court, any profit received by Defendants was unreasonable. *Oklahoma Department of Securities, et al. v. Blair, et al.*, 2010 OK 16. Contrary to Defendants’ suggestion, there is no need for additional discovery to determine whether Defendants contracted with Schubert for a reasonable interest rate. Defendants admittedly do not recall whether they contracted for a particular interest rate

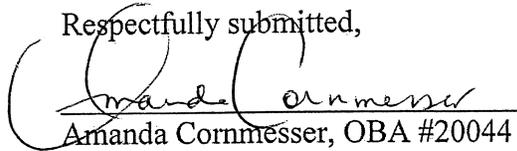
and have provided no documentation that they contracted for such a rate. There is no evidence in the record of the existence of an antecedent debt. Based on *Blair* and in light of the speculative nature of options and day trading, Defendants can have no expectation of a return of any amount.

In reality, Defendants were involved in an extensive check kite. The payments they received were both abnormally high and unusually consistent, i.e. almost daily they gave a check to Schubert and received a check in return that was for a greater amount. See BKD Report, Exhibit 1; see also Affidavit of Dan Clarke, Exhibit G ¶¶11-12 to the Motion. Participation in a check kite cannot create an expectation of a profit of any size or amount. Clearly, any net profit received was not in satisfaction of an antecedent debt. See BKD Report, Exhibit 1.

### **Conclusion**

It is undisputed that Defendants received net fictitious profits of \$509,505 that were paid from the Commingled Funds. Furthermore, the funds that Defendants Wilcox received constitute an “unreasonably high dividend” under the standard recently created in *Blair*. Defendants have failed to provide sufficient responses and evidence to refute the Facts as presented with evidence by Plaintiffs. “When on the basis of established facts, the plaintiff is entitled to summary judgment as a matter of law, the defendant contending and arguing that there is a genuine issue of material fact cannot and will not make it so.” *Weeks v. Wedgewood Village, Inc.*, 554 P.2d 780 citing *Aktiengesellschaft Der Harlander, etc. v. Lawrence Walker Cotton*, 288 P.2d 691, 697 (1955). Based on their *Motion for Summary Judgment*, and this reply, summary judgment should be granted to the Plaintiffs.

Respectfully submitted,

  
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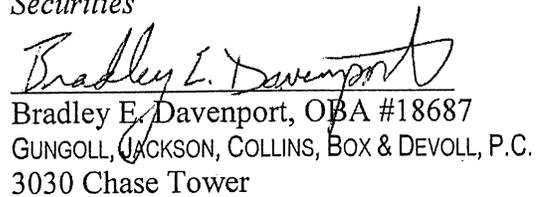
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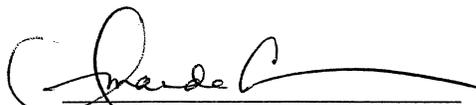
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*Attorney for Plaintiff/Receiver, Douglas L. Jackson*

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of September 2010, I mailed a true and correct copy of the above and foregoing instrument, postage pre-paid to:

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