

IN THE DISTRICT COURT OF OKLAHOMA COUNTY

STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

OKLAHOMA DEPARTMENT OF)
SECURITIES ex. rel. IRVING L.)
FAUGHT, ADMINISTRATOR;)

JUL 27 2005

PATRICIA PRESLEY, COURT CLERK
by _____
Deputy

Plaintiffs,)

vs.)

Case No.: CJ-2005-3799

Judge Vicki Robertson

BARRY POLLARD AND)
ROXANNE POLLARD,)

Defendants.)

DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' PETITION

COMES NOW Defendants, Barry Pollard and Roxanne Pollard (hereinafter "Pollards") and request this Court grant their Motion to Dismiss Plaintiffs', Oklahoma Department of Securities (hereinafter "ODS") Petition and state:

ARGUMENT

The ODS fails to establish that it has any authority to bring this action against the Pollards. Being that the Pollards are innocent investors of a *Ponzi Scheme*, obviously they are the inappropriate party to sue. A *Ponzi Scheme* was defined by the United States Court of Appeals for the Tenth Circuit *In re Hedged-Investments Assoc., Inc.*, 84 F.3d 1281, 1282 n.1 (10th Cir. 1996), as follows:

A Ponzi scheme is a fraudulent investment scheme in which "profits" to investors are not created by the success of the underlying business venture but instead are derived fraudulently from the capital contributions of other investors. *Sender v. Nancy Elizabeth R. Heggland Family Trust (In re Hedged-Investments Assoc., Inc.)*, 48 F.3d 470, 471 n.2 (10th Cir. 1995).

(Emphasis supplied.).

This case should be dismissed because the ODS lacks standing to sue, the ODS lacks capacity of a party to sue, the Petition fails to state a claim upon which relief may be granted, and venue is improper in Oklahoma.

PROPOSITION

I. The ODS lacks standing to sue the Pollards.

The ODS has not established its authority to bring this lawsuit against the Pollards. In *Lujan v. Defenders of Wildlife*, 504 U.S. 555, —, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351, 364 (1992), the United States Supreme Court explained that at a minimum standing contains the following three elements:

First, the plaintiff must have suffered an "injury in fact"— an invasion of a legally-protected interest which is (a) concrete and particularized, ... and (b) "actual or imminent, not 'conjectural' or hypothetical,"

... Second, there must be a causal connection between the injury and the conduct complained of — the injury has to be "fairly ... trace[able] to the challenged action of the defendant, **and not ... th[e] result [of] the independent action of some third party not before the court.**"

Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." (citations and footnote omitted) *Id.* at —, 112 S.Ct. at 2136, 119 L.Ed.2d at 364.

Clearly the ODS is not the aggrieved party. The ODS has not suffered a direct or immediate harm from the actions of any of the Pollards. Furthermore, the ODS cannot claim aggrieved person status when the very wrongs that led to the filing of this lawsuit were carried

out by Marsha Schubert and others. There is nothing establishing the ODS' authority to bring this claim against the Pollards.

The Pollards were innocent investors of Marsha Schubert's scheme. The Pollards did not knowingly invest their funds with the intent of benefitting at the expense of other similarly situated investors. Furthermore, the ODS has not identified these injured "investors".

II. The ODS lacks the legal capacity to bring this lawsuit.

The ODS has failed to cite any authority establishing its legal capacity to bring this lawsuit against the Pollards. The ODS has the authority to enforce the Oklahoma Securities Laws against "wrongdoers" pursuant to 71 O.S. § 1-603. Under this statute, the "Administrator" may bring a lawsuit against individuals and permits the "Administrator" to enjoin and force compliance of the Oklahoma Security laws.

More specifically Section 1-603(A) states the following:

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 issued under this act or constituting a dishonest or unethical practice or that 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.

Section 1-603(A) requires and is limited to a showing of wrongdoing in violation of the Oklahoma securities laws. The ODS admits that Defendants are innocent victims of a *Ponzi*

Scheme. It thus follows that the ODS lacks capacity to bring any viable causes of action against the Pollards.

III. The Petition fails to state a claim upon which relief can be granted and should be dismissed.

The ODS classifies this case as the above described *Ponzi Scheme*. However, the ODS fails to establish that the Pollards, as investors, committed fraud or knowingly participated in a *Ponzi Scheme*. The ODS basis its claims on the unlawful conduct of Marsh Schubert, one who is not a party to this case.

The ODS fails to provide any authority in support of its standing to bring this action against the Pollards, who innocently invested their money with Marsh Schubert and/or her agents, representatives, and associated entities. However, the ODS attempts to directly roll the blame over onto the innocent investor because Schubert is insolvent. By the ODS' arguing that the Pollards were victims of the scheme, it clearly relinquishes the Pollards of any wrongful conduct and resulting liability. Therefore, since Pollards had no wrongdoing in the resulting *Ponzi Scheme*, the ODS fails to state a claim upon which relief may be granted.

III. Venue is improper in Oklahoma County.

The Defendants are residents of Garfield County. Furthermore, at all times relevant to this case, all contacts relating to this matter occurred in Garfield County. Therefore, this case should be dismissed from Oklahoma County on the basis of improper venue.

CONCLUSION

WHEREFORE, the Defendants, Barry and Roxanne Pollard, respectfully request this Court dismiss the Oklahoma Department of Securities' Petition in its entirety, and to grant such other relief as it deems just and proper in equity and law.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on the 27th day of July, 2005, true and correct copies of the above and foregoing were mailed by first class mail, postage prepaid, to the following:

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