

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

Oklahoma Department of Securities)
ex rel. Irving L. Faught,)
Administrator;)
)
Plaintiff,)
)
v.)
)
Barry Pollard and Roxanne Pollard,)
)
Defendants.)

Case No. CJ-2005-3799

**PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
AGAINST DEFENDANTS BARRY AND ROXANNE POLLARD
AND BRIEF IN SUPPORT**

Plaintiff, Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator (Plaintiff), pursuant to Rule 13 of the Rules for the District Courts of Oklahoma, moves for summary judgment against Defendants Barry and Roxanne Pollard (Defendants Pollard). Initially, this matter was consolidated with Case No. CJ-2005-3796 before the Honorable District Judge Patricia Parrish. When Defendants Pollard moved to transfer this case due to a perceived conflict, Judge Parrish ordered the matter relating transfer to this Court.

There is no dispute that Defendants Pollard received funds from Marsha Schubert d/b/a Schubert and Associates (Marsha Schubert) for which they did not give reasonably equivalent value and that they received this financial benefit at the expense or to the detriment of others who were drawn into Marsha Schubert's "Ponzi" scheme. Based on the undisputed facts, the attached evidentiary materials, and legal authority set forth herein, summary judgment should be entered against Defendants Pollard.

**STATEMENT OF MATERIAL FACTS AS TO WHICH THERE
IS NO SUBSTANTIAL CONTROVERSY**

1. Marsha Schubert operated a fraudulent "Ponzi" scheme in violation of federal and state laws including 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). See Order of Permanent Injunction attached as 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 attached as Exhibit B, *United States of America v. Marsha Kay Schubert*, CR 05-078; Marsha Schubert's State Guilty Plea attached as Exhibit C, *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).

2. Marsha Schubert's fraudulent scheme began as early as December 1999, and continued until October 2004. See Affidavit of Dan Clarke, Exhibit D, ¶ 4. Marsha Schubert, promising large financial returns, accepted funds in excess of Two Hundred Million Dollars (\$200,000,000) for purported investment (Schubert Investment Program). See Affidavit of Dan Clarke, Exhibit D, ¶ 5. Marsha Schubert did not make the investments that she represented 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. Approximately 87 persons lost in excess of Nine Million Dollars (\$9,000,000) 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) in the "Ponzi" scheme (Relief Defendants). *See* Affidavit of Dan Clarke, Exhibit D, ¶ 9.

3. At all times material hereto, Marsha Schubert owned and/or controlled several bank accounts including account number 34-7477 at Farmers and Merchants Bank (F&M Bank) in Crescent, Oklahoma (Schubert F&M Account), account number 35-9424 at F&M Bank (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 (Schubert BancFirst Account). *See* Affidavit of Dan Clarke, Exhibit D, ¶ 3.

4. The majority of the proceeds obtained by Marsha Schubert through the Schubert Investment Program were deposited into the Schubert F&M Account where the proceeds were commingled with proceeds of bank loans, and Marsha Schubert's personal funds, such as commission and royalty checks. A portion of the proceeds was deposited into 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 Account, the Farm Account and the Schubert BancFirst Account shall hereinafter be referred to as "Commingled Funds."

5. Defendant Barry Pollard deposited money into a legitimate brokerage account with AXA Advisors, LLC (AXA Advisors), through its clearing agent, Pershing, LLC (Pershing). *See* Affidavit of Carol Gruis, Exhibit E; checks to AXA Advisors and Pershing, Exhibit F. Marsha Schubert was the AXA Advisors representative assigned to the account. *See* AXA Advisors Statement for Barry Pollard dated April 1, 2000 through April 28, 2000, Exhibit N. All monies received into the AXA Account of Defendant Barry Pollard, to include his principal investment amount of \$20,000, market gains, dividends, and incoming wires, are

accounted for through purchases of securities, market losses, a margin debit balance, and a cash withdrawal by Defendant Barry Pollard. *See* Exhibit E, ¶ 10.

6. From April 2000 through October 2004, Defendants Pollard paid a total of Fifty-Nine Thousand One Hundred Ten Dollars and Thirty-Five Cents (\$59,110.35) directly to Marsha Schubert and/or Schubert and Associates, which was deposited into the Commingled Funds. *See* Accountant's Compilation Report prepared by BKD, LLP (BKD) for Defendants Barry and Roxanne Pollard, Exhibit G.

7. From April 2000 through October 2004, Defendants Pollard received a total of Four Hundred Forty-Five Thousand Two Hundred Sixty-Eight Dollars and Six Cents (\$445,268.06) from the Commingled Funds. *See* Exhibit G.

8. As a result of the payments described in paragraphs 6 and 7 above, Defendants Pollard received a net gain of \$386,158.06. *See* Exhibit G.

9. Defendant Barry Pollard admits that the accounting compiled by BKD is correct. *See* Transcr. Depo. Barry Pollard 25:3-12 (February 15, 2007), Exhibit H.

10. Defendants Pollard purchased life insurance policies from AXA Equitable Life Insurance Company (AXA Equitable). Beginning in 2001, Marsha Schubert used funds obtained from other persons to make the premium payments on behalf of Defendants Pollards for two of the AXA Equitable policies. *See* Transcr. Depo. Barry Pollard 34:19-21 (February 15, 2007), Exhibit G.

11. Marsha Schubert represented to Defendant Barry Pollard that the premium payments were made from the profits of a purported investment account that Marsha Schubert opened on behalf of Defendants Pollard. *See* Transcr. Depo. Barry Pollard 21:9-21 (February 15,

2007), Exhibit H. Such account was fictional. *See* Transcr. Depo. Barry Pollard 24:3-6 (February 15, 2007), Exhibit H.

12. Defendant Barry Pollard received notice from AXA Equitable that the two policies referenced in paragraph 11 above would lapse if he did not pay the required premiums. *See* Notices of Policy Lapse, Exhibit I. When Defendant Barry Pollard failed to pay the required premiums, the policies were terminated by AXA Equitable. *See* Notices of Policy Termination, Exhibit J. Defendant Barry Pollard acknowledged that he no longer needed one of the policies and allowed it to lapse. *See* Transcr. Depo. Barry Pollard 61:2-8 (March 8, 2007), Exhibit K.

13. During the “Ponzi” scheme years, Marsha Schubert did not make premium payments on behalf of Defendants Pollard on any other life insurance policies. *See* Affidavit of Dan Clarke, Exhibit D, and Exhibit G.

14. Defendants Pollard did not provide Marsha Schubert and/or Schubert and Associates any goods, services, labor, or other consideration during the time period of January 1, 2000 through October 14, 2004. *See* Excerpt of *Barry and Roxanne Pollards’ Response to Plaintiffs’ First Set of Discovery Requests* attached as Exhibit L, the verified Response to Interrogatory No. 20 at p.11.

ARGUMENTS AND AUTHORITIES

PROPOSITION I **PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE IS NO SUBSTANTIAL CONTROVERSY AS TO CERTAIN 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. ANN. 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.

PROPOSITION II
DEFENDANTS POLLARD WERE UNJUSTLY ENRICHED TO THE
DETRIMENT OF SHORT INVESTORS

Defendants Pollard were unjustly enriched by the payments they received from Marsha Schubert. The Supreme Court of Oklahoma has held that “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.” *McBride v. Bridges*, 1950 OK 25, 215 P.2d 830. To recover for unjust enrichment, there must be enrichment to another coupled with a resulting injustice. *See Teel v. Public Serv. Co.*, 1985 OK 112, 767 P.2d 391, 398.

Unjust enrichment recovery depends upon a showing the defendants received money that, in equity and good conscience, they ought not be allowed to retain. *See French Energy, Inc. v. Alexander*, 818 P.2d 1234, 1991 OK 106. The knowledge, innocence or beliefs of an investor are not relevant to the determination of whether an investor has been unjustly enriched. Regardless of fault, retention of money that does not belong to the defendant is particularly offensive to principles of equity. *Id.* at 1237. In fact, the Seventh Circuit affirmed summary judgment as to five innocent religious organizations who had received charitable donations from a “Ponzi” scheme perpetrator and had to return the money they had received. *See Scholes v. Lehmann*, 56 F.3d 750. To allow defendants to keep money that does not belong to them in

exchange for nothing would result in them being substantially and unjustly enriched. *See French Energy* at 1238.

Defendants Pollard received the benefit of fictitious profits totaling \$386,158 from Marsha Schubert, despite the fact that they did not provide anything of reasonably equivalent value to Marsha Schubert, and the money was not generated from any real or legitimate investment. *See* Affidavit of Dan Clarke, Exhibit D, ¶¶ 7 and 13; BKD Accounting for Defendants Pollard, Exhibit G. The receipt by Defendants Pollard of these unearned profits benefited or enriched them. In addition, the \$386,158 windfall Defendants Pollard received was literally at the expense of the creditors and claimants of Marsha Schubert, including the 87 “Ponzi” scheme victims. The undisputed facts pertaining to Defendants Pollard present a textbook example of unjust enrichment. Therefore, Plaintiff is entitled to judgment as a matter of law on its claim of unjust enrichment.

PROPOSITION III

**THE PLAINTIFF IS ABLE TO SEEK THE RETURN OF MONEY PAID OUT TO
RELIEF DEFENDANTS BY MARSHA SCHUBERT**

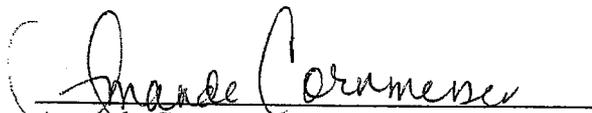
Judge Parrish has ruled in Case No. CJ-2005-3796 that, under the theory of unjust enrichment, the Plaintiff is entitled to seek disgorgement for the money paid out by Marsha Schubert to relief defendants in excess of value exchanged. *See* Order Granting Summary Judgment against Robert W. Mathews, Exhibit M. The Court ruled there were no genuine issues of material fact pertaining to Plaintiff’s unjust enrichment cause of action and approximately 20 motions for summary judgment were granted in Plaintiff’s favor. Plaintiffs should be entitled to seek disgorgement from Defendants Pollard in this case. *See* Rule 11 of the Oklahoma District Court Rules.

CONCLUSION

The facts stated herein and evidentiary materials attached hereto establish that no genuine issue of material fact exists regarding the Plaintiff's cause of action for unjust enrichment, and as such, Plaintiff is entitled to summary judgment against Defendants Pollard.

WHEREFORE, Plaintiff Department prays that this Court enter summary judgment against Defendants Pollard, jointly and severally, in the amount of \$386,158, plus prejudgment interest on that liquidated amount, postjudgment interest at the statutory rate accruing from the date judgment is entered until paid in full, the costs of this action, and any other relief the Court may deem just and equitable.

Respectfully submitted,

A handwritten signature in cursive script, appearing to read "Amanda Commesser", is written over a horizontal line.

Amanda Commesser, OBA #20044

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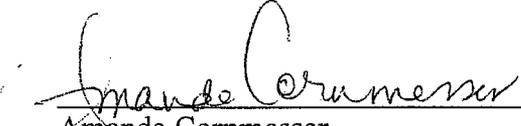
Department of Securities

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 29th day of March, 2007, a true and correct copy of the above and foregoing was mailed by U.S. Mail, with postage prepaid thereon, addressed to:

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