

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, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
FARMERS & MERCHANTS BANK, et al. )  
 )  
Defendants, )  
 )  
and )  
 )  
ROBERT LYNN POURCHOT, Trustee of )  
the Robert Lynn Pourchot Trust, et al., )  
 )  
Intervenors. )

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Case No. CJ-2006-3311

Hearing Date: 6/5/09  
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Judge: Parrish

**DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT  
AGAINST PLAINTIFF AND BRIEF IN SUPPORT THEREOF**

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INC., JOHN V. ANDERSON and JOHN TOM  
ANDERSON**

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Defendants Farmers & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson and John Tom Anderson (collectively referred to as “Defendants”) respectfully move this Court to grant this Motion for Partial Summary Judgment (“Motion”) against Plaintiff, Oklahoma Department of Securities (“ODS”). In support hereof, Defendants submit the following Brief in Support of its Motion.

### **INTRODUCTION**

ODS’s civil enforcement action against Defendants in this case is unusual and unprecedented on a variety of levels. Defendants are a state chartered bank (referred to herein as “F&M”) and certain individual officers of F&M, all of whom are located in Crescent, Oklahoma. As a state chartered bank, Defendants’ banking operations are not subject to ODS’s supervision or regulation.

Defendants are not members of a national securities association, nor are they licensed or registered to conduct securities related business in Oklahoma or elsewhere. Defendants do not provide advice or analysis on securities; Defendants do not provide research or opinions on securities or securities markets; and Defendants do not receive compensation in any form for providing advice on securities. Simply put, Defendants are not engaged in the regular activities of the securities industry and, therefore, are neither regulated by ODS nor subject to ODS scrutiny, investigation, or enforcement based upon standards solely applicable to registered securities professionals.

Despite the foregoing, ODS has filed this civil enforcement action against Defendants based upon allegations that Defendants materially participated and/or materially aided in the

sale of securities made by one of its depositors, Marsha Schubert (“Schubert”)<sup>1</sup> to third parties with whom she had an investment relationship. However, discovery has failed to disclose any evidence of material participation or aid by Defendants in the purported sales of securities Schubert made to short investors by means of untrue statements of material fact.

### **FACTUAL BACKGROUND**

Three investors who lost money through Schubert are Lenard Briscoe, L&S Pollard Farms, LLC, and the Williams R. Mathews Trust lost money through “investing” with Schubert (for the purposes of this Motion referred to as the “short investors”).<sup>2</sup>

#### ***Lenard Briscoe***

By way of background, Lenard Briscoe is a resident of Kingfisher, Oklahoma. (*See Deposition of Lenard Briscoe (“Briscoe Depo.”)*, p. 1, lines 14-15, attached hereto as Exhibit “3”). Mr. Briscoe maintained an account through the branch office of AXA Advisors, LLC (“AXA”) and later Wilbanks Securities, Inc., located in Crescent, Oklahoma, which was staffed by Schubert. (*See Statement of Claim in Lenard Briscoe, et al. v. AXA Advisors, et al, Before the National Association of Securities Dealers*, ¶ 1, attached hereto as Exhibit “4”).

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<sup>1</sup> At all relevant times, Schubert was a licensed broker-dealer agent and investment adviser representative of AXA Advisors, LLC and later Wilbanks Securities.

<sup>2</sup> These “short investors” are the only investors that have been deposed by Defendants at this time. However, to a person, they have spoken with one voice in their vehement denial of any allegation that Defendants participated or aided in any way with respect to their individual securities sales transactions with Schubert. In fact, these investors have never spoken with anyone at ODS regarding the facts and circumstances surrounding their individual sales transactions with Schubert. ODS apparently does not believe such information and testimony is relevant for purposes of determining Defendants’ joint and several liability. For this reason, and because Defendants anticipate that the evidence will be similar for all other short investors, Defendants move for partial summary judgment relating to the claims asserted by ODS for the benefit of these three (3) short investors. By doing so, Defendants hope to resolve an overarching question that will be applicable to all other short investors for whom ODS seeks an order of restitution for their “damages.”

Until April 27, 2004, Schubert served as both a registered representative and investment advisor of AXA. (*Statement of Claim*, Ex. 4, ¶ 2). Starting in May of 2004, Schubert served the same roles on behalf of Wilbanks. (*Id.*).

Mr. Briscoe began investing with AXA, through Schubert, in August 2003. (*Briscoe Depo.*, Ex. 3, pp. 11 – 14, p. 15, lines 1-20.) Schubert invested in Harley Davidson stock for Mr. Briscoe and made a few other trades for him that “made a little bit of money through AXA.” (*Briscoe Depo.*, Ex. 3, p. 15, lines 11-17). On May 19, 2004, Mr. Briscoe was contacted via telephone by Schubert, and was asked by Schubert if he had any “extra money” since she had a “hot deal” for him on a stock. (*Briscoe Depo.*, Ex. 3, p. 20, lines 13-21.) Mr. Briscoe could not recall the exact nature of the “hot deal” or if Schubert even told him what it was. (*Briscoe Depo.*, Ex. 3, p. 20, lines 17-18.) However, based upon his telephone conversation with Schubert, Mr. Briscoe wrote a check to Schubert & Associates for \$25,000.00. (*Briscoe Depo.*, Ex. 3, p. 20, lines 22-25; p. 21, lines 1; and *see Check No. 3241 dated 05/19/04 of Lenard or Melba Briscoe in the amount of 25,000.00*, attached hereto as Exhibit “5.”) Schubert instructed Mr. Briscoe to write the check to Schubert & Associates. (*Briscoe Depo.*, Ex. 3, p. 20, lines 24-25; p. 21, line 1.)

After this investment, Schubert contacted Mr. Briscoe “three or four times” and told him that his \$25,000 investment “was now 55 and 60 [thousand]. Just going through the roof.” (*Briscoe Depo.*, Ex. 3, p. 21, lines 20-23.) However, Mr. Briscoe never received a statement from Schubert that verified Schubert’s statements of how well his \$25,000.00 investment was doing, nor did he ask (*Briscoe Depo.*, Ex. 3, p. 22, lines 1-22). Mr. Briscoe testified that Schubert was essentially “baiting” him to make additional investments of

monies with her by touting the returns she was purportedly making for him on the initial \$25,000. (*Briscoe Depo.*, Ex. 3, p. 21, lines 20-23.)

Four or five months later, Schubert called Mr. Briscoe again and said that “[s]he had another hot deal.” (*Briscoe Depo.*, Ex. 3, p. 21, lines 4-12.) Again, Schubert did not tell Mr. Briscoe what the “hot deal” was in; however, based upon this statement, Mr. Briscoe wrote another check to Schubert & Associates on October 4, 2004, for \$100,000.00. (*Briscoe Depo.*, Ex. 3, p. 21, lines 4-14; and see *Check No. 3369 dated 10/04/04 of Lenard or Melba Briscoe in the amount of \$100,000.00*, attached hereto as Exhibit “6.”) The two checks made payable to Schubert & Associates, totaling \$125,000.00, were not actually invested by Schubert, but were diverted by her to something else. (*Briscoe Depo.*, Ex. 3, p. 20, lines 2-9.) Mr. Briscoe never received any money from Schubert & Associates. (See *Proof of Claim of Lenard Briscoe*, attached hereto as Exhibit “7.”) Mr. Briscoe sued both AXA and Wilbanks in arbitration for the loss of his \$125,000.00, wherein he claimed that AXA and Wilbanks were at fault for not detecting Schubert’s scheme. (*Statement of Claim*, Ex. “4”; *Briscoe Depo.*, Ex. 3, p. 24, lines 16-25; p. 25, lines 1-16.)

#### ***L&S Pollard Farms, LLC***

Schubert’s father and brother, Loren Pollard and Stephen Pollard, respectively, do business as L&S Pollard Farms, LLC (“L&S”). (See *Deposition of Stephen Pollard (“S. Pollard Depo.”)*, p. 5, lines 24-25; p. 6, line 1, 114-18, attached hereto as Exhibit “8.”) L&S is a farming and ranching operation that is run out of Hennessey, Oklahoma. (*S. Pollard Depo.*, Ex. 8, p. 5, lines 13-18). L&S is a domestic limited liability company that is no

longer in good standing with the Oklahoma Secretary of State.<sup>3</sup> (*See Oklahoma Secretary of State Sooner Access Document for L&S Pollard Farms, L.L.C.*, attached hereto as Exhibit “9.”)

Stephen Pollard, on behalf of L&S, signed over checks from third parties to Schubert for investment purposes. (*S. Pollard Depo.*, Ex. 8, p. 14, lines 2-7.) Stephen Pollard believed that Schubert worked for AXA and Wilbanks during the time period of his investments. (*S. Pollard Depo.*, Ex. 8, p. 33, lines 11-14.) Schubert advised him that she was “going to invest in options, and that we would be making big money.” (*S. Pollard Depo.*, Ex. 8, p. 15, lines 19-25.) Between May 31, 2004 and October 1, 2004, L&S invested approximately \$248,464.05 with Schubert. (*See Proof of Claim of L&S Pollard Farms, L.L.C.*, attached hereto as Exhibit “10”; *S. Pollard Depo.*, Ex. 8, p. 14, lines 8-25; p. 15, lines 1-18.) On one occasion during that time period, Schubert showed Stephen Pollard a computer screen in her office that purportedly showed Mr. Pollard how well L&S’s investments were performing, thereby causing him to invest more money with Schubert. (*S. Pollard Depo.*, Ex. 8, p. 32, lines 8-25; p. 33, lines 1-25.) Stephen Pollard eventually discovered that Schubert never made any investments on behalf of L&S with AXA. (*S. Pollard Depo.*, Ex. 8, p. 22, lines 24-25; p. 23, lines 1-2; p. 24, lines 20-25; *Proof of Claim*, Ex. 10.)

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<sup>3</sup> Under Oklahoma law, a domestic limited liability company that is not in good standing may not maintain an action in court, nor may any assignee of the domestic limited liability company maintain an action in court. *See* 18 O.S. § 2055.2(G). Thus, ODS may not do indirectly what L&S is prohibited from doing directly: seek recovery in court against Defendants for the benefit of a domestic limited liability company that is not in good standing.

### *Williams R. Mathews Trust*

In 2000, William R. Mathews transferred his trust account to AXA and Marsha Schubert. (*See Statement of Claim (excluding exhibits) in W. R. Mathews, et al. v. AXA Advisors, L.L.C., Before the National Association of Securities Dealers Statement of Claim*, ¶¶ 1, 11, attached hereto as Exhibit “12.”). Due to his father’s incapacitation, Bob Mathews was appointed co-trustee of his father’s trust – the William R. Mathews Trust – in 2002 or 2003 along with his two sisters. (*See Deposition of Robert Mathews (“Mathews Depo.”)*, p. 19, lines 16-23; p. 23, lines 9-14, attached hereto as Exhibit “13.”)

As co-trustees, Bob Mathews and his sister (Sharon Allen) transferred trust money to Schubert for investment purposes. (*Mathews Depo.*, Ex. 13, p. 23, lines 19-22; p. 24, lines 11-15.) Specifically, in the summer of 2004, Bob Mathews and his sister Sharon Allen wrote trust checks to Schubert & Associates for investment. (*Mathews Depo.*, Ex. 13, pp. 59 – 62; *see also Proof of Claim of William R. and Betty R. Mathews Trusts*, attached hereto as Exhibit “14.”) These checks represented the proceeds from the sale of a home and farm owned by William Mathews. (*Id.*) Bob Mathews does not recall having any conversation with Marsha Schubert with respect to how the trust money was going to be invested. (*Mathews Depo.*, Ex. 13, p. 73, lines 1-18.)

Against this factual backdrop, the undisputed evidence demonstrates that Defendants did not: (1) communicate with the short investors; (2) disseminate information to the short investors; (3) solicit the short investors; (4) negotiate the terms of sale with the short investors; (5) stand to gain if investments were made with Schubert by the short investors. In addition, Defendants were not present during the short investors’ meetings/conversations with Schubert, and had no knowledge of any communications taking place and similarly did

not know what Schubert was telling or not telling them during their communications. Based on this undisputed record and controlling Oklahoma law, Defendants cannot – as a matter of law – be found to have materially participated or materially aided in the securities sales between Schubert and the short investors.

The banking transactions relied upon by ODS to purportedly create liability for Defendants simply did not occur during an actionable sale of a security to a short investor. To adopt ODS's unprecedented interpretation of the scope of conduct prohibited by the Oklahoma Securities Act ("OSA") would not only expand liability beyond the plain language of the statutes, but it would also introduce new and far-reaching duties and uncertainties for those engaged in day-to-day banking activities.

#### **STATEMENT OF UNDISPUTED MATERIAL FACTS**

1. ODS is seeking an order of restitution against Defendants "for the benefit of all participants in the Purported Investment Program who transferred money to Marsha Schubert for the purpose of making securities investments on their behalf and who suffered damages from their participation in the Purported Investment Program." *See Petition*, p. 60, attached hereto as Exhibit "1."

2. Three of the investors who lost money through Schubert are Lenard Briscoe, L&S Pollard Farms, LLC, and the Williams R. Mathews Trust. *See Exhibit 1-A to BKD Report*, attached hereto as Exhibit "2."

3. Mr. Briscoe never spoke with anyone at F&M regarding Schubert or his investments with her. (*Briscoe Depo.*, Ex. 3, p. 26, lines 5-9.) Mr. Briscoe never talked to John V. Anderson or John Tom Anderson regarding his investments with Schubert. (*Briscoe*

*Depo.*, Ex. 3, p. 26, lines 10-12.) Mr. Briscoe has never even been to F&M Bank (*Briscoe Depo.*, Ex. 3, p. 26, lines 1-2.)

4. Mr. Briscoe “had no dealings with the bank” and was not aware of Schubert’s banking relationships during the time of his investments with Schubert because it was not important to his investment decision. (*Briscoe Depo.*, Ex. 3, p. 33, lines 10-12, 22-25; p. 34, lines 1-5.) Mr. Briscoe stated that F&M and the Andersons did not have anything to do with his decision to purchase securities or invest with Schubert. (*Briscoe Depo.*, Ex. 3, p. 33, lines 13-18.) Mr. Briscoe further testified that neither F&M nor the Andersons did anything that aided or assisted in his purchase of securities from Schubert, nor does he have any knowledge that anyone at F&M was aware of his investments. (*Briscoe Depo.*, Ex. 3, p. 33, lines 3-7, 13-21; p. 35, line 25 – p. 36, lines 1-4.)

5. Neither Stephen Pollard nor Loren Pollard ever spoke with anyone at F&M Bank about Schubert or making investments with Schubert. (*S. Pollard Depo.*, Ex. 8, p. 11, lines 4-6, 14-17; *see Deposition of Loren Pollard (“L. Pollard Depo.”)*, p. 7, lines 17-22, attached hereto as Exhibit “11.”) No one from F&M encouraged Stephen Pollard or Loren Pollard to invest with Schubert. (*S. Pollard Depo.*, Ex. 8, p. 11, lines 18-20; *L. Pollard Depo.*, Ex. 11, p. 8, lines 24-25; p. 9, lines 1-4). The decision by L&S to invest with Schubert was made jointly between Stephen Pollard and Loren Pollard. (*S. Pollard Depo.*, Ex. 8, p. 11, lines 21-24.) Stephen Pollard and Loren Pollard both testified that neither F&M nor the Anderson’s participated or aided in any way with respect to Schubert’s sales of securities to L&S. (*S. Pollard Depo.*, Ex. 8, p. 12, lines 1-11; p. 31, lines 2-21; *L. Pollard Depo.*, Ex. 11, p. 9, lines 5-8.) Stephen and Loren Pollard further testified that, to their knowledge, neither F&M Bank nor the Anderson’s were even aware of L&S’s investments

with Schubert. (*S. Pollard Depo.*, Ex. 8, p. 31, lines 9-13; *L. Pollard Depo.*, Ex. 11, p. 7, lines 17-22.)

6. Bob Mathews holds AXA and Schubert responsible for the losses suffered by his father's trust. (*Statement of Claim*, Ex. 12; *Proof of Claim*, Ex. 14; *Mathews Depo.*, Ex. 13, p. 43, line 21 – p. 44, line 1; p. 45, lines 8 – 11; p. 47, lines 6-18; p. 52 lines 21-25; p. 62, lines 7-9; p. 65, lines 11-19.) F&M Bank and the Anderson's did not aid Bob Mathews or his father in the purchase of securities for the trust; nor did F&M Bank or the Anderson's participate in the sale of securities to the trust (*Mathews Depo.*, Ex. 13, p. 72, line 21 – p. 73, line 25.) Further, Bob Mathews has no knowledge that the Bank was even aware of his father's investments with Schubert. (*Mathews Depo.*, Ex. 13, p. 73, lines 16-19.) Mathews never spoke to the Anderson's or anyone at F&M Bank regarding Schubert. (*Mathews Depo.*, Ex. 13, p. 48, lines 13-18.)

7. Defendants had no knowledge of any communications, telephone conversations or meetings between Marsha Schubert and Lenard Briscoe, Stephen Pollard, Loren Pollard, or any trustee of the William R. Mathews Trust wherein any matter was discussed. (*See Affidavits of John Tom Anderson and John V. Anderson*, attached as Exhibits "15" and "16," respectively.) Further, Defendants did not know what Marsha Schubert communicated or failed to communicate to Lenard Briscoe, Stephen Pollard, Loren Pollard, or any trustee of the William R. Mathews Trust during any of their communications. *Id.*

8. The financial analysis prepared by the accounting firm of BKD reflects that any funds received by Schubert, which caused her to be unjustly enriched, were dissipated by Schubert to pay a variety of expenses and/or bills incurred by Schubert or a business entity controlled by Schubert for such things as groceries, merchandise, utilities, car payments,

trips, etc. Ex. “4,” ¶ 4; see also *Excerpt Transcript of Proceedings in Case No. FD-2005-297 dated 02/08/06*, p. 8, lines 11-14, attached hereto as Exhibit “17”; Ex. “5,” p. 27, lines 19-25.

### STANDARD

Rule 13 of the Oklahoma Rules for District Courts governs summary judgments. The main purpose of the procedure is to avoid useless trials while achieving a final determination on the merits. *Union Oil of California v. Board of Equalization of Beckham County*, 1996 OK 40, 913 P.2d 1330. Summary judgment is appropriate if there is no substantial controversy as to any material fact. *Id.*; *Copeland v. Tela Corp.*, 1999 OK 81, 996 P.2d 931, 932. When the evidentiary materials, viewed as a whole, eliminate all factual disputes relative to a question of law, summary judgment is should be granted on that issue. See *Dixon v. Bhuiyan*, 2000 OK 56, 10 P.3d 888, 890. In this case, partial summary judgment is appropriate in favor of Defendants in light of the fact that, as demonstrated below, there is no genuine issue of material fact relating to Defendants’ purported joint and several liability under the Oklahoma Securities Act and Defendants are entitled to partial judgment as a matter of law on that issue.

### ARGUMENT AND AUTHORITIES

**Proposition I: Partial Summary Judgment Should Be Granted To Defendants Since The Undisputed Material Facts Demonstrate That Defendants Did Not Materially Participate Or Materially Aid In Schubert’s Securities Sales To The Short Investors**

**A. Standards Governing Statutory Construction**

The source of Defendants’ joint and several liability in this case must be found, if at all, in the statutory text of the relevant provision(s) of the Oklahoma Securities Act. See 71 O.S. § 408(b) of the Predecessor Act and 71 O.S. § 1-509(G)(5) of the Successor Act. When construing a statute that is clear, a court has “no authority to transcend or add to the statute,

[and the statute] may not be enlarged, stretched, or expanded, or extended to cognate or related cases not falling within its provisions.” *Id.* (quoting *Huffman v. Oklahoma Coca-Cola Bottling Co.*, 1955 OK 76, 281 P.2d 436, 440) (edits in original) (Emphasis added); *see also Oklahoma City Zoological Trust v. State Public Employees Relations Board*, 2007 OK 21, ¶ 6, 158 P.3d 461, 464.

**1. The scope of conduct prohibited by the securities statutes may not be read expansively**

Interpretation of securities statutes are subject to the same standard rules of statutory construction.<sup>4</sup> *See Touche Ross & Co. v. Redington*, 442 U.S. 560, 99 S.Ct. 2479 (1979) (noting that interpretation of the federal Securities Exchange Act “must begin with the language of the statute itself . . .” and “generalized references to the ‘remedial purposes’ of the Act will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit”); *see also Nikkel v. Stifel, Nicolaus & Co.*, 1975 OK 158, 542 P.2d 1305 (rejecting plaintiff’s attempt to enlarge the class of persons liable under 71 O.S. § 408(a) beyond those class of persons expressly defined in the statute).

Importantly, when the issue is the *scope of conduct* prohibited by a federal securities act, the United States Supreme Court has repeatedly emphasized that the federal securities acts may *not* be read expansively. “Our cases considering the scope of conduct prohibited by [the securities statutes] . . . have emphasized adherence to the statutory language . . . We have refused to allow . . . challenges to conduct not prohibited by the text of the statute.” *Central Bank of Denver, N.A. v. First Interstate Bank of Denver*, 511 U.S. 164, 173, 114 S.Ct. 1439, 1446 (1994) (citations and internal quotations omitted); *see also Pinter v. Dahl*, 486 U.S.

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<sup>4</sup> 71 O.S. § 501 of the Predecessor Act states that the Act should be construed so as “to coordinate the interpretation and administration of this act with the related federal regulation.”

622, 653, 108 S.Ct. 2063, 2082 (1988) (“The ascertainment of congressional intent with respect to the scope of liability created by a particular section of the Securities Act must rest primarily on the language of that section”).

By strictly adhering to the statutory text when deciding the scope of conduct prohibited by the securities laws, the Supreme Court has acted to prevent uncertainty from being introduced into “an area that demands certainty and predictability.” *Id.* at 652, 108 S.Ct. at 2081. To read the securities statutes more broadly than its language reasonably permits would, in effect, “amend the statute to create liability for acts” that fall outside the scope of prohibited conduct. *Id.* at 177-78. Such an undesirable result would, for all practical purposes, lead to “decisions made on an ad hoc basis, offering little predictive value to those who provide services to participants in the securities business.” *Id.*

## **2. ODS’s interpretation of the securities statutes is not entitled to deference**

The United States Supreme Court’s “settled methodology”<sup>5</sup> of rejecting broad and expansive readings of the scope of prohibited conduct applies equally to cases brought by governmental agencies charged with enforcing the securities laws. “[T]here are limits, grounded in the language, purpose, and history of the particular statute, on how far an agency properly may go in its interpretative role.” *International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America v. Daniel*, 439 U.S. 551, 566, 99 S.Ct. 790, 799-800 (1979). “On a number of occasions in recent years this Court has found it necessary to reject the SEC’s interpretation of various provisions of the Securities Acts.” *Id.* at n.20.

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<sup>5</sup> *Central Bank of Denver*, 511 U.S. at 177, 114 S.Ct. at 1448.

For instance, in *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 199, 96 S.Ct. 1375, 1383 (1976), the Court rejected the SEC's interpretation that § 10(b) of the Securities Exchange Act of 1934 covered negligent conduct. The Court noted that the SEC's interpretation would "add a gloss to the operative language of the statute quite different from its commonly accepted meaning." Similarly, in *SEC v. Sloan*, 436 U.S. 103, 98 S.Ct. 1702 (1978), the Court rejected the SEC's interpretation of their authority under § 12(k) of the Securities Exchange Act of 1934 to suspend trading in a security. The Court stated that "Even assuming . . . that a totally satisfactory remedy – at least from the Commission's viewpoint – is not available in every instance in which the Commission would like such a remedy, we would not be inclined to read § 12(k) more broadly than its language and the statutory scheme reasonably permit." *Id.* at 116, 98 S.Ct. at 1711. *See also Reliance Company v. Emerson Electric Company*, 404 U.S. 418, 427, 92 S.Ct. 596, 601 (1972) (rejecting the SEC's interpretation of § 16(b) of the Securities Exchange Act of 1934 and noting that the Court is "not free to adopt a construction of the statute that not only strains, but flatly contradicts the words of the statute").

Until this case arose, the public records reveal no evidence that ODS has ever rendered any binding or official interpretation of these statutes, let alone applied it to a bank as it has in this unorthodox case. During a previous hearing, counsel for ODS advised the Court that ODS has never used the civil liability statutes as a basis for a civil enforcement action. Thus, there is no consistent, longstanding interpretation of the statute by ODS that would be entitled to deference by this court.

## B. Liability Under The Oklahoma Securities Act

### 1. Elements of liability

As previously stated, the legal basis for ODS's lawsuit against Defendants stems from 71 O.S. § 408 (of the Predecessor Act) and 71 O.S. § 1-509 (of the Successor Act). Under the Predecessor Act, a person commits a violation of Oklahoma's securities laws if he or she "materially participates or aids in a sale made by any person liable under [§ 408(a)(1) or (2)] . . ." In order to establish that a particular defendant materially participated or aided in the sale of securities, the plaintiff must show two things: "(1) that the defendant was a material participant or aided in the sale of securities by a seller, and (2) that the seller is 'liable' under § 408(a)." *Southwestern Oklahoma Development Authority v. Sullivan Engine Works, Inc.*, 1996 OK 9, 910 P.2d 1052, 1058. Thus, "the liability of the seller is a prerequisite for there to be liability as to one materially participating or aiding in the sale." *Nikkel*, 542 P.2d at 1307 (Emphasis added).

Under this standard, a transactional predicate must be shown in order to establish Defendants' violation of the securities laws. ODS must first establish that Schubert is liable under 71 O.S. § 408(a)(2) or 71 O.S. § 1-509(B)<sup>6</sup> for selling a security to the Short Investors "by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading (the other party not knowing of the untruth or omission)."

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<sup>6</sup> Similarly, under the Successor Act, a person commits a violation of Oklahoma's securities laws if he or she "materially aids in the conduct giving rise to the liability under subsections B through F . . ." 71 O.S. § 1-509(G)(5). Subsection B reads substantially similar to § 408(a)(2) of the Predecessor Act, and creates civil liability for the sale of a security by means of an untrue statement of material fact.

After establishing that Schubert is liable, ODS must prove that Defendants materially participated or materially aided in the sale is anchored to the same sales transaction between the short investor and Schubert. Put simply, there must be: (1) a *sale* of a security by Schubert to a short investor by means of an untrue statement of material fact (the other party not knowing of the untruth), and (2) Defendants must have materially participated with Schubert in *the same sale* that gives rise to her liability. It would flatly contradict the words of the statute to hold Defendants jointly and severally liable with the seller for conduct other than that which occurred during the sales transaction.

The Oklahoma Securities Act, like its federal counterpart, defines “sale” and “sell” to include “every contract of sale of, contract to sell, or disposition of, a security or interest in a security for value.” 71 O.S. § 2(t)(1). Thus, the fact that a “contract to sell” may still constitute a “sale” is relevant to this Motion since Schubert never actually fulfilled her promise to purchase the “security” for the short investors.<sup>7</sup>

Consequently, since the scope of prohibited conduct is that which occurs during the sale of a security, the focal point relates to the time period during which the contract to sell was entered into between the short investor and Schubert. Under this analysis, the contract to sell was completed when Schubert and the short investor were irrevocably committed to the transaction.<sup>8</sup> *See Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 891 (2<sup>nd</sup> Cir. 1972)

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<sup>7</sup> Judge Miles-LaGrange ruled in a federal case brought by investors that were defrauded by Marsha Schubert, *Schnorr v. Marsha Schubert et al.*, 2005 WL 2019878 (W.D. Okla. August 18, 2005), that Schubert’s misrepresentations occurred in connection with a sale of securities. “[A] plaintiff need only allege that money changed hands in connection with a *contract* for the purchase or sale of securities; no actual purchase or sale of securities need be alleged.” \* 5 (citing *Grippio v. Perazzo*, 357 F.3d 1218, 1223 (11<sup>th</sup> Cir. 2004)).

<sup>8</sup> “The rationale for using the moment of commitment as the critical point in time derives from the underlying purpose of the antifraud provisions to protect the investment decision

(finding that the sale of securities occurs when the parties involved are irrevocably committed to one another). This has been defined as “the point at which, in the classical contractual sense, there was a meeting of the minds of the parties . . . .” *Radiation Dynamics*, 464 F.2d at 891. Activities that occur after the sale of a security cannot form the basis of liability under the securities acts. *See Seattle-First National Bank v. Carlstedt*, 678 F.Supp. 1543, 1547-1548 (W.D. Okla. 1987).

Since a sale constitutes a single, individualized act that gives rise to a buyer-seller relationship, “not unlike traditional contractual privity,” *Pinter, supra.*, at 2076, it is critical to bear the above principles in mind when analyzing the scope of conduct that gives rise to liability for a person that materially participates or materially aids in the sale.

**C. Defendants Did Not Materially Participate Or Materially Aid In The Sales Of Securities By Schubert To The Short Investors**

**1. Oklahoma case law**

Courts in Oklahoma have uniformly interpreted the scope of conduct that gives rise to joint and several liability under § 408(b) and § 1-509(G)(5) in a manner that necessarily rejects ODS’s broad interpretation. *See Howell v. Ballard*, 1990 OK CIV APP 92, 801 P.2d 127; *Odor v. Rose*, 2008 WL 2557607 (W.D. Okla. June 20, 2008); *Franke v. Midwestern Oklahoma Development Authority*, 428 F.Supp. 719 (W.D. Okla. 1976).

As more fully explained below, these cases adhere to the statutory text of the Oklahoma Securities Act and establish two fundamental principles regarding the scope of prohibited conduct: (1) the focal point of the analysis begins and ends with the conduct

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from inadequate disclosure and misrepresentations. Once the decision is made and the parties are irrevocably committed to the transaction, there is little justification for penalizing alleged omissions or misstatements which occur thereafter and which have no effect on the decision.” *SEC v. National Student Marketing Corp.*, 457 F.Supp. 682, 703 (D.D.C. 1978).

occurring during the actual buy-sell transaction which gives rise to liability for the primary actor (here, Schubert); and (2) the secondary actor (Defendants) must participate to a substantial degree in the actual buy-sell transaction, such that their conduct in the sale can fairly be said to have been directed at the investor and designed to produce the sale – thus, making them equally culpable with the primary actor.<sup>9</sup>

For instance, in *Howell*, 801 P.2d at 127, the Oklahoma Court of Civil Appeals interpreted and clarified the precise limits of liability under § 408(b) of the Predecessor Act. In that case, Plaintiff Howell brought suit against Defendant Tate-Page Enterprises for selling him a security in violation of § 408(a). Howell also sued Defendants Tate and Ballard for joint and several liability under § 408(b) for allegedly materially participating or aiding in the sale that violated § 408(a). *Id.* at ¶ 1.

The factual record revealed that both Ballard and Tate “took part in a number of meetings involving the proposed formation and structure of a business enterprise which was to be run by Appellant Tate-Page Enterprises.” *Id.* at ¶ 2. Although Ballard and Tate argued

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<sup>9</sup> In the subsection immediately preceding 71 O.S. § 1-509(G)(5), the Oklahoma legislature chose to identify broker-dealers, agents, investment advisers, and investment adviser representatives as examples of dealmakers, participants, or aiders who would qualify for joint and several liability for materially aiding in the sale. *See* 71 O.S. § 1-509(G)(4). These persons each have in common that they are involved in the securities business and undertake on behalf of sellers to promote the sale. Each has a financial incentive to accomplish the sale, and each engages in the kind of purposeful and persuasive effort described *infra*. Thus, under the principle of *ejusdem generis*, the general words of subparagraph (G)(5), i.e., “[a]ny other person who materially aids . . .” are to be construed “as applying only to things of the same general kind or class as subparagraph” (G)(4). *Savage v. Burton*, 2008 OK CIV APP 20, ¶ 7, n.5, 178 P.3d 205, 207. *See also Broadway Clinic v. Liberty Mutual Insurance Company*, 2006 OK 29, ¶ 19, 139 P.3d 873, 878. After all, the securities department only regulates the securities industry. Thus, the only way an individual who is not normally employed or engaged in the securities industry can be part of the securities industry (and thereby subject to ODS’s regulation) is through participation in a specific securities transaction.

that they did not materially participate or aid in the sale, the Court concluded that both Tate and Ballard “*participated in the solicitation and negotiation stages of the business transaction with Appellee [Howell] which led to his investment.*” *Id.* at ¶ 10 (emphasis added). Because they actively participated and aided in the sales transaction – via soliciting<sup>10</sup> Howell and negotiating the terms of the sale – the Court found both Tate and Ballard jointly and severally liable with Tate-Page Enterprises.

The Court in *Odor*, 2008 WL 2557607, adopted similar reasoning in deciding that Defendants Morgan and Reedy were jointly and severally liable with the sellers for materially aiding in the sale of securities in violation of the Successor Act. Focusing on the defendants’ involvement in the actual sales transaction, the court concluded that, “Defendants *solicited* Plaintiff to purchase and made representations to him to *induce* his purchase of those securities . . . and thereby materially participated or aided in the sale of . . . securities by Geo Companies of North America, Inc. and Geonatural Resources, Inc.” \*4. Thus, the defendants were jointly and severally liable under § 408(b) and § 1-509(G)(5).<sup>11</sup>

Finally, in *Franke*, 428 F.Supp. at 719, the Plaintiff asserted a claim under § 408(b) against a law firm (Smith, Leaming) for its material participation/aid in the fraudulent sale of

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<sup>10</sup> As the United States Supreme Court noted in *Pinter*, 486 U.S. at 646-47, 108 S.Ct. at 2078, “solicitation of a buyer is perhaps the most critical stage of the selling transaction. It is the first stage to involve the buyer, and it is directed at producing the sale . . . [S]olicitors are well positioned to control the flow of information to a potential purchaser . . . [and] are the participants in the selling transaction who most often disseminate material information to investors. Thus, solicitation is the stage at which an investor is most likely to be injured, that is, by being persuaded to purchase securities without full and fair information.”

<sup>11</sup> It is noteworthy that the defendants in both the *Howell* and *Odor* cases, who were found to be jointly and severally liable with the sellers, were motivated to participate/aid in the sales by a desire to serve their own financial interests or those of the seller with whom they had an agency relationship. In other words, the defendants had a financial stake in obtaining investors. Such facts are certainly not present in this case.

industrial revenue bonds (“Chill Can Bonds”). Smith, Leaming’s sole involvement in the issuance of the Chill Can Bonds was limited to its preparation of a “legality opinion” in connection with the bond issue. However, plaintiff claimed that Smith, Leaming omitted to tell him certain material facts regarding his investment prior to his purchase of the Chill Can Bonds issued by the Midwestern Oklahoma Development Authority. *Id.* at 722-723.

The Court granted summary judgment to Smith, Leaming. In doing so, the Court held that:

The facts show that Smith, Leaming as a matter of law did not materially participate or aid in the sale of the bonds to the instant plaintiff. This plaintiff never met Leaming; he paid for his Chill Can Bonds before he received any information about them; and he received the bonds before he read Smith, Leaming’s opinion. The requirement of material participation on the part of these defendants, 71 Okla. Stat. 1971, Section 408(b), is lacking.

*Id.* at 726 (Emphasis added). The plaintiff simply had no subjective awareness of Smith, Leaming at the time of his purchase.

The *Franke* case, consistent with the *Howell* and *Odor* cases, illustrates that in Oklahoma the focal point of the analysis under § 408(b) is the secondary actor’s conduct in connection with the actual sales transaction that violates § 408(a). The secondary actor must materially participate or aid to such a degree – whether it be through solicitation, negotiation, promotion, or other affirmative actions directed at inducing the sale – that their conduct during the sale can fairly be said to have actually produced the sale, thereby making them equally liable with the seller. The plaintiff in *Franke* knew absolutely nothing about Smith, Leaming’s existence – let alone their legality opinion – prior to his purchase of the bonds. Thus, the court correctly concluded *as a matter of law* that there was no evidence to support Plaintiff’s claim of wrongdoing against Smith, Leaming since the “requirement of material participation on the part of [Smith, Leaming during the sale was] lacking.” *Id.*

## 2. Case law from other jurisdictions

Blue sky cases from other jurisdictions interpreting statutes with substantially similar wording to § 408(b) and § 1-509(G)(5) lend further (if not dispositive) support to Defendants' position as to the scope of prohibited conduct. For instance, in *Luallin v. Koehler*, 644 N.W.2d 591 (N.D. 2002), the North Dakota Supreme Court analyzed the scope of conduct prohibited by its own securities statute, which creates joint and several liability for any agent of a seller who has "participated or aided *in any way* in making [a] sale [in violation of North Dakota's securities statutes]." <sup>12</sup>

The plaintiffs in *Luallin* were investors who purchased interests in two oil and gas partnerships: Whitworth Energy Resources, Ltd. ("Whitworth") and Williston Basin Holding Corporation ("Williston"). After the SEC shut down the operations of Whitworth and Williston based upon the fraudulent investment activity <sup>13</sup> of its principals, plaintiffs sued the defendant Condor Petroleum, Inc. ("Condor") for allegedly participating in the fraudulent sale of the Whitworth and Williston partnership interests. *Id.* at 593-594. However, Condor's sole involvement in the case was that it provided "geological, engineering, and other general information to Whitworth and Williston [to assist them] in deciding which oil and gas drilling ventures they would invest." *Id.* at 596.

The Supreme Court of North Dakota ruled, *as a matter of law*, that Condor "did not participate or aid in the unlawful sale or contract for sale of securities which would subject

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<sup>12</sup> North Dakota's statute is thus broader than Oklahoma's because (1) it does not require "material participation" or "material aid" in the unlawful sale of a security; and (2) it reaches conduct that constitutes participation or aid "in any way" in making such sale.

<sup>13</sup> As in this case, there were allegations that the principals of the two partnerships were merely operating a Ponzi scheme. *Id.* at 593.

them to [joint and several] liability.” *Id.* at 600. The Court initially distinguished the cases relied upon by Plaintiffs by stating that the culpable parties’ activities in those cases “were directly related to the solicitation of investors and to the sale of the securities.” *Id.* at 597.

[Condor] never had any communication or contact with any of the plaintiff investors prior to their investing in the Whitworth and Williston partnerships. By merely providing information to Whitworth and Williston, Condor did not participate in soliciting investors or aid in making sales of the limited partnerships.

*Id.* at 597-598.

Additionally, the court distinguished an Oregon case relied upon by Plaintiffs. *See S.E.C. v. Thomas D. Kienlen Corp.*, 755 F.Supp. 936 (D. Or. 1991). In *Kienlan*, the defendants’ activity included holding “meetings and provid[ing] brochures and other materials to potential purchasers with the obvious and direct purpose of soliciting them to invest in the defendants’ mutual funds.” *Id.* at 598. However, Condor never had any “communications or meetings with any of the plaintiffs about investing or about anything else. Unlike the defendants in *Kienlen*, Condor did not participate or aid in the solicitation or sale of any security to the plaintiffs as potential investors.” *Id.* Consequently, the court upheld the trial court’s award of summary judgment to Condor and held, as a matter of law, that North Dakota’s equivalent to § 408(b) and § 1-509(G)(5) was “not applicable under the circumstances and Condor [was] not subject to liability thereunder.”<sup>14</sup> *Id.*

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<sup>14</sup> While *Luallin* lies on one side of the spectrum with respect to conduct that does *not* constitute “participation or aid” in the sale of securities, *Boland v. Hammond*, 759 N.E.2d 789 (Ohio App. 2001) is a representative case of the type and extent of activity that may subject a person to joint and several liability. In *Boland*, the Defendant Hammond (who was a resident of Ohio) invested with one of his friends from Louisiana (Rogers, who was the president of an investment company, Sunbelt). The two acted in concert with the direct and obvious purpose of gaining more investors in Sunbelt through the sale of securities. The court found the following facts determinative of Hammond’s joint and several liability: (1) Hammond disseminated information regarding the proposed terms of the sales from Rogers

In addition to *Luallin*, cases from other jurisdictions are replete with similar reasoning and analysis as that applied by Oklahoma courts in determining the scope of conduct prohibited by securities statutes similar to § 408(b) and § 1-509(G)(5). Defendants commend the following cases to this Court for further review and analysis: (1) *Dillon v. Axxsys International, Inc.*, 385 F.Supp.2d 1307, 1311 (M.D. Florida 2005) (applying Florida law and noting that the words “participate or aid in making the sale necessarily implies some activity in inducing the purchaser to invest . . . [the person] must actively and directly, rather than passively, derivatively, or by attribution or imputation, influence or induce the investor to buy”)<sup>15</sup>; (2) *Hogg v. Jerry*, 773 S.W.2d 84, 87-88 (Ark. 1988) (Arkansas Supreme Court found that agent of seller materially aided sale of securities by providing prospectus to Appellee Spencer and promoting his participation in the venture; however, agent did not materially aid sale of securities to Appellees George and Powers whom he never knew, met, or communicated with); (3) *Standard Chartered PLC v. Price Waterhouse*, 945 P.2d 317, 333 (Ariz. 1996) (holding that Price Waterhouse, who annually examined and audited seller’s books and records, did not participate in or induce the sale of securities under Arizona’s

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to investors; (2) Hammond arranged and attended meetings between Rogers and investors; and (3) Hammond “stood to gain financially if investments were ultimately made in Sunbelt . . . Thus, he had a stake in raising the capital for Sunbelt . . .” *Id.* at 94-95. From this undisputed evidence, the *Boland* Court reasoned that Hammond “was much more involved than just bringing Rogers together with investors. He in fact participated in and aided Rogers and Sunbelt in the sales of the securities to appellees.” Accordingly, “[g]iven his extensive involvement in the sales transactions and his financial stake in obtaining investors for Rogers and Sunbelt, we find that . . . Hammond ‘participated in or aided’ Rogers and Sunbelt in the sale of securities to appellees . . . .”

<sup>15</sup> The district court’s decision in *Dillon* was affirmed by the Eleventh Circuit on appeal. *See Dillon*, 2006 WL 1683462. Notably, the court rejected Plaintiff’s theory that joint and several liability could be imposed if the Defendant’s conduct created an “essential link in the sale.” \*\*4. “[T]hat is not the proper test. The law requires some personal activity and involvement *in the sale*.” *Id.* (emphasis added).

Securities Act)<sup>16</sup>; (4) *Froehlich v. Matz*, 417 N.E.2d 183 (Ill. App. 1981) (finding that Defendant did not participate or aid in sale where he had no connection with the sales).

### 3. Defendants' lack of involvement in the sales transactions

As discussed above, courts simply will not stretch liability to secondary actors that were not involved in the sales transaction. The test is not whether the secondary actor's conduct constituted some remote "link in the chain" that led to the investor's purchase. Rather, the test is whether they materially participated or aided in the buy-sell transaction that created liability for the primary actor. Thus, the test *can* be met where the secondary actor was substantially and directly involved in the sales transaction. Such prohibited conduct includes instances where the secondary actor has a financial incentive to accomplish the sale, and purposefully engages in efforts aimed at (1) finding investors, and (2) promoting, touting, or disseminating information to investors. It is through this conduct that investors are likely to be injured, which is why the law holds the secondary actors jointly and severally liable with the seller. Such a test cannot be met, however, when the defendant never met or communicated with the investor regarding anything, let alone the investment of money.

In this case, the evidence is undisputed that Defendants did not materially participate or materially aid in the sales transactions between Marsha Schubert and the short investors. *See* UMF Nos. 3, 4, 5, and 6. Each short investor testified to this effect and their testimony is not entitled to any greater weight than their own words.

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<sup>16</sup> In so holding, the court stated, "We conclude that the legislature did not mean . . . to stretch civil liability under the Security Act to collateral actors such as PW, remote from the transaction, who neither financially participate, nor promote or solicit the transaction, but merely provide information that contributes to a buyer or seller's decision to close the deal."

Defendants did not: (1) communicate with the short investors; (2) disseminate information to the short investors; (3) solicit the short investors; (4) negotiate the terms of sale with the short investors; or (5) stand to gain if investments were made with Schubert by the short investors. Additionally, Defendants were not present during the short investors' meetings/conversations with Schubert or have knowledge that such conversations were taking place. Based on this undisputed record, Defendants cannot – as a matter of law – be found to have materially participated or materially aided in the securities sales between Schubert and the short investors.

**Proposition II: Partial Summary Judgment Should Be Granted To Defendants Since The Undisputed Material Facts Demonstrate That Defendants Did Not Have Knowledge That Marsha Schubert Sold Securities To The Short Investors By Means Of Untrue Statements Of Material Fact**

Even if the Court found that Defendants materially participated or aided in the sales, the evidence establishes that Defendants did not know that Schubert contracted to sell securities to Lenard Briscoe, L&S Pollard Farms, and the William R. Mathews Trust by means of untrue statements of material fact. Both 71 O.S. § 408(b) and 71 O.S. § 1-509(G)(5) provide an affirmative defense to cover instances where the person “did not know, and in the exercise of reasonable care could not have known, of the existence of the conduct by reason of which liability is alleged to exist.” *See* 71 O.S. § 1-509(G)(5). The conduct giving rise to liability is Schubert’s contract to sell securities to the short investors by means of untrue statements of material fact.

As previously discussed, Defendants had absolutely no involvement in Schubert’s meetings or discussions with the short investors in which the sales of securities were discussed, which would even give rise to an inference that they knew Schubert contracted to

sell them a security by means of an untrue statement of material fact. Among other things, Defendants did not know: (1) when Schubert communicated with the short investors; and (2) what she was telling or not telling them during their communications. See UMF No. 7. Under such factual settings, courts have refused to impose joint and several liability on the secondary actor. See *Froelich*, 417 N.E.2d at 183; *Foley v. Allard*, 427 N.W.2d 647 (Minn. 1988).

**Proposition III: Partial Summary Judgment Should Be Granted To Defendants Since The Undisputed Material Facts Demonstrate That ODS Cannot Trace Funds Belonging To The Short Investors To Schubert Or Defendants**

ODS has steadfastly maintained in this case that it is seeking equitable restitution against Defendants. This court previously found that Defendants may be held liable in equity, jointly and severally, for Schubert's unjust enrichment without any showing that Defendants were unjustly enriched. Thus, an order of equitable restitution against Defendants in this case is contingent upon a showing by ODS that it can meet the elements of equitable restitution with respect to Schubert. This ODS cannot do.

The United States Supreme Court has found that restitution may only be awarded in equity "where money or property identified as belonging in good conscience to the plaintiff could clearly be traced to particular funds or property in the defendant's possession." *Great-West Life & Annuity Insurance Company v. Knudson*, 534 U.S. 204, 213, 122 S.Ct. 708, 714 (2002). If the property sought to be recovered or its proceeds have been dissipated by the wrongdoer, the plaintiff's claim is not one for equitable restitution. Thus, "for restitution to lie in equity, the action must not seek to impose personal liability on the defendant, but to restore to the plaintiff particular funds or property in the defendant's possession." *Id.* at 214.

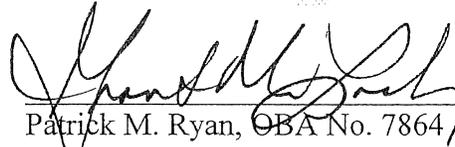
In this case, ODS cannot prove that Schubert or Defendants have funds belonging to the short investors. The financial analysis prepared by the accounting firm of BKD reflects (a) the total amount of money lost by the short investors; and (b) the identity of persons or entities that gained or profited by Schubert's Ponzi scheme at the expense of the short investors, including the amount of their gain.

While the Relief Defendants (those that made money in Schubert's scheme) were unjustly enriched at the expense of the short investors for approximately \$6,059,024.00, BKD's financial analysis also found that Schubert was unjustly enriched by the short investors for approximately \$2,817,292.00. Ex. "4," ¶ 4; *see also Excerpt Transcript of Proceedings in Case No. FD-2005-297 dated 02/08/06*, p. 8, lines 11-14, attached hereto as Exhibit "17." Importantly, BKD's financial analysis also reflects that Schubert dissipated those Investor Assets to pay a variety of expenses and/or bills incurred by Schubert or a business entity controlled by Schubert for such things as groceries, merchandise, utilities, car payments, trips, *etc.* *Id.*; Ex. "17," p. 27, lines 19-25; UMF No. 8.

Consequently, based on the foregoing evidence, ODS cannot meet its burden with respect to equitable restitution since it cannot clearly trace funds belonging to the short investors to either Schubert or Defendants.

### **CONCLUSION**

Based upon the foregoing, Defendants respectfully request that the Court grant Defendants' Motion for Partial Summary Judgment, and award Defendants such other relief they may be entitled to or which this Court finds just and equitable.



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**CERTIFICATE OF SERVICE**

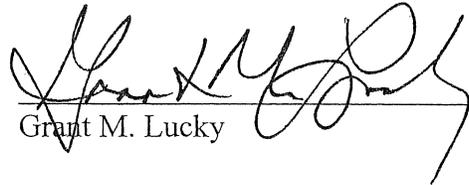
The undersigned certifies that on the 24<sup>th</sup> day of April, 2009, a copy of the foregoing Notice to Take Deposition was sent via U.S. Mail, first-class, postage prepaid, to the following attorneys of record:

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