

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

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.)

Hearing Date: 06/05/09
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Judge: Parrish
Case No. CJ-2006-3311

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

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INC., JOHN V. ANDERSON and JOHN TOM
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TABLE OF CONTENTS

INTRODUCTION..... 1

STATEMENT OF UNDISPUTED MATERIAL FACTS..... 2

STANDARD 7

ARGUMENT AND AUTHORITIES..... 8

Proposition I: Summary Judgment Should Be Granted To Defendants Since The Undisputed Material Facts Demonstrate That The Intervenors Cannot Establish Defendants' Liability Under Oklahoma's Securities Laws..... 8

A. Standards Governing Statutory Construction 8

B. Liability Under The Oklahoma Securities Act....., 9

C. The Intervenors Cannot Establish That Schubert Is Liable..... 10

 1. An annuity is not a security under Oklahoma's Securities Acts 10

 2. The Arbitration Panel denied and dismissed with prejudice the Pourchots' claims against Schubert..... 12

D. Defendants Did Not Materially Participate Or Materially Aid In The Sales Of Securities By Schubert To The Intervenors 13

 1. Definition of sale..... 13

 2. Oklahoma case law on material participation/aid 14

 3. Case law from other jurisdictions 18

 4. Defendants' lack of involvement in the sales transactions 21

Proposition II: 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 Intervenors By Means Of Untrue Statements Of Material Fact..... 22

Proposition III: Punitive Damages Are Not Recoverable Under The Oklahoma Securities Act 23

CONCLUSION 24

TABLE OF AUTHORITIES

Cases

<i>Badillo v. Mid Century Ins. Co.</i> , 2005 OK 48, 121 P.3d 1080.....	24
<i>Boland v. Hammond</i> , 759 N.E.2d 789 (Ohio App. 2001).....	19, 20
<i>Broadway Clinic v. Liberty Mutual Insurance Company</i> , 2006 OK 29, 139 P.3d 873.....	15
<i>Byrley v. Nationwide Life Ins. Co.</i> , 640 N.E.2d 187 (Ohio App. 1994).....	24
<i>Central Bank of Denver, N.A. v. First Interstate Bank of Denver</i> , 511 U.S. 164, 114 S.Ct. 1439 (1994).....	13, 14
<i>Cities Service Company v. Gulf Oil Corporation</i> , 1999 OK 14, 980 P.2d 116.....	12
<i>Copeland v. Tela Corp.</i> , 1999 OK 81, 996 P.2d 931.....	7
<i>Dillon v. Axxsys International, Inc.</i> , 385 F.Supp.2d 1307 (M.D. Florida 2005)	20
<i>Dixon v. Bhuiyan</i> , 2000 OK 56, 10 P.3d 888.....	7
<i>Foley v. Allard</i> , 427 N.W.2d 647 (Minn. 1988).....	23
<i>Franke v. Midwestern Oklahoma Development Authority</i> , 428 F.Supp. 719 (W.D. Okla. 1976).....	14, 17, 18
<i>Froehlich v. Matz</i> , 417 N.E.2d 183 (Ill. App. 1981).....	21, 23
<i>Grippio v. Perazzo</i> , 357 F.3d 1218 (11 th Cir. 2004)	13
<i>Hogg v. Jerry</i> , 773 S.W.2d 84 (Ark. 1988).....	20
<i>Hovet v. Allstate Ins. Co.</i> , 89 P.3d 69 (N.M. 2004)	24
<i>Howell v. Ballard</i> , 1990 OK CIV APP 92, 801 P.2d 127	14, 15, 16, 17
<i>Huffman v. Oklahoma Coca-Cola Bottling Co.</i> , 1955 OK 76, 281 P.2d 436.....	8
<i>Lambrecht v. Bartlett</i> , 1982 OK 158, 656 P.2d 269.....	23
<i>Luallin v. Koehler</i> , 644 N.W.2d 591 (N.D. 2002)	18, 19, 20
<i>McLaughlin v. National Ben. Life Ins. Co.</i> , 1988 OK 41, 772 P.2d 383, 385-89	24
<i>MidAmerica Federal Savings & Loan Assn. v. Shearson/American Express, Inc.</i> , 962 F.2d 1470 (10 th Cir. 1992)	23

<i>Naranjo v. Paull</i> , 803 P.2d 254 (N.M. 1990)	24
<i>Newport v. USAA</i> , 2000 OK 59, 11 P.3d 191.....	24
<i>Nikkel v. Stifel, Nicolaus & Co.</i> , 1975 OK 158, 542 P.2d 1305.....	8, 9, 12
<i>Odor v. Rose</i> , 2008 WL 2557607 (W.D. Okla. June 20, 2008).....	14, 16, 17
<i>Oklahoma City Zoological Trust v. State Public Employees Relations Board</i> , 2007 OK 21, 158 P.3d 461.....	8
<i>Radiation Dynamics, Inc. v. Goldmuntz</i> , 464 F.2d 876 (2 nd Cir. 1972).....	13, 14
<i>Russell v. Dean Witter Reynolds</i> , 510 A.2d 972 (Conn. 1986)	24
<i>S.E.C. v. Thomas D. Kienlen Corp.</i> , 755 F.Supp. 936 (D. Or. 1991)	19
<i>Savage v. Burton</i> , 2008 OK CIV APP 20, 178 P.3d 205	15
<i>Schnorr v. Marsha Schubert et al.</i> , 2005 WL 2019878 (W.D. Okla. August 18, 2005).....	13
<i>Seattle-First National Bank v. Carlstedt</i> , 678 F.Supp. 1543 (W.D. Okla. 1987).....	14
<i>SEC v. National Student Marketing Corp.</i> , 457 F.Supp. 682 (D.D.C. 1978).....	14
<i>Southwestern Oklahoma Development Authority v. Sullivan Engine Works, Inc.</i> , 1996 OK 9, 910 P.2d 1052.....	9, 10, 12
<i>Sprangers v. Interactive Technologies, Inc.</i> , 394 N.W.2d 498 (Minn. App. 1986).....	24
<i>Standard Chartered PLC v. Price Waterhouse</i> , 945 P.2d 317 (Ariz. 1996).....	21
<i>Thiel v. Taurus Drilling Ltd.</i> , 710 P.2d 33 (Mont. 1985).....	24
<i>Touche Ross & Co. v. Redington</i> , 442 U.S. 560, 99 S.Ct. 2479 (1979).....	8
<i>Union Oil of California v. Board of Equalization of Beckham County</i> , 1996 OK 40, 913 P.2d 1330.....	7
<i>Willis v. Midland Risk Ins. Co.</i> , 42 F.3d 607 (10 th Cir. 1994)	24
Statutes	
23 Okla.Stat. § 9.1(B)	24
36 O.S. § 6061(D).....	11
71 O.S. § 1-102	10
71 O.S. § 1-102(32)(b).....	10
71 O.S. § 1-509	9, 23
71 O.S. § 1-509(B).....	9
71 O.S. § 1-509(B)(3).....	23

71 O.S. § 1-509(G)(4).....	15
71 O.S. § 1-509(G)(5).....	passim
71 O.S. § 2(t)(1).....	13
71 O.S. § 2(w).....	10
71 O.S. § 408	9, 23
71 O.S. § 408(2)(A)	23
71 O.S. § 408(a).....	8, 15, 17
71 O.S. § 408(a)(2)	9
71 O.S. § 408(b).....	passim
71 O.S. § 501	8

Other Authorities

“Variable Annuities: What You Should Know,” Online Publications for Investors, U.S. Securities and Exchange Commission, at http://www.sec.gov	10
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Rules

Rule 13 of the Oklahoma Rules for District Courts.....	7
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Defendants Farmers & Merchants Bank (“F&M”), 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 Summary Judgment (“Motion”) against Plaintiffs/Intervenors.¹ In support hereof, Defendants submit the following Brief in Support of its Motion.

INTRODUCTION

Defendants are F&M, a state chartered bank, and certain individual officers of F&M, all of whom are located in Crescent, Oklahoma. 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.

Despite the foregoing, Intervenors have filed this action against Defendants based solely upon the civil liability provisions of the Oklahoma Securities Act.² Intervenors allege that Defendants materially participated and/or materially aided in the sale of purported

¹ The Intervenors in this case are: (1) Robert Lynn Pourchot, Trustee of the Robert Lynn Pourchot Trust; (2) Donald Orr, Trustee of the Pork Chop Trust; (3) The Will Foundation; (4) Pourchot Investments, LP; (5) Phillip M. Pourchot, Trustee of the Phillip M. Pourchot Revocable Trust (Defendants collectively refer to Intervenors 1 through 5 as the “Pourchots”); (6) Richard Reynolds; (7) Richard Reynolds, Trustee of the Richard Reynolds Living Trust; (8) Annenda Reynolds; (9) Steven B. Sanders; (10) Vicki L. Sanders; and (11) Crandall & Sanders, Inc.

² See *Petition in Intervention*, ¶¶ 13, 109. Intervenors allege no other cause of action against Defendants.

“securities” made by one of its depositors, Marsha Schubert (“Schubert”)³ to Intervenors. However, the undisputed facts establish that all the losses that the Pourchots seek from Defendants in this case relate to moneys that the Pourchots believed were in annuities, when no such annuities existed. In Oklahoma, annuities are plainly excluded from the definition of a security, and thus are outside the scope of the civil liability provisions of the Oklahoma Securities Acts.

The undisputed facts also establish that the Pourchots previously sued Schubert in arbitration based upon the same operative facts involved in this case. After a full and lengthy hearing, the arbitration panel denied and dismissed with prejudice the Pourchots’ claims against Schubert. Thus, the Pourchots cannot establish a required element of their case against Defendants: the liability of Schubert for selling “securities” by means of untrue statements of material facts.

Finally, the undisputed facts establish that Defendants did *not* materially participate or aid in the sales of purported “securities” Schubert made to Intervenors by means of untrue statements of material fact. For the above reasons, Defendants are entitled to summary judgment on the Intervenors’ claims.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. In 1992, Schubert became licensed by the Oklahoma Insurance Department to sell variable annuity products. (*See Marsha Schubert Licensing File Received from Oklahoma Insurance Department, OID 0025-0036, attached hereto as Exhibit “1.”*) Schubert

³ At all relevant times, Schubert was a licensed broker-dealer agent and investment adviser representative of AXA Advisors, LLC and later Wilbanks Securities. She was also a licensed insurance agent for an AXA affiliate (“Equitable”) and was licensed to sell variable annuities.

became a licensed insurance agent for an AXA affiliate, AXA Equitable Life Insurance Company (“Equitable”). (*ODS Petition*, ¶ 6.) (*See U4 Employment History*, ODS – 29714, attached hereto as Exhibit “2.”) Prior to investing monies with Schubert, the Pourchots investigated Equitable and were comforted by the fact that Equitable was one of the largest insurance companies in the world. (*See Deposition of Robert Pourchot (“Robt. Pourchot Depo.”)*, p. 75, line 15 – p. 76, line 12, attached hereto as Exhibit “3”; *see also Robert Pourchot Testimony of 07/24/06 in Pourchot, et al. v. AXA Advisors, et al., Before the National Association of Securities Dealers (“Robt. Pourchot 07/24/06 AXA Testimony”)*, p. 199; p. 243, lines 13-18, attached hereto as Exhibit “4.”)

2. On December 28, 2004, the Oklahoma Insurance Commissioner revoked Schubert’s insurance license for, among other things, violating insurance laws, improperly converting monies received in the course of doing insurance business, and using fraudulent practices in the conduct of business in Oklahoma. (*See Final Administrative Order*, Ex. 1, OID 0002-0013.) The factual basis for the Commissioner’s revocation order involved allegations that John C. Stanbrough⁴ made payments to Schubert on what he believed was an annuity contract when, in fact, no annuity contract existed. *See Emergency Conditional Administrative Order and Notice of Right to be Heard (including Ex. A)*, Ex. 1, OID 0014-0022.

3. Robert Pourchot made the investment decisions on behalf of the Robert Lynn Pourchot Trust, the Will Foundation, and the Pork Chop Trust. (*Robt. Pourchot Depo.*, Ex. 3, p. 11, lines 1-4; p. 15, line 1 - p. 16, line 2; p. 12, line 24 - p. 13, line 5; p. 13, lines 6-25;

⁴ Records obtained from the Oklahoma Department of Securities reflect the Estate of John C. Stanbrough as a short investor in Schubert’s Ponzi scheme and a person for whom they are seeking an order of restitution against Defendants.

see also Donald Orr Testimony of 04/20/06 in *Pourchot, et al. v. AXA Advisors, et al.*, Before the National Association of Securities Dealers (“Orr AXA Testimony”), p. 200, lines 24-25; p. 207, lines 7-13, attached hereto as Exhibit “5.”) Phillip Pourchot made the investment decisions on behalf of his trust, the Phillip M. Pourchot Revocable Trust. (*Phil. Pourchot Depo.*, Ex. 7, p. 8, lines 3-6.) Robert Pourchot and Phillip Pourchot made joint investment decisions on behalf of Pourchot Investments, LP. (*Robt. Pourchot Depo.*, Ex. 3, p. 11, lines 8-24; *Phil. Pourchot Depo.*, Ex. 7, p. 6, lines 3-6.)

4. All the losses Robert Pourchot and Phillip Pourchot are seeking in this case against Defendants relate to moneys they believed Schubert put into separate variable annuities when, in fact, no variable annuity existed. (*Robt. Pourchot Depo.*, Ex. 3, p. 64, line 20 – p. 65, line 13; p. 50, line 24 – p. 51, line 3; p. 55, lines 9-13; see also Robert Pourchot Testimony of 07/25/06 in *Pourchot, et al. v. AXA Advisors, et al.*, Before the National Association of Securities Dealers (“Robt. Pourchot 07/25/06 AXA Testimony”) p. 47, line 18 – p. 48, line 2; p. 101, lines 18-21; p. 118, lines 5-19; p. 132, lines 1-10; p. 134, lines 1-9; p. 139, lines 1-18, attached hereto as Exhibit “6”; *Deposition of Phillip Pourchot* (“*Phil. Pourchot Depo*”) p. 33, line 4 – p. 35, line 8; p. 35, line 17 – p. 36, line 6, attached hereto as Exhibit “7”; *Phillip Pourchot Testimony of 07/26/06 in Pourchot, et al. v. AXA Advisors, et al.*, Before the National Association of Securities Dealers (“*Phil. Pourchot AXA Testimony*,” p. 51, lines 12-22; p. 117, lines 8-10, 20-23, attached hereto as Exhibit “8”; and see Edd Painter (*Phillip Pourchot’s CPA*) Testimony of 04/20/06 in *Pourchot, et al. v. AXA Advisors, et al.*, Before the National Association of Securities Dealers (“*Edd Painter AXA Testimony*”), p. 145, line 12 – p. 146, line 8, attached hereto as Exhibit “9.”)

5. Schubert misrepresented to the Pourchots that there was a variable annuity for each of the Pourchots. (*Robt. Pourchot 07/24/06 AXA Testimony*, Ex. 4, p. 243, lines 1-3; *Phil. Pourchot AXA Testimony*, Ex. 8, p. 29, line 16 – p. 30, line 11.) Schubert misrepresented that each annuity had its own contract number and beneficiary. (*Robt. Pourchot 07/24/06 AXA Testimony*, Ex. 4, p. 227, line 23 – p. 228, line 6; *Phil. Pourchot AXA Testimony*, Ex. 8, p. 29, line 16 – p. 30, line 11.) Schubert misrepresented that the Pourchot annuities were eight (8) year annuities with a surrender charge of eight (8) percent if the Pourchots withdrew from the annuity early. (*Robt. Pourchot 07/24/06 AXA Testimony*, Ex. 4, p. 243, lines 6-7; *Robt. Pourchot 07/25/06 AXA Testimony*, Ex. 6, p. 120, lines 18-20; *Phil. Pourchot AXA Testimony*, Ex. 8, p. 29, line 16 – p. 30, line 11.) Schubert misrepresented that any gains made by the Pourchots would be tax deferred because their investments were in a variable annuity. (*Robt. Pourchot Depo.*, Ex. 3, p. 48, line 24 – p. 49, line 5; *Phil. Pourchot AXA Testimony*, Ex. 8, p. 29, line 16 – p. 30, line 11; *Phil. Pourchot Depo.*, Ex. 7, p. 35, line 17 – p. 36, line 6; *Edd Painter AXA Testimony*, Ex. 9, p. 145, line 12 – p. 146, line 8.)

6. Schubert would intermittently provide the Pourchots with Personal Investment Reports reflecting the gains made in the Pourchot annuities and the value of the annuity as of the date listed thereon. (*Robt. Pourchot Depo.*, Ex. 3, p. 56, lines 1-12; p. 58, lines 12-18; p. 58, line 24 – p. 59, line 9; p. 60, lines 1-16; *Phil. Pourchot Depo.*, Ex. 7, p. 26, lines 15-19; p. 33, line 4 – p. 34, line 2; p. 34, lines 3-13; *see also Personal Investment Reports of Robert Pourchot and Phillip Pourchot*, attached hereto as Exhibits “10” and “11,” respectively.)

7. Phillip Pourchot has never had an account at F&M and does not know the Andersons. (*Phil. Pourchot Depo.*, Ex. 7, p. 39, lines 12-19.) Phillip Pourchot had no

contact with F&M or the Andersons with respect to his investments with Schubert. (*Phil. Pourchot Depo.*, Ex. 7, p. 39, line 20 – p. 40, line 10.) The Andersons were not present during his meetings with Schubert. (*Phil. Pourchot Depo.*, Ex. 7, p. 40, lines 11-16.) Phillip Pourchot did not rely on anything Defendants did or said in investing through Schubert (*Phil. Pourchot Depo.*, Ex. 7, p. 40, lines 17-21; p. 41, lines 4-6.) Defendants did not aid or assist Phillip Pourchot in making his investments. (*Phil. Pourchot Depo.*, Ex. 7, p. 41, lines 7-9.) Phillip Pourchot has no knowledge that anyone at F&M was aware that PP invested in annuities through Schubert. (*Phil. Pourchot Depo.*, Ex. 7, p. 41, lines 14-19.) Phillip Pourchot was not aware of Schubert's banking relationship with F&M when he invested with Schubert nor did it influence his decision to invest. (*Phil. Pourchot Depo.*, Ex. 7, p. 44, line 12 – p. 45, line 18; p. 46, lines 3-7.)

8. Robert Pourchot has never had an account at F&M, has never been there, nor does he know the Andersons. (*Robt. Pourchot Depo.*, Ex. 3, p. 65, line 16 – p. 66, line 2.) Robert Pourchot never spoke to the Andersons or anyone at F&M regarding Schubert or investing with Schubert. (*Robt. Pourchot Depo.*, Ex. 3, p. 66, lines 3-9.) Neither the Andersons nor anyone at F&M were present at any meetings between Robert Pourchot and Schubert. (*Robt. Pourchot Depo.*, Ex. 3, p. 68, lines 19-25.) Robert Pourchot has no knowledge that F&M knew anything about what Schubert was telling or not telling the Pourchots. (*Robt. Pourchot Depo.*, Ex. 3, p. 74, lines 1-13.)

9. The Pourchots sued Schubert to recover the losses they suffered as a result of the misrepresentations she made to the Pourchots. (*See Second Amended Statement of Claim in Pourchot, et al. v. AXA Advisors, et al., Before the National Association of Securities*

Dealers, attached hereto as Exhibit "12.") The NASD arbitration panel denied the Pourchots claims against Schubert and dismissed their claims against her with prejudice. *Id.*

10. Defendants do not know and have never met, spoken to, or contacted Richard Reynolds, Annenda Reynolds, Steve Sanders or Vicki Sanders. At the time of their investments with Schubert, Defendants had no knowledge of any communications, telephone conversations or meetings between Schubert and Intervenors wherein any matter was discussed. (See *Affidavits of John Tom Anderson and John V. Anderson*, attached as Exhibits "13" and "14," respectively.) Further, Defendants did not know what Marsha Schubert communicated or failed to communicate to Intervenors during any of their communications. *Id.* Intervenors have never opened or maintained accounts at F&M. *Id.*

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, 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 judgment as a matter of law on that issue.

ARGUMENT AND AUTHORITIES

Proposition I: Summary Judgment Should Be Granted To Defendants Since The Undisputed Material Facts Demonstrate That Intervenors Cannot Establish Defendants' Liability Under Oklahoma's Securities Laws

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.

Interpretation of securities statutes are subject to the same standard rules of statutory construction.⁵ *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).

⁵ 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.”

B. Liability Under The Oklahoma Securities Act

As previously stated, the sole legal basis for Intervenor'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. The Intervenor must first establish that Schubert is liable under 71 O.S. § 408(a)(2) or 71 O.S. § 1-509(B)⁶ for selling a *security* to them "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)." If this first requirement cannot be met, there is no liability for one who materially participates or aids in the sale.

⁶ 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.

C. **The Intervenor's Cannot Establish That Schubert Is Liable**

1. **An annuity is not a security under Oklahoma's Securities Acts**

As reflected above, in order to establish Schubert's liability,⁷ Intervenor's must establish that Schubert sold them a *security* by means of an untrue statement of material fact. However, the Oklahoma Securities Acts exclude an annuity⁸ from the definition of a security. See 71 O.S. § 2(w) of the Predecessor Act; 71 O.S. § 1-102(32)(b) of the Successor Act. Specifically, the "Oklahoma Comments" to 71 O.S. § 1-102 unequivocally state (at ¶ 4) that:

The drafters of the Uniform Act left to each state's discretion whether to include variable annuities in the definition of "security." Like the Predecessor Act, both fixed and variable annuities are *excluded* from the definition of "security" in the Oklahoma Act by the language set forth in paragraph 32.b.

(Emphasis added). Thus, the Oklahoma Legislature made a careful and deliberate choice in excluding annuities – and sales abuse practices involving annuities – from the scope of the Oklahoma Securities Act, including the civil liability provisions upon which the Pourchots solely rely in their suit against Defendants.

⁷ In *South Western Oklahoma Development Authority*, 910 P.2d at 1052, the Supreme Court found that a plaintiff "need only prove that seller has committed the acts or omissions which may result in liability according to [408(a)]."

⁸ A variable annuity is a hybrid investment containing both securities and insurance features. It is a contract between a purchaser and an insurer, which provides the investor with an opportunity to participate in potential capital appreciation and income through investments in the securities markets, typically mutual funds. The investor is able to select the type of investments and adjust asset allocations as changes occur. Furthermore, no taxes are paid on the income and investment gains until the money is withdrawn. The insurance feature permits the investor to receive money periodically or at a date certain. It also provides a death benefit to the beneficiary if the investor dies before payout. Variable annuities also have fees and charges, such as surrender charges. See "Variable Annuities: What You Should Know," Online Publications for Investors, U.S. Securities and Exchange Commission, at <http://www.sec.gov>.

Instead, the Oklahoma legislature opted to provide the Insurance Commissioner with the “sole and exclusive authority” to regulate abusive and fraudulent practices relating to the issuance and sale of variable annuities. For this reason, “agents or other persons who sell [variable annuities] **shall not be subject to the Oklahoma Securities Act nor to the jurisdiction of the Oklahoma Securities Commission thereunder.**” 36 O.S. § 6061(D).⁹

In this case, all the losses that the Pourchots seek to recover from Defendants relate to moneys they believed Schubert put into separate variable annuities when, in fact, no variable annuity existed.¹⁰ See UMF No. 4. Among other things, Schubert misrepresented: (1) that there was a variable annuity for each of the Pourchots; (2) that each annuity had its own contract number and beneficiary; (3) that the Pourchot annuities were eight-year annuities with a surrender charge of eight percent if the Pourchots withdrew from the annuity early; and (4) that the rapid gains made by the Pourchots would be tax-deferred because their investments were in a variable annuity.¹¹ The Pourchots believed Schubert and lost money as a result of Schubert’s misrepresentations relating to the sale of a variable annuity. Accordingly, since a variable annuity is not a security, the Pourchots cannot establish that Schubert is liable for selling them a *security* by means of an untrue statement of material fact.

⁹ Exercising this authority, the Oklahoma Insurance Commissioner revoked Schubert’s license to sell variable annuity products under facts substantially similar to those involved in this case. See UMF No. 2. Schubert misrepresented to John C. Stanbrough that the money he provided her was being invested in an annuity that did not exist. Instead, Schubert misappropriated or converted the monies Mr. Stanbrough gave her. Those are the facts of this case as well.

¹⁰ Prior to investing his monies with Schubert, Robert Pourchot investigated AXA Equitable and was comforted by the fact that Equitable was one of the largest insurance companies in the world. See *Depo. of Robt. Pourchot*, Ex. 3, p. 75, line 15 – p. 76, line 12.

¹¹ Robert Pourchot testified that one of the features that really appealed to him was that the purported gains being made in the annuities were tax-deferred. See UMF No. 5.

2. The Arbitration Panel denied and dismissed with prejudice the Pourchots' claims against Schubert

The Pourchots also cannot establish Schubert's liability based upon the arbitration case they filed against Schubert. (*Second Amended Statement of Claim*, Ex. 12.) In that case, the Pourchots attempted to establish Schubert's liability based upon the same operative facts that they are relying upon in this case. In fact, when Defendants requested the material or principals facts upon which the Pourchots rely to establish Schubert's liability, they specifically directed Defendants to their testimony from the arbitration hearing. (*See Intervenors' Supplemental Responses to Defendants' First Set of Interrogatories, Interrogatory No. 3*, attached hereto as Exhibit "15.") Their claims against Schubert were actually litigated and the arbitration panel denied the Pourchots' claims "each and all against Schubert" and dismissed them with prejudice. (*See Arbitration Award in Pourchot, et al. v. AXA Advisors, et al., Before the National Association of Securities Dealers*, attached hereto as Exhibit "16.")

The adjudication rendered by the arbitration panel¹² precludes a finding of Schubert's liability in this case. As the Oklahoma Supreme Court stated in *South Western Oklahoma Development Authority*, 910 P.2d at 1052, "Of course, it would be impossible to show . . . seller liability, where a court has already adjudged [the] seller to not be liable in that action or a previous one . . . In such a scenario, the plaintiff would be collaterally estopped from having the issue litigated again." (Emphasis added.) Thus, since Schubert was found not liable by the arbitration panel, that issue cannot be relitigated in this case.

¹² An arbitration award has the same force and effect as a judgment of a court of competent jurisdiction. *See Cities Service Company v. Gulf Oil Corporation*, 1999 OK 14, ¶ 16, 980 P.2d 116.

D. Defendants Did Not Materially Participate Or Materially Aid In The Sales Of Securities By Schubert To The Intervenors

1. Definition of sale

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 Intervenors.¹³

Consequently, since the scope of prohibited conduct is that which occurs during the sale of a security,¹⁴ the focal point relates to the time period during which the contract to sell was entered into between Intervenors and Schubert. Under this analysis, the contract to sell was completed when Schubert and Intervenors were irrevocably committed to the transaction.¹⁵ See *Radiation Dynamics, Inc. v. Goldmuntz*, 464 F.2d 876, 891 (2nd Cir. 1972)

¹³ 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 (11th Cir. 2004)).

¹⁴ As previously discussed, *supra*, statutes cannot be construed to cover cases not falling within their provisions. 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).

¹⁵ “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 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

(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.

2. Oklahoma case law on material participation/aid

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 Interveners’ broad interpretation.¹⁶ *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).

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).

¹⁶ By strictly adhering to the statutory text when deciding the scope of conduct prohibited by the securities laws, the U.S. Supreme Court has acted to prevent uncertainty from being introduced into “an area that demands certainty and predictability.” *Pinter v. Dahl*, 486 U.S. 622, 652, 108 S.Ct. 2063, 2081 (1988). 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. *Central Bank*, 511 U.S. 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.” *Pinter, supra.*

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 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.¹⁷

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

¹⁷ 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.

to be run by Appellant Tate-Page Enterprises.” *Id.* at ¶ 2. Although Ballard and Tate argued 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 soliciting¹⁸ 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).¹⁹

¹⁸ 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.”

¹⁹ 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.

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 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.*

3. 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]." ²⁰

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 activity²¹ 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.

²⁰ 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.

²¹ As in this case, there were allegations that the principals of the two partnerships were merely operating a Ponzi scheme. *Id.* at 593.

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 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.”²² *Id.*

²² 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

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”)²³; (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,

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 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 . . .”

²³ 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).

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 Securities Act)²⁴; (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).

4. 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 Intervenors. *See*

²⁴ 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."

UMF Nos. 7, 8, and 10. The Pourchots testified to this effect and their testimony is not entitled to any greater weight than their own words.

Among other things, Defendants did not: (1) communicate with Intervenors; (2) disseminate information to Intervenors; (3) solicit Intervenors; (4) negotiate the terms of sale with Intervenors; or (5) stand to gain if investments were made with Schubert by Intervenors. Additionally, Defendants were not present during Intervenors' 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 Intervenors.

Proposition II: 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 Intervenors By Means Of Untrue Statements Of Material Fact

Even if the Court found a question of fact regarding Defendants' purported material participation or aid in the sales, the evidence establishes that Defendants did not know that Schubert contracted to sell securities to Intervenors 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 Intervenors by means of untrue statements of material fact.

As previously discussed, Defendants had absolutely no involvement in Schubert's meetings or discussions with Intervenors in which the sales of securities were discussed. 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. 10. 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: Punitive Damages Are Not Recoverable Under The Oklahoma Securities Act

As previously noted, Intervenor brings only one claim against Defendants based on a purported violation of the Oklahoma Securities Act. See *Petition in Intervention*, ¶¶ 13, 109. Both the current Act and its predecessor expressly provide the relief available to the plaintiff, which essentially includes “the amount that would be recoverable upon a tender, less the value of the security when the purchaser disposed of it, and interest at the legal rate of interest per year from the date of purchase, costs, and reasonable attorneys’ fees determined by the court.” See 71 O.S. § 1-509(B)(3); 71 O.S. § 408(2)(A). There is no suggestion that punitive damages are appropriate. In fact, the Official Comments to § 509 of the Uniform Securities Act – upon which § 1-509 of the Oklahoma Securities Act is based – expressly states that “Punitive or ‘double’ damages are not provided by this section” See ¶ 1.

Thus, in *Lambrecht v. Bartlett*, 1982 OK 158, 656 P.2d 269, the plaintiff sought to recover statutorily-prescribed damages and punitive damages for violation of the Oklahoma Securities Act, yet the Oklahoma Supreme Court, after directing the trial court to enter a directed verdict in plaintiff’s favor, only provided for an award of damages in compliance with § 408, consisting of the loss with ten percent interest plus a reasonable attorney’s fee and all court costs. Similarly, in *MidAmerica Federal Savings & Loan Assn. v. Shearson/American Express, Inc.*, 962 F.2d 1470 (10th Cir. 1992), the Tenth Circuit, in applying Oklahoma law, permitted recovery of both attorney fees under the Securities Act

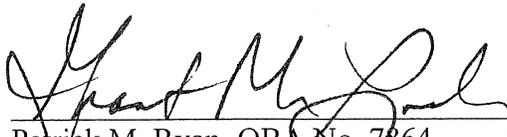
claim and punitive damages under the fiduciary duty claim. Notably, here, there is no fiduciary duty claim to support the award of punitive damages.

Such a determination is consistent with other jurisdictions interpreting similar securities acts. *See Hovet v. Allstate Ins. Co.*, 89 P.3d 69 (N.M. 2004), *citing Naranjo v. Paull*, 803 P.2d 254, 261 (N.M. 1990) (noting NM Securities Act does not provide a remedy for punitive damages); *Byrley v. Nationwide Life Ins. Co.*, 640 N.E.2d 187, 200 (Ohio App. 1994) (punitive damages not permitted under language of statute so not allowed); *Thiel v. Taurus Drilling Ltd.*, 710 P.2d 33 (Mont. 1985) (noting the Montana securities act did not allow for punitive damages); *Sprangers v. Interactive Technologies, Inc.*, 394 N.W.2d 498 (Minn. App. 1986) (punitive damages not recoverable under securities statute without independent tort); *Russell v. Dean Witter Reynolds*, 510 A.2d 972 (Conn. 1986) (setting aside punitive damages award after determining recovery would be permitted only under the Connecticut securities act).²⁵

CONCLUSION

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

²⁵ Moreover, even if the Oklahoma Securities Act could somehow be read to permit punitive damages, it is still improper to submit the issue to the jury in the matter. *Badillo v. Mid Century Ins. Co.*, 2005 OK 48, 121 P.3d 1080, 1106; *Newport v. USAA*, 2000 OK 59, 11 P.3d 191, 204; *Willis v. Midland Risk Ins. Co.*, 42 F.3d 607, 614-15 (10th Cir. 1994); *McLaughlin v. National Ben. Life Ins. Co.*, 1988 OK 41, 772 P.2d 383, 385-89. There is no evidence, let alone the clear and convincing evidence required, that Defendants somehow "recklessly disregarded" some right of Intervenors. 23 Okla.Stat. § 9.1(B).



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CERTIFICATE OF SERVICE

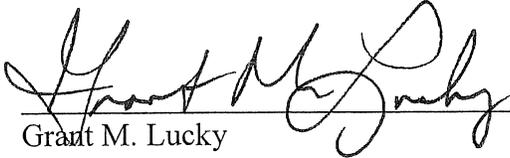
The undersigned certifies that on the 1st day of May, 2009, a copy of the foregoing Notice to Take Deposition was sent via U.S. Mail, first-class, postage prepaid, to the following attorneys of record:

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