

ARGUMENTS

Prior to the hearing, Defendants propounded discovery requests to the Department seeking extensive information and records relating to the Short Investors' individual dealings with Marsha Schubert that are not relevant to the issue before the Court and/or are outside the relevant time period. Such discovery requests addressed the Short Investors' written or verbal communications with Marsha Schubert, any attorney, accountant or tax adviser; the methods of solicitation and payment; and the identity of witnesses to the securities transactions. The Defendants also requested the production of the Short Investors' tax returns, and records of their due diligence efforts and investment account history, including accounts that were active prior to their involvement with Marsha Schubert. The Department never sought or received such details or records from the Short Investors because that information is, and was, not necessary or relevant to the prosecution of this case, the case against Marsha Schubert, or any of the related cases brought by the Department. The Department, in good faith, made all responsive and non-privileged documents in its possession, custody or control available for Defendants' review at their convenience.

Short Investor Information Is Not Relevant to Merits of Case

The Department's allegations against Defendants are based solely on Marsha Schubert's financial records including, for the most part, records created and distributed by Defendant F&M Bank. To support its claim that the Defendants materially aided Marsha Schubert's "Ponzi" scheme, the Department must show (i) that a securities violation occurred; (ii) that the Defendants rendered substantial assistance to the primary wrongdoer; and (iii) that the Defendants had knowledge, or in the exercise of reasonable

care, could have known of the violation(s). See 71 O.S. § 1-509 (G)(5); see also *State ex rel. Goettsch v. Diacide Distributors, Inc.*, 561 N.W. 2d 369, 377 (Iowa 1997). The Short Investors' knowledge about their investments is not relevant to whether the Defendants materially aided Marsha Schubert's scheme. Any evidence sought by the Defendants "must be relevant since a defendant does not have a constitutional right to present irrelevant evidence." *U.S. v. Munoz*, 233 F.3d 1117, 1134 (9th Cir. 2000).

The existence of the "Ponzi" scheme and the harm to the Short Investors has already been judicially established in the state and federal criminal proceedings against Marsha Schubert. In addition, the Logan County District Court sanctioned Marsha Schubert by ordering her to make restitution to the Short Investors.

As this Court previously ruled, if Defendants have materially aided the "Ponzi" scheme, they are jointly and severally liable *with and to the same extent as* Marsha Schubert. This means that Defendants are liable "in the same, identical way, and to the same extent and degree" as Marsha Schubert. See *Barsch v. Mullins*, 1959 OK 2, 338 P.2d 845, 856. Marsha Schubert's liability to the Short Investors to make restitution has also been determined by the Logan County court in case no. CJ-2004-256. That court appointed Douglas L. Jackson to be receiver for the benefit of the claimants and creditors of Marsha Schubert and Schubert and Associates (Receiver). The Short Investors filed claims of their net losses from Marsha Schubert's scheme that the Receiver reviewed against Marsha Schubert's bank records. Based upon the Receiver's recommendations, the Logan County court determined the Short Investors' claims totaled \$9,034,960.07. Recently, the Receiver requested approval to make a second distribution to the Short

Investors that will reduce their total outstanding claims to \$4,221,220.88¹. The amount owed by Defendants for their joint and several liability should be reduced by previous recoveries to Short Investors.²

Defendants' belief that any fault or neglect on the part of the Short Investors will decrease their culpability or liability is misguided. While this case is not a negligence case, any comparative or contributory fault of the Short Investors does not result in a reduction of the Defendants' liability. When a defendant's conduct is found to be reckless, the defendant is liable for the amount of damages that extends from the defendant's conduct. *Stroud v. Arthur Anderson & Co.*, 2001 OK 76, 37 P.3d 783, 789. This case is not about what the Short Investors did or did not do. This case is about how the Defendants materially aided Marsha Schubert's securities fraud.

The Department Does Not Represent the Short Investors

Defendants suggest that because the Department has sought restitution that may benefit the Short Investors, the Department represents those investors. In their discovery requests to the Department, the Defendants defined the terms "you" and "your" to include "the individual investor(s) who lost money in Marsha Schubert's purported investment program and on whose behalf [the Department] is seeking an order of restitution...." Defendants proceeded to request information from the Department regarding the Short Investors' investment history and other personal, confidential information that the Department has never sought from those investors. The Department objected to

¹ The reduced claim amounts take into account both the 17% distribution made to the Short Investors in October of 2007 and arbitration settlements/awards from the brokerage companies with whom Marsha Schubert was affiliated.

² As a convenience to this Court and in order to avoid the time and expense of duplicating the efforts of the Receiver, the Department has requested that any restitution granted in this matter be directed to the Receiver for distribution to the receivership claimants.

Defendants' definition of the terms "you" and your" and Defendants' implication that the Department represents, or somehow stands in the shoes of, the Short Investors.

The Department does not represent individual investors in its enforcement actions. Rather, the Department brings an action such as this to enforce Oklahoma's securities laws, an action that is "separate and apart from (although it may frequently concur with) the interest of injured investors". *SEC v. Egan*, 856 F. Supp. 401 (N.D. Ill. 1993). The Department merely requests that the Short Investors receive the benefit of the Department's efforts to enforce the securities laws of this state.

The Department Is Not Required to Seek Additional Short Investor Information for the Defendants' Benefit

In their discovery requests, Defendants stated that they were directing their requests towards all information available to the Department "upon its reasonable inquiry" or "at the disposal of" Department staff. Combining their definition of "you" and "your" and their suggestion that the Department represents the Short Investors, the Defendants imply that the Department has access to the Short Investors' personal and confidential information and/or that the Department has sufficient control over the Short Investors to require them to produce the information sought by Defendants.

As explained above, the Department does not represent the Short Investors. Furthermore, the Department is under no obligation to seek information that is not contained in the records or documents already in its possession, custody or control, or within the knowledge of any officer, employee, attorney, investigator or agent of the agency. 12 O.S. 3234(A)(1). The Short Investors are not within or under the Department's control.

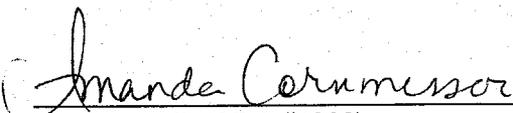
To obtain the information sought by the Defendants that is currently in dispute, the Department would have to subpoena the Short Investors. To the extent that this Court finds that such information is relevant to this matter, it is the Defendants' responsibility to subpoena the Short Investors for that information. *See Central Cal. Conference Ass'n of Seventh-Day Adventists v. Great American Ins. Co.*, 1998 WL 46813 (D.Or).

Conclusion

The Department requests that this Court deny Defendants the opportunity to depose the Short Investors as the testimony they will provide is not relevant to a determination of the merits of this matter and would only serve to delay the commencement of the trial. In the alternative, the Department requests that this Court find that it is the Defendants' responsibility to conduct their own discovery directly through the Short Investors and any other relevant third party.

Respectfully submitted,

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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the *Plaintiff's Memorandum*, was mailed this 1st day of August, 2008, by depositing it in the U.S. Mails, postage prepaid, to the following counsel of record:

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