

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

MAY - 8 2009

PATRICIA PRESLEY, COURT CLERK

by ~~DEPUTY~~
Case No. CJ-2006-3311

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.)

PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff, Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator, pursuant to Rule 13, Rules for the District Courts of Oklahoma, moves for summary judgment against Defendants Farmers & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson, and John Tom Anderson (collectively, the "Defendants"). Based on the uncontroverted facts and authority set forth herein, summary judgment should be entered against Defendants.

STATEMENT OF MATERIAL FACTS

1. Farmers & Merchants Bank (F&M Bank) is a state chartered bank located in Crescent, Oklahoma. *Admitted in Defendants' Answer*, attached hereto as Ex. A, ¶ 1.
2. Farmers & Merchants Bancshares, Inc. (Bancshares), an Oklahoma corporation, is the holding company of F&M Bank, N.A., *Admitted in Defendants' Answer*, Ex. A, ¶ 2.

3. John V. Anderson, an individual, resides in or near Crescent, Oklahoma. John V. Anderson is, and at all times material hereto was, Chairman of the Board of Directors of F&M Bank. John V. Anderson and his wife own controlling interests in Bancshares. *Admitted in Defendants' Answer*, Ex. A, ¶ 3.

4. John Tom Anderson, an individual, resides in or near Crescent, Oklahoma. John Tom Anderson is, and at all times material hereto was, President/Chief Executive Officer and a director of F&M Bank. John Tom Anderson, the son of John V. Anderson, owns an interest in Bancshares. *Admitted in Defendants' Answer*, Ex. A, ¶ 4.

5. From May of 1992 to April of 2004, Marsha Schubert (Schubert) was registered as a broker-dealer agent of AXA Advisors, LLC (AXA), a registered broker-dealer and investment adviser. From May of 2000 to April of 2004, Schubert was registered as an investment adviser representative of AXA. In May of 2004, Schubert became registered as a broker-dealer agent of Wilbanks Securities, Inc., a registered broker-dealer. Aff. of Carol Gruis attached hereto as Ex. B, ¶¶ 4-6.

6. At all times material hereto, Schubert owned account number 34-7477 at F&M Bank (Schubert F&M Account) and account number 35-9424 at F&M Bank (Kattails Account) (collectively, the "F&M Accounts"). Kattails was a small retail business in Crescent, Oklahoma, owned in part by Schubert. Aff. of Dan Clarke, Ex. C, ¶¶ 3 and 12.

7. Prior to December 2002, the Schubert F&M Account was classified as a personal account. The status of the account was changed from personal to business in December 2002. Clarke Aff., Ex. C, ¶ 5.

8. Schubert, doing business as Schubert and Associates, perpetrated a securities fraud in violation of federal and state laws including the Oklahoma Uniform Securities Act of

2004 (Act), Okla. Stat. tit. 71, §§ 1-101 through 1-701 (Supp. 2003), and the Oklahoma Securities Act (Predecessor Act), Okla. Stat. tit. 71, §§ 1-413, 501, 701-703 (1991 & Supp. 2003). Aff. of Marsha Kay Schubert attached hereto as Ex. D; Order of Permanent Injunction attached as Ex. E, *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator v. Marsha Schubert, et al.*, CJ 2004-256.

9. Between December of 1999 and October of 2004 (the “Relevant Period”), Schubert deposited funds in excess of Two Hundred Sixty-Five Million Dollars (\$265,000,000) into the Schubert F&M Account. Clarke Aff., Ex. C, ¶ 6.

10. During the Relevant Period, Schubert, doing business as Schubert and Associates, accepted funds from investors in excess of Two Hundred Million Dollars (\$200,000,000). Clarke Aff., Ex. C, ¶ 7. Schubert promised large profits from the investments she would make on their behalf. Schubert Aff., Ex. D, ¶ 5.

11. In connection with the fraudulent sales of securities, Schubert represented to investors that she would invest their funds in a legitimate venture and return large profits resulting from the success of the investments. Schubert Aff., Ex. D, ¶ 5.

12. When she accepted their investment dollars, Schubert did not tell investors: (a) that she was committing securities fraud; (b) that she was violating state and federal securities laws; (c) that she was not going to invest their monies; (d) that she was acting outside the scope of her association with the brokerage firm with which she was registered; and/or (e) that she was perpetuating a “Ponzi” scheme. Schubert Aff., Ex. D, ¶ 21.

13. The majority of the investment proceeds obtained by Schubert were deposited into the Schubert F&M Account where the proceeds were commingled with proceeds of bank

loans and her personal funds. A portion of the investment proceeds was deposited into the Kattails Account. Clarke Aff., Ex. C, ¶ 7.

14. Schubert did not make the investments that she represented to investors she would make. Investor funds, Schubert's personal funds and borrowed capital from F&M Bank were the only sources of revenue for Schubert and Associates. Schubert used these sources of funds to make payments of fictitious investment returns to her investors. Schubert Aff., Ex. D, ¶¶ 6, 7 and 9.

15. Payments of fictitious investment returns were necessary to create the appearance of legitimacy and success that enabled Schubert to continue the securities fraud for as long as she did. Schubert Aff., Ex. D, ¶ 8.

16. Initially, Schubert used funds from her personal and business bank accounts and her husband's farm account, for which she was an unauthorized signatory, to pay fictitious investment returns to investors. As the balances in those accounts became inadequate to cover the returns she told investors that they had made, Schubert borrowed money and also used the commingled investor funds to pay the fictitious returns. Schubert Aff., Ex. D, ¶ 9.

17. When she paid fictitious investment returns to investors, Schubert did not tell them (a) that the payments were anything other than a return on their investments; (b) that the primary source of the payments was other investors' monies; and/or (c) that the checks and wires were drawn on insufficient or uncollected funds. Schubert Aff., Ex. D, ¶ 22.

18. Investors have testified in depositions taken in this matter that they did not know, and that they would not have invested through Schubert and Associates *if* they had known, any one of the following facts: (a) that Schubert was committing securities fraud; (b) that she was not going to invest their monies as promised; (c) that she was acting outside the scope of her

association with the brokerage firm with whom she was registered; (d) that she was orchestrating and perpetuating a “Ponzi” scheme; (e) that a primary source of the payments of investment returns was other investors’ monies; and/or (f) that she was orchestrating and perpetuating a check kite. Transcr. Depo. Lenard Briscoe, Ex. F; 38:25-39:24; Transcr. Depo. Stephen Pollard, Ex. G, 35:21-37:10; Transcr. Depo. Robert Mathews, Ex. H, 76:17-24; Transcr. Depo. Loren Pollard, Ex. I, 11:19-12:12.

19. Investors lost in excess of Nine Million Dollars (\$9,000,000) in the Ponzi Scheme (Short Investors). Clarke Aff., Ex. C, ¶ 8. Sixty-Seven (67) Short Investors with outstanding losses totaling \$3,558,026.56 still remain. Aff. of Doug Jackson, Ex. J, ¶¶ 11-12.

20. As a result of her fraudulent conduct, Schubert was enjoined and ordered by the Logan County District Court to make restitution. Order of Permanent Injunction attached as Ex. E, *Oklahoma Department of Securities ex rel. Irving L. Faight, Administrator v. Marsha Schubert, et al.*, CJ 2004-256.

The Check Kite

21. To further prevent the discovery of the truth about her activities, Schubert devised a scheme involving a continual movement of funds between third party bank accounts that she controlled and the F&M Accounts. Relying on the float created by this activity, Schubert paid fictitious investment returns using insufficient and/or uncollected funds in the Schubert F&M Account. Schubert Aff., Ex. D, ¶ 10; Clarke Aff., Ex. C, ¶¶ 17-36.

22. The third party bank accounts that Schubert used extensively to continue the securities fraud were those of Lance Berry (Berry), Bob Mathews (Mathews) and Marvin Wilcox (Wilcox). Schubert Aff., Ex. D, ¶ 11; Clarke Aff., Ex. C, ¶¶ 27-36.

23. On at least one occasion, Chad Johnson (Johnson), an F&M loan officer, suggested to Schubert that Berry, Mathews and Wilcox open accounts at F&M for their investment purposes in order to eliminate the reoccurring uncollected funds issue in the Schubert F&M Account. Schubert Aff., Ex. D, ¶ 15; Transcr. Depo. Chad Johnson, Ex. K, 59:2-13.

24. Schubert stopped using the F&M accounts of Berry, Mathews and Wilcox because good or collected funds were not attainable in the Schubert F&M Account or the F&M accounts of Berry, Mathews and Wilcox. Schubert Aff., Ex. D, ¶ 15.

25. In the end, Mathews was unjustly enriched in an amount in excess of Five Hundred Twenty Thousand Dollars (\$520,000). Wilcox was unjustly enriched in an amount in excess of Five Hundred Thousand Dollars (\$500,000). Berry was unjustly enriched in an amount in excess of Thirty-Three Thousand Dollars (\$33,000). Clarke Aff., Ex. C, ¶¶ 33-35.

26. As earlier investors received their purported investment returns, the word spread to other persons who then invested with Schubert. Short Investors invested with Schubert after hearing of the returns Berry, Mathews and Wilcox were receiving. Briscoe Transcr. Depo., Ex. F, 9:11-14; Stephen Pollard Transcr. Depo., Ex. G, 9:4-12.

Defendants' Involvement

27. At all times material hereto, the F&M Bank loan committee met each business day to review the previous day's business. The loan committee members reviewed new requests for loans, renewed loans, extensions or deferrals of loans, overdrafts, and "large items." *Admitted in Defendants' Answer*, Ex. A, ¶ 93.

28. F&M Bank defined a "large item" as any deposit into an F&M Bank account or any check drawn on an F&M Bank account in an amount greater than Twenty-Five Hundred Dollars (\$2,500). *Admitted in Defendants' Answer*, Ex. A, ¶ 94. Seventy-seven percent (77%)

of the number of deposits into the Schubert F&M Account were “large items.” Clarke Aff., Ex. C, ¶ 11.

29. During the Relevant Period, John V. Anderson, John Tom Anderson, and Johnson served on the F&M Bank loan committee. Johnson Transcr. Depo., Ex. K, 40:18 -41:4.

30. Ed Stanton (Stanton) and Justin Tarrant (Tarrant) served on the F&M Bank loan committee until their departures from the bank in March of 2004. Stanton Transcr. Depo., Ex. L, 8:2-12; Transcr. Depo. Justin Tarrant, Ex. M, 13:6-8, 68:7-14.

31. Johnson, Stanton, and Tarrant received “large item” distributions of purported investment returns from the Schubert F&M Account. Clarke Aff., Ex. C, ¶¶ 60-78.

32. Jordan Carris served on the F&M Bank loan committee beginning in June of 2004 and regularly observed the Schubert F&M Account on the bank’s internal reports relating to uncollected fund balances. Transcr. Depo. Jordan Carris, Ex. N, 14:18-15:11, 17:23-18:15.

33. Pursuant to F&M Bank policy, all outgoing wire transfers required advance approval by a loan officer. *Admitted in Defendants’ Answer*, Ex. A, ¶ 95.

Knowledge of Defendants

34. John V. Anderson assumed responsibility for addressing the issues raised by the uncollected fund balances in the Schubert F&M Account. Johnson Transcr. Depo., Ex. K, 134:14-21; Stanton Transcr. Depo., Ex. L, 36:9-19, 48:18-20.

35. John V. Anderson frequently reviewed the Schubert F&M Account and was aware that Schubert was routinely operating on large uncollected balances in that account. Transcr. Depo. Melissa Moon, Ex. O, 22:4-15, 31:1-9. John V. Anderson reviewed the deposits made into the Schubert F&M Account that were set aside by F&M Bank tellers as the deposits

were made, at the request of John V. Anderson. Transcr. Depo. Beth Armer, Ex. P, 35:1-20; Johnson Transcr. Depo., Ex. K, 134:2-13.

36. John V. Anderson discussed the uncollected fund balances in the Schubert F&M Account during many of the morning loan committee meetings. Stanton Transcr. Depo., Ex. L, 36:12-15; Carris Transcr. Depo., Ex. N, 12:4-11; Moon Transcr. Depo., Ex. O, 50:19-52:4.

37. On multiple occasions, John V. Anderson communicated with Schubert about getting her F&M Accounts into a collected fund status and requested collateral to secure the uncollected balances in those accounts. Schubert Aff., Ex. D, ¶ 14; FBI Form 302, Ex. Q.

38. When Schubert continued to operate on a large uncollected balance, John V. Anderson directed that the Schubert F&M Account be reclassified from a personal checking account to a business account in December of 2002. Thereafter, F&M Bank treated the uncollected balances in the Schubert F&M Account as unsecured loans, and the bank assessed a service charge each month on the average uncollected balance in the Schubert F&M Account. FBI Form 302, Ex. Q. The first such service charge was assessed in January of 2003. Clarke Aff., Ex. C, ¶ 26.

39. John V. Anderson knew that Schubert was kiting checks between her F&M Accounts and the bank accounts of other persons at NBanC in Kingfisher, Oklahoma, on a very regular basis. FBI Form 302, Ex. Q.

40. John V. Anderson monitored the accounts of Berry, Mathews and Wilcox during the time that they maintained checking accounts at F&M Bank. Stanton Transcr. Depo., Ex. L, 40:10-14.

41. John V. Anderson knew that at least two of the F&M loan officers, Stanton and Johnson, invested through Schubert and Associates. John V. Anderson believed Stanton and

Johnson were receiving investment returns of 20-30% through Schubert and advised them that the rates seemed "too good to be true." FBI Form 302, Ex. Q.

42. John Tom Anderson knew that Schubert was operating on large uncollected balances in the Schubert F&M Account from the morning loan committee meetings. Stanton Transcr. Depo., Ex. L, 36:12-15; Carris Transcr. Depo., Ex. N, 12:4-11; Moon Transcr. Depo., Ex. O, 50:19-52:4.

43. On at least one occasion, John Tom Anderson talked with Dennis Themer, President of the Kingfisher, Oklahoma branch of NBanC, and learned that the NBanC accounts of Berry, Mathews and Wilcox used by Schubert in the check kite were operating on uncollected funds. Transcr. Depo. Dennis Themer, Ex. R, 38:5-24; Transcr. Depo. Jim Talkington, Ex. S, 45:19-46:22.

44. Johnson allowed Schubert to liquidate a maturing certificate of deposit owned by Schubert Implement, an entity owned by Leland Schubert, and deposit the proceeds into the Schubert F&M Account. Schubert had no authority over any account related to Leland Schubert. Schubert used the proceeds from the liquidation of the certificate of deposit to pay fictitious investment returns to investors. Schubert Aff., Ex. D, ¶ 20; Clarke Aff., Ex. C, ¶¶ 47-48.

45. F&M Bank transferred funds from an F&M Bank account for the estate of Leland Schubert to the Schubert F&M Account. Schubert was not authorized to make transfers from the F&M Bank account for the estate of Leland Schubert. Schubert used the transferred funds to pay fictitious investment returns. Schubert Aff., Ex. D, first ¶ 21; Clarke Aff., Ex. C, ¶¶ 43-46.

46. In the spring of 2004, Johnson spoke with Michael Brennan (Brennan), an outside consultant to F&M Bank, about his investment with Schubert and, specifically the lack of statements from her. Brennan raised the question of whether the activity might be a Ponzi

scheme. Johnson Transcr. Depo., Ex. K, 71:3-72:12; Transcr. Depo. Michael Brennan, Ex. T, 20:1-21:20.

47. Brennan also spoke with Melissa Moon, the Bank Secrecy Act officer for F&M Bank, regarding the possibility that Schubert's activities involved a Ponzi scheme. Brennan Transcr. Depo., Ex. T, 21:21-25; Moon Transcr. Depo., Ex. O, 13:16-24.

48. The uncollected fund balances in the Schubert F&M Account were in greater amounts than allowed in any other F&M Bank account. Moon Transcr. Depo., Ex. O, 53:1-20.

49. The Schubert F&M Account was allowed to operate on uncollected funds for a longer period of time than other F&M Bank customers. Stanton Transcr. Depo., Ex. L, 47:14-18.

50. Defendants did not follow normal banking practices in connection with the Schubert F&M Account. Aff. of Harry Potter, Ex. U; Jackson Aff., Ex. J, ¶¶ 9-10.

51. If, at any time, Defendants had refused to approve payment of the checks drawn on insufficient and/or uncollected funds, the payments of fictitious investment returns would have stopped and Schubert's fraud would have come to an end. Schubert Aff., Ex. D, ¶ 17.

ARGUMENTS AND AUTHORITIES

THERE IS NO SUBSTANTIAL CONTROVERSY AS TO MATERIAL FACTS

The summary judgment procedure authorized by Rule 13 of the Rules of the District Courts of Oklahoma provides a method to dispose of cases where no genuine issue exists for any material fact, or where only a question of law is involved. When a party demonstrates to the court that no controversy exists as to any material facts, and the moving party is entitled to judgment as a matter of law, the Court has a duty to enter summary judgment in favor of that party. Rule 13, Rules for the District Courts of Oklahoma, OKLA. STAT. ANN. TIT. 12, Ch.2, App. (Rule 13).

PLAINTIFF IS ENTITLED TO SUMMARY JUDGMENT AS A MATTER OF LAW

Oklahoma statutes establish a cause of action for participating in or providing aid to a fraudulent sale of securities. *See* Section 408 of the Predecessor Act and Section 1-509 of the Act. The pertinent statutes provide that a person, who is not himself the seller of the security, is liable in connection with the fraudulent sale of securities if he “materially participates” or provides “material aid” to the actual seller. Specifically, subsection (b) of Section 408 of the Predecessor Act, a uniform act provision, states as follows:

Every person who materially participates or aids in a sale or purchase made by any person liable [for making untrue statements of material fact or material omissions in connection with the sale of securities], or who directly or indirectly controls any person so liable, shall also be liable jointly and severally with and to the same extent as the person so liable, unless the person who so participates, aids or controls, sustains the burden of proof that he did not know, and could not have known, of the existence of the facts by reason of which liability is alleged to exist.¹

I. REQUIRED PROOF FOR JOINT AND SEVERAL LIABILITY

In *South Western Oklahoma Development Authority v. Sullivan Engine Works, Inc.*, 1996 OK 9, 910 P.2d 1052 (Okla. 1996), the Oklahoma Supreme Court pronounced a two-prong test for adjudging a participant or provider of aid liable in connection with the sale of securities. The required elements of proof under Section 408 of the Predecessor Act are: (1) that the seller is liable [for making untrue statements of material fact or material omissions in connection with the sale of securities]; and (2) that the defendant aided or materially participated in the sale of securities by the seller or had control over the seller. *Id.* at 1058. A defendant may escape joint

¹ The required elements of proof for providing material aid under Section 1-509 of the Act are the same as those under the Predecessor Act.

and several liability under the Predecessor Act by showing he did not know, and could not have known, of the existence of the facts on which the seller's liability is based.² See Section 408(b).

A. First Element of Proof: Underlying Securities Violation

The first element of proof has clearly been established in this case. Schubert was adjudged liable for securities fraud by the District Court of Logan County and ordered to make restitution to the Short Investors. Schubert's fraud was based on omissions and misrepresentations in connection with the sale of the securities.

The materiality of alleged misrepresentations and omissions is established using a "reasonable investor" test. That is, if a reasonable investor would have considered the information important in making his investment decision, the misrepresentations and omissions were material. *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 93 (5th Cir. 1975); see also *Lloyds of America, LTD, v. Theoharous*, 2005 WL 3115329 (Okl. Dist.) at *7. Short Investors have testified in depositions taken in this matter that they did not know, and that they would not have invested through Schubert and Associates if they had known, any one of the following facts: (1) that Schubert was committing securities fraud; (2) that she was not going to invest their monies as promised; (3) that she was acting outside the scope of her association with the brokerage firm with whom she was registered; (4) that she was orchestrating and perpetuating a Ponzi scheme; (5) that a primary source of the payments of investment returns was other investors' monies; and/or (6) that she was orchestrating and perpetuating a check kite. Thus, Schubert's misrepresentations and omissions were material.

Schubert admits in her affidavit attached hereto that she perpetuated her securities fraud through a Ponzi scheme and check kite. In a Ponzi scheme, "money from new investors is used

² Pursuant to Section 1-509 of the Successor Act, a defendant is entitled to the affirmative defense if he shows that he did not know, and in the exercise of reasonable care could not have known, of the existence of the conduct on which the seller's liability is based.

to pay . . . earlier investors in order to create an appearance of profitability and attract new investors so as to perpetuate the scheme.” *In re Manhattan Investment Fund Ltd.*, 2007 WL 4440360 (S.D.N.Y.) at *4. The payments to the earlier investors are made to “forestall disclosure of the fraud.” *Id.* at *8. The court in *Bald Eagle Area School District v. Keystone Financial, Inc.*, 1999 WL 719906 (W.D. Pa.), in describing a Ponzi scheme stated:

The very nature of a Ponzi scheme means that the fraud continues over a period of time. In other words, the fraud is not limited to one transaction. The viability of the scheme rests upon keeping it afloat, and enticing others to invest. *Id.* at *6.

The material misrepresentations and omissions Schubert made to just one investor harmed all investors because the misrepresentations and omissions allowed her to continue the Ponzi scheme and receive more and more investor money. *Neilson v. Union Bank of California, N.A.*, 290 F.Supp. 2d 1101, 1132 (C.D. Cal. 2003). Schubert kept her fraudulent scheme afloat and enticed others to invest by consistently making distributions of fictitious investment returns from her F&M Bank account with funds she did not have or funds that did not even exist. Any “conduct undertaken to keep a securities fraud Ponzi scheme alive is conduct undertaken in connection with the purchase and sale of securities.” *Sell v. Zions First National Bank*, 2006 WL 322469 (D. Ariz.) at *11 (citation omitted).

Like Schubert’s Ponzi scheme, the fraud in *Sell* entailed distributions to investors who were told that the money they were receiving was the fruit of “bona fide, existing and performing loans.” The money was actually obtained from other investors who too believed they were investing in “bona fide, existing and performing loans.” *Id.* at *9. The *Sell* court opined that “[t]he disbursement[s] of money from more recent investors to older investors . . . are, in other words, ‘in connection with’ securities fraud.” *Sell* at *10. The plaintiffs in *Bald Eagle* claimed the defendant, acting as a custodial bank, enabled a securities fraud to continue by allowing the

primary wrongdoer to utilize monies in the custodial account to operate and conceal a Ponzi scheme. *Bald Eagle* at *2. The court found the culpable conduct of the defendant bank was “intrinsically connected” to the Ponzi scheme and in connection with the purchase or sale of securities. *Id.* at *6.

A check kite is illegal and by its very nature is a form of bank fraud. *Frost National Bank v. Parker*, 1999 WL 33438078 (C.D. Ill.) at *1. Check kiting occurs:

when a person draws on an account at one bank, deposits the checks in another bank, and then secures the cash before the checks’ actual collection by the first bank. Further, check kiting involves the continual movement of funds from bank to bank. Due to such a scheme, the check-kiting customer’s account will show a positive balance due to deposits into the account. However, these are “ledger balances” which do not represent actual funds in the subject account.

Oxford Bank & Trust v. Hartford Accident & Indemnity Co., 698 N.E. 2d 204, 207 (Ill. App. Ct. 1998). The “ledger balances” referenced above are also called “uncollected funds”, *i.e.*, funds posted to a bank customer’s account that have not been finally paid by the bank on which the funds were drawn. *Norwest Bank Black Hills, N.A. v. Rapid City Teachers Federal Credit Union (No. 4122)*, 433 N.W.2d 560, 564 (S.D. 1988). By taking advantage of the delay in the check collection process, the successful check kiter has the use of the bank’s money, interest free, *if* the bank grants provisional credit for the deposited checks. *Frost* at *1.

Schubert unequivocally states that she relied on the float created by her check kite to make the continual distributions of fictitious investment returns. In the heyday of the check kite, Schubert used her Schubert and Associates F&M Account and the NBanC accounts of Lance Berry, Bob Mathews and Marvin Wilcox (collectively, “BMW”).³ Schubert effected her scheme by continuously repeating a cycle of writing checks to BMW for amounts exceeding her actual account balance, and then depositing checks written on the NBanC accounts of BMW to her

³ Early on in the fraud, Marsha Schubert similarly used the accounts of Johnny Stanbrough, the W.R. Mathews Trust and the Betty R. Mathews Trust.

Schubert F&M Account. F&M Bank granted provisional credit to the Schubert F&M Account based on these deposits, thereby covering the checks Marsha Schubert had just written to BMW and enabling Schubert to write other checks as well. Most of those “other checks” were written by Schubert to pay purported investment profits to her defrauded investors.

In *Aetna Casualty & Surety Co. v. Leahey Construction Co., Inc.*, 219 F.3d 519 (6th Cir. 2000), the primary wrongdoer manipulated its books for purposes of obtaining a surety bond on its construction projects. *Id.* at 524. The company’s assets were inflated on its financial statements by \$275,000 through the proceeds of a four-day bank loan made at month end. *Id.* at 535. Litigation resulted after the company defaulted on three bonded projects. *Id.* at 524. The court considered the loan to have established a critical level of credibility between the construction firm and the bonding company. *Id.* at 537. “Because this credibility served as the foundation for increased trust between the parties,” the court concluded that the bank substantially assisted the underlying fraud. *Id.*

It follows from *Sell* and *Bald Eagle* that the Defendants’ tolerance and acquiescence to Schubert’s check kite, by paying the distribution checks drawn on uncollected funds, was “intrinsically related to” and “in connection with” the sale of securities. Schubert created the illusion of Schubert and Associates as a prospering and legitimate company – an illusion that induced the Short Investors to invest. The Defendants’ failure to stop Marsha Schubert’s banking practices further concealed Schubert’s fraudulent misrepresentations and omissions and enabled the continuation of her scheme resulting in the financial losses to the Short Investors.

B. Second Element of Proof: Material Participation or Aid

Without question, Marsha Schubert committed securities fraud. It is also beyond dispute that Defendants rendered banking services to Schubert as she did so. The question before the

Court is whether the evidence establishes that the Defendants provided aid to or materially participated in Schubert's fraud.

The methods by which a person can provide assistance to the primary wrongdoer vary from case-to-case for purposes of establishing joint and several liability. Assistance is not defined by any particular act or acts. *Bayhi v. State*, 629 So.2d 782, 789 (Ala. Crim. App. 1993). For secondary liability to attach, however, it is **not** necessary for the defendant to have acted in the offers and sales of the securities or to have made the fraudulent misrepresentations or omissions. *Id.* at 790; *see also U.S. v. Mayo*, 646 F.2d 369, 371 (9th Cir. 1981); *U.S. v. Kessi*, 868 F.2d 1097, 1105 (9th Cir. 1989); *Kahn v. Chase Manhattan Bank, N.A.*, 760 F.Supp. 369, 374 (S.D.N.Y. 1991). Furthermore, it is **not** necessary for the accused to have knowledge of the misrepresentations, omissions or any other details of the underlying fraud. *Woods v. Barnett Bank of Fort Lauderdale*, 765 F.2d 1004, 1012 (11th Cir. 1985). In short, joint and several liability can be derived solely from the unlawful conduct of the seller. *Ainslie v. First Interstate Bank of Oregon, N.A.*, 939 P.2d 125, 137 (Or. Ct. App. 1997).

While the culpable conduct at issue must be "material," all that must be shown is "a substantial causal connection" between the conduct in question and the resulting investment losses. *Mendelsohn v. Capital Underwriters, Inc.*, 490 F. Supp. 1069, 1084 (N.D. Cal. 1979). If the aid "has a natural tendency to influence, or was capable of influencing, the decision of the purchaser", the aid is considered material. *Connecticut National Bank v. Giacomi*, 699 A.2d 101, 122 (Conn. 1997).

There are but a few times that the courts have considered conduct that constitutes aid or material participation in connection with the sale of securities under Oklahoma law. *See Howell v. Ballard*, 1990 OK CIV APP 92, 801 P.2d 127; *Odor v. Rose*, 2008 WL 2557607 (W.D. Okla.

2008). However, the facts of these cases have, by mere coincidence, involved the most basic form of aid or material participation: the direct involvement in the solicitation or negotiation of the securities transaction. The case law of other states becomes relevant in demonstrating the broader range of conduct constituting aid or material participation.⁴

It is an established tenet of statutory construction that statutes, like the securities laws, should be construed broadly to effectuate their remedial purpose. *Tcherepnin v. Knight*, 389 U.S. 332, 336 (1967). Consequently, courts interpreting state statutes with a provision similar to that in Section 408 of the Predecessor Act have taken a broad view of conduct that may support a finding of joint and several liability. *Klein v. Oppenheimer & Co., Inc.*, 130 P.3d 569, 584 (Kan. 2006). For example, in *Prince v. Brydon*, 764 P.2d 1370 (Or. 1988),⁵ an investor who purchased unregistered limited partnership interests sued the partnership's attorney for participating in or materially aiding the sale of the securities. The investor argued that the attorney's role in drafting the limited partnership agreement and the offering documents, including a tax opinion, constituted material aid. The Oregon Supreme Court agreed and opined: "[w]hether one's assistance in the sale is 'material' does not depend on one's knowledge of the facts that make [the sale] unlawful; it depends on the importance of one's personal contribution to the transaction." *Id.* at 1371. The court further explained its findings as to the liability of the attorney by saying:

[t]yping, reproducing, and delivering sales documents may all be essential to a sale, but they could be performed by anyone; it is a drafter's knowledge,

⁴ See Section 501 of the Predecessor Act and Section 1-608 of the Act (general policy is to maximize uniformity in regulation among states); see also, *Mayfield v. H.B. Oil & Gas*, 1987 OK 106, 745 P.2d 732, 736 (Oklahoma Securities Act is to be construed "so as to make uniform the laws of those states which have enacted the Uniform Securities Act").

⁵ Oregon, like Oklahoma, adopted the Uniform Securities Act.

judgment, and assertions reflected in the contents of the documents that are “material” to the sale. *Id.* at 1371.⁶

In another Oregon case, the appellate court addressed the issue of participation or material aid in connection with securities sold in violation of a condition of the registration of such securities under state law. *Ainslie v. Spolyar*, 926 P.2d 822 (Or. Ct. App. 1996). The pertinent facts in *Ainslie* involved the escrow of the investment proceeds from the sale of limited partnership interests to be released by the First Interstate Bank of Oregon (FIOR) on receipt of full payment for all of the partnership units. *Id.* at 823-824. The defendant attorney prepared instructions for a transaction between FIOR and The Oregon Bank that nominally resulted in there being the required amount to cause the release of the escrowed monies. *Id.* at 825. The fictitious transaction between the two banks involved paper adjustments to their correspondence accounts and resulted in the release of the funds actually in escrow. *Id.* The defendant attorney was found by the court to have materially aided the unlawful sale of securities based on the extent and importance of his involvement in the fictitious banking transaction. *Id.* at 828.

In a significant companion case to *Ainslie*, the same plaintiffs sued FIOR and Security Pacific Bank Oregon (formerly “The Oregon Bank”). *Ainslie v. First Interstate Bank of Oregon, N.A., et al.*, 939 P.2d 125 (Or. App. 1997) (“*Ainslie II*”). The court determined that liability based on the role of an accused as a participant or provider of material aid “can be derivative from the unlawful activities of the seller or other principals in the sale.” *Id.* at 137. The court, relying on the opinion in *Prince*, reiterated that “liability as a participant or a provider of material aid depends on the extent and importance of the defendant’s involvement.” *Id.* at 137. However, the court in *Ainslie II* further opined that:

⁶ Of additional importance is the court’s declaration that a finding of “material aid” does not depend in any way on the knowledge of the accused. *Id.* at 1372. As will be addressed below, knowledge is relevant only as an affirmative defense under Oklahoma law. Section 408 of the Predecessor Act and Section 1-509 of the Act.

although proof of direct unlawful activity by a defendant or its participation in the seller's unlawful acts themselves, as distinct from the sale generally, is not *essential* to establish its liability as a participant, or material aider, proof of that kind can nevertheless be *relevant* to the question; the extent and importance of the defendant's *involvement* in a sale can be shown by evidence of its connection with unlawful activities as much as with any other aspects of the sale. *Id.* (emphasis in original).

The court concluded that FIOR's connection to the "use and misuse of investor funds" evidenced the fact that FIOR "participated in and materially aided the sale and the unlawful activity itself." *Id.* at 138.

The Iowa Supreme Court in *State v. Diacide Distributors, Inc.*, 561 N.W.2d 369 (Iowa 1997), construed the comparable uniform act provision in that state's code. The defendant was accused of aiding and abetting a Ponzi scheme in which the seller, *inter alia*, represented that the investment proceeds were to be used to purchase insecticide for subsequent distribution. *Id.* at 370. The court went to great lengths to enumerate the activities of Mr. McHose, the accused, to include that: (a) Mr. McHose was aware that the company was selling the investment notes as he was an investor himself; (b) Mr. McHose accepted his interest payments knowing the source of such payments to be the proceeds from the sale of the notes to others; (c) Mr. McHose caused checks to be issued to himself, his associates and/or affiliates that would not have cleared the bank but for the deposit of investors' monies; (d) Mr. McHose caused checks to be issued to earlier investors that would not have cleared the bank but for the deposit of investors' monies; (e) in at least one instance, Mr. McHose deposited money from an investor and on the same day made an interest payment to that investor from the same account; and (f) Mr. McHose did not see funds directed to any insecticide supplier and, therefore, knew that the representations made to investors as to the use of their funds were not true. *Id.* at 379-381. The court, describing the services of Mr. McHose as not otherwise attainable by the wrongdoer, found his activities, over a

two year period, constituted “substantial assistance” to the Ponzi scheme. *Id.* at 383. The court also concluded that the Ponzi scheme would have collapsed long before it did without the aid of Mr. McHose. *Id.*

The federal courts have established a “substantial assistance” standard that is evidenced by a “substantial causal connection between the culpable conduct of the alleged aider and abettor and the harm to the [investor]” or “encouragement or assistance [that] is a substantial factor in causing the resulting tort.” *Metge v. Baehler*, 762 F.2d 621, 624 (8th Cir. 1985), *cert. denied*, 474 U.S. 1057 (1986) (citations omitted).⁷ This “substantial assistance” standard is comparable to the standard developed by the Oregon court in *Prince*, that is, resolution of the issue of “material aid” depends on the extent and importance of the accused’s involvement in the transaction in question.

1. Affirmative acts

As to aiding and abetting by a bank, the basic proposition is that routine or regular banking practices cannot form the basis for liability under the securities laws. Conversely, employing unreasonable or atypical banking practices is a basis for such liability. The case of *Woodward v. Metro Bank of Dallas*, 522 F.2d 84 (5th Cir. 1975), is frequently cited for the proposition that banking assistance “constituting the daily grist of the mill” is insufficient to establish joint and several liability. *Woodward* at 97. However, “if the method or transaction is atypical or lacks business justification,” joint and several liability can be imposed. *Id.*

There are multiple cases in which affirmative acts by banks have been interpreted by the federal courts to equate to “substantial assistance” in cases brought under an “aiding and abetting” theory. See *Vendsouth, Inc. v. Arth*, 2003 WL 22399581 (Bkrtcy. M.D.N.C.) at *18

⁷ Section 501 of the Predecessor Act and Section 1-608 of the Act mandate uniformity in regulation among the states as well as with the related federal regulation. See also *Howell v. Ballard*, 1990 OK CIV APP 92, 801 P.2d 127, 128.

(bank knowingly allowed continuation of a circular movement of funds through acceptance of “on us” checks and granting of provisional credit while receiving benefit of interest charges on uncollected funds); *Lawyers Title Insurance v. United American Bank*, 21 F.Supp. 2d 785, 798-800 (W.D. Tenn. 1998) (bank’s policies and actions, to include allowing overdrafts that were covered with worthless funds and a revolving line of credit to cover shortages in an escrow account, enabled the primary violator to stay in business and perpetuate his fraudulent scheme); and *Neilson v. Union Bank of California, N.A.*, 290 F.Supp. 2d 1101, 1129-1132 (C.D. Cal. 2003) (employee of banking institution vouched for primary wrongdoer and promoted his skills as an investment adviser).

An issue decided in *Vendsouth* was the sufficiency of the evidence to support a claim that the defendant bank substantially assisted and had the requisite knowledge to be liable for aiding and abetting a breach of fiduciary duty. The alleged fraud depended on the continuation of a check kite orchestrated by the debtor in bankruptcy. With respect to the evidence of the bank’s substantial assistance, the court emphasized (a) that the bank’s internal account reports indicated possible fraudulent activities, to include a potential check kite, and (b) that the bank actually benefitted from the continuation of the debtor’s fraud by charging fees equal to “prime plus 3%” for the use of the uncollected funds. In addition, the court concluded that had the bank refused to accept the “on us” checks and stopped the granting of provisional credit to the debtor, the fraud and breach of fiduciary duty would have ended.⁸ *Vendsouth* at *18.

Cases brought under state law are of similar precedential value. For example, in *Judson v. Peoples Bank and Trust Co.*, 134 A.2d 761 (N.J. 1957), former stockholders claimed they were fraudulently induced to sell their shares of stock in a company through misrepresentations

⁸ The *Vendsouth* court’s opinion as to the knowledge factor for the aiding and abetting claim will be discussed by Plaintiff below in Section II.

made by the company's president. As a result of the subsequent sale, the president became the beneficial owner of the company. Corporate funds received from the defendant bank through a loan collateralized by the company's inventory were used by the president to purchase the stock. The court found that the bank participated in the fraudulent scheme by knowingly funding the corporate assets to be used for the personal benefit of the president to defraud the selling stockholders. *Id.* at 767-768. *See also Kelly v. Central Bank & Trust Co. of Denver*, 794 P.2d 1037, 1044 (Colo. App. 1990) (bank's failure to follow reasonable banking practices, *i.e.*, to make inquiry as to the reason and authority for the deposit of a check endorsed by a corporate payee into a third person's account before accepting the check for deposit, was deemed to be evidence of substantial assistance in a scheme to defraud); *Grace v. Corn Exchange Bank Trust Co.*, 38 N.E.2d 449, 453 (N.Y. 1941) (bank that knowingly accepted loan payment made by borrower with monies not belonging to him was participant in borrower's wrongdoing).

The court in *Exchange State Bank v. Kansas Bankers Sur. Co.*, 177 P.3d 1284 (Kan. Ct. App. 2008), determined that Exchange Bank officials acted outside normal banking practice when they routinely and consciously decided to honor checks drawn on uncollected funds, thereby continually extending credit to the accountholder over a period of many months. *Id.* at 1290. The court was charged with determining whether the bank's losses from a check-kiting scheme were excluded from insurance coverage. The insurance policy at issue specifically excluded coverage "for any loss which is the result of the willful extension of credit by the Insured through the payment of checks drawn on uncollected funds." *Id.* at 1285.

The pertinent facts in *Exchange Bank* included, *inter alia*, the following: (1) for a period of several months, the bank president directly handled the account at issue and authorized payment of insufficient checks and imposition of a fee against the account; (2) the account at

issue continuously appeared on the bank's overdraft report for almost four years; (3) uncollected funds reached a high of \$66,578 in 2002, \$165,974 in 2003, and \$373,575 in 2004; and (4) uncollected funds were in excess of \$300,000 six times in 2004 and three times in August of 2004. *Id.* at 1286-1287.

The court found that the bank's payment of checks drawn on uncollected funds by its customer was the result of "conscious decision-making" and constituted the "willful" extension of credit. *Id.* at 1289. The *Exchange Bank* court stated:

a willful extension of credit necessarily involves some conscious decision to lend money and take on some credit risk. The **normal banking practice** of allowing expedited funds availability is not done for the purpose of extending credit. It is done to accommodate the needs of customers, to comply with federal policy on availability of funds, and to expedite check processing given the relatively small percentage of returned checks. The mere practice of allowing bank customers **generally** to use uncollected funds would not constitute the willful extension of credit under the policy. *Id.* at 1288. (Emphasis added.)

It was the conclusion of the court, however, that the actions of Exchange Bank were "more knowing and purposeful." *Id.* Like the actions of Exchange Bank, the actions of the Defendants herein were atypical, more knowing and more purposeful.

2. Silence and inaction

With the exception of a footnote in *Waugh v. Heidler*, 1977 OK 78, 564 P.2d 218, there is no Oklahoma case law addressing the issue of whether silence and/or inaction by the accused can amount to substantial assistance. *Id.* at 221, n. 2. Although not applied to the facts in *Waugh*, a case addressing Section 408 of the Predecessor Act, the Oklahoma Supreme Court recognized that silence or inaction may justify the imposition of joint and several liability. *Id.* Likewise, silence and/or inaction has proven sufficient to establish substantial assistance under other states' laws. For example, in *Cagan v. West Suburban Bank*, 1992 WL 80966 (N.D. Ill.), the plaintiffs alleged that the defendant bank aided the perpetuation of a Ponzi scheme by making over 20

loans totaling \$5.8 million to the primary wrongdoers. *Id.* at *1. The loan proceeds were used to pay interest and principal to earlier investors until new investors could be enticed into the scheme. *Id.* When the bank learned of the underlying fraud, it chose to remain silent and protect its own financial interest. *Id.* The court concluded that the injury to investors by the bank was caused by its facilitation of the investments and that its silence facilitated the investors' losses - particularly, the losses of the later investors. *Id.* at *6.

The issue of inaction was also addressed by the *Diacide* court. The experience of Mr. McHose as a banker for over twenty years formed the foundation of the court's opinion as to his substantial assistance to and knowledge of the fraudulent sale of the investment notes at issue. *Diacide* at 382. The court declared:

[a]lthough there may be no duty to disclose and there is only inaction on the part of the aider and abettor, liability under the substantial assistance test may still result in a securities law setting. Thus, inaction "may provide a predicate for liability where the plaintiff demonstrates that the aider-abettor consciously intended to assist in the perpetration of the wrongful act." *Id.* at 383 (citations omitted).

Not only did the court find there to be sufficient evidence to show the assistance of Mr. Hose to be a substantial factor in causing the securities fraud, but that Mr. McHose "consciously intended to assist in the perpetuation of a fraudulent scheme." *Id.* at 384.

Participation in the daily loan committee meetings provided Defendants with access to all "Large Item" transactions effected through the Schubert F&M Account. The Defendants' involvement in Schubert's check kite clearly evidences their connection to the use and misuse of investor funds and to the fraudulent sales of securities by Schubert.

II. KNOWLEDGE: THE AFFIRMATIVE DEFENSE

With no Oklahoma cases addressing the knowledge factor as an affirmative defense, the holding of the Oregon court in *Prince v. Brydon* again provides guidance. The Oregon court in

Prince v. Brydon stressed that knowledge is relevant only as an affirmative defense noting that the drafters of the Oregon securities statutes “took pains to make clear that the relevant knowledge is of ‘the existence of the facts,’ not of the unlawfulness of a sale.” *Id.* at 1372. Although the provision may appear to impose a heavy burden on the accused who is attempting to exonerate himself, the legislature’s choice of language was deliberate. *Id.* Knowledge of the “existence of the facts” was the relevant factor deliberately chosen by the Oklahoma Legislature in establishing the affirmative defense under this state’s securities laws. Section 408(b) of the Predecessor Act and Section 1-509 of the Act.

While knowledge is pertinent only as an affirmative defense under Oklahoma securities statutes, the knowledge of the accused is an element of proof for a plaintiff under federal law. *Woodward* at 94-95.⁹ As the test for determining the liability of an alleged aider and abettor has evolved, the federal courts have concluded that the “substantial assistance” and “knowledge” elements should be considered in relation to each other and not in isolation. *Metge*, at 624; *SEC v. Nacchio*, 2009 WL 690306 (D. Colo.) at *7. Specifically, “the more acute a party’s knowledge of the ongoing fraudulent scheme, the less substantial the acts constituting substantial assistance need be, and *vice-versa*.” *Id.*

When evaluating the knowledge of the defendant in *Diacide*, the court incorporated a similar test:

[a] party who engages in atypical business transactions or actions which lack business justification may be found liable as an aider and abettor with a minimal showing of knowledge. Conversely, a party whose actions are routine and part of normal everyday business practices would need a higher degree of knowledge for liability as an aider and abettor to attach.

⁹ See *Day v. Southwest Mineral Energy, Inc.*, 617 P.2d 1334, 1339 (Okla. 1980) (Oklahoma Supreme Court adopted the interpretative history of the federal securities laws when interpreting the securities statutes of this state).

Diacide at 378, citing *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991). The court's conclusions as to knowledge were two-fold: Mr. McHose was aware that the atypical business transactions involved a Ponzi scheme and he was aware of his role in furthering the fraudulent scheme. *Id.* at 378-382.

The *Diacide* court described the evidence on which it relied to establish the knowledge of the defendant as "circumstantial" but "persuasive and largely undenied." *Id.* at 381-382. As stated by the *Woodward* court, "knowledge" of the existence of a securities violation by the accused aider and abettor must usually be inferred; knowledge does not have to be proven by direct evidence but may be proven by circumstantial evidence based on the facts submitted. *Woodward* at 95-97.

A determination that the requisite knowledge by the defendant bank to support the aiding and abetting claim in *Vendsouth, Inc. v. Arth* was also based largely on circumstantial evidence: the number of checks drawn on uncollected funds, the fact that the check kite extended over a period of seventeen (17) months, and the size and nature of the checks deposited. *Id.* at 17. Specifically, the "on us" checks were 1,250 in number and totaled \$106,000,000 in amount; the checks were deposited on nearly a daily basis; many of the checks were for amounts greater than \$100,000 and some were for amounts greater than \$200,000; the deposited checks were not remittances from customers; and there were almost continuous negative uncollected balances in the debtor's account. *Id.* The court ultimately concluded as to the aiding and abetting claim that:

[t]aken together, [the bank's] knowledge of the "on us" deposits combined with the benefits to the bank by the continuation of the fraud and the fact that but for the continued acceptance of the "on us" checks and granting of provisional credit, the check kite could not have continued, the plaintiff has put forth evidence of sufficient facts to defeat [the bank's] motion for summary judgment. *Id.* at *18.

Except as to degree, the critical facts cited above by the *Vendsouth* court parallel the uncontroverted facts in the case at hand. While the Defendants' conduct here is much more egregious, the result is still the same. Like the defendants in *Diacide* and *Vendsouth*, the Defendants materially aided Schubert's securities fraud by consciously deciding to allow Schubert to operate a massive, illegal check kite over a period of many months, while financially benefiting from the receipt of fees and interest charges.

CONCLUSION

The genesis of this entire matter is the fraudulent investment scheme orchestrated and perpetuated by Marsha Schubert over the course of almost five years. A preponderance of the evidence shows that Schubert made material misrepresentations and omissions to investors in connection with the sale of securities, which she was able to hide through the payment of fictitious investment profits. The continual payments of investment profits created the appearance of legitimacy and success that enabled Schubert to continue her fraudulent activities for as long as she did. Schubert made the payments of fictitious profits by issuing checks drawn on uncollected funds and relying on the float created by a check kite. With knowledge of the activity in and through the Schubert F&M Account, including the transactions involving Berry, Mathews and Wilcox, Defendants allowed a Ponzi scheme and a check kite to perpetuate over the years.

The summation of the bank's activity in *Connecticut National Bank v. Giacomi*, 699 A.2d 101 (Conn. 1995), is extremely apropos here. The court said:

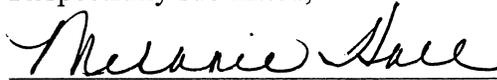
The banking activity established by the evidence in this case, however, cannot by even the most generous stretch of the imagination be described as normal everyday business practices. Rather, the banking practices here were atypical in the extreme. No one who has ever dealt with a bank . . . can review the catalogue of [the bank's] acts in this case without shaking his head in wonder. *Id.* at 123.

Defendants provided aid or materially participated in Marsha Schubert's fraudulent activities and are jointly and severally liable to the same extent as Marsha Schubert pursuant to Section 408 of the Predecessor Act and Section 1-509 of the Act. The facts stated herein and evidentiary materials attached hereto establish that no genuine issue of material fact exists regarding the Plaintiff's cause of action, and as such, Plaintiff is entitled to summary judgment against Defendants. Further, Plaintiff is entitled to summary judgment as a matter of law.

Plaintiff requests remedies in the form of an injunction, civil penalties in the amount of \$15,000 per Defendant, and restitution. Injunctive relief is appropriate where, as here, Defendants' conduct was ongoing over a period of several years and Defendants' business presents the opportunity for future violations. *SEC v. Better Life Club of America*, 995 F.Supp 167, 178 (D.D.C. 1998). Defendants' repeated aid to and/or participation with Schubert over the years warrants civil penalties for their part in aiding the fraud. Section 406.1 of the Predecessor Act and Section 1-603(B)(2)(c) of the Act.

Restitution to redress fraud is designed to make the victims whole. *Better Life Club of America* at 179-180. The Defendants are jointly and severally liable with and to the same extent as Schubert pursuant to Section 408(b) of the Predecessor Act and Section 1-509(G) of the Act and may be held responsible for the entire loss. *SEC v. AbsoluteFuture.com*, 393 F.3d 94 (2nd Cir. 2004). Investor losses caused by the actions of Schubert and Defendants were in excess of \$9,000,000. Recognizing that Plaintiff is entitled to only one satisfaction of the amount jointly and severally owed, and acknowledging that the Short Investors have already covered some of their losses through third-party recoveries or through receivership distributions, Plaintiff requests an order of restitution finding Defendants jointly and severally liable with and to the same extent as Marsha Schubert for the remaining loss of \$3,558,026.56.

Respectfully submitted,



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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the *Plaintiff's motion for Summary Judgment*, was mailed this 8th day of May, 2009, by depositing it in the U.S. Mails, postage prepaid, to the following counsel of record:

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