

IN THE DISTRICT COURT OF OKLAHOMA COUNTY  
STATE OF OKLAHOMA

Oklahoma Department of Securities )  
*ex rel.* Irving L. Faught, )  
Administrator, )  
 )  
Plaintiff, )  
 )  
v. )  
 )  
Farmers & Merchants Bank, an Oklahoma )  
banking entity; Farmers & Merchants )  
Bancshares, Inc., an Oklahoma corporation; )  
John V. Anderson, individually, as an officer )  
and director of Farmers & Merchants Bank, )  
and as a shareholder of Farmers & )  
Merchants Bancshares, Inc.; and John Tom )  
Anderson, individually, as an officer and )  
director of Farmers & Merchants Bank, and )  
as a shareholder of Farmers & Merchants )  
Bancshares, Inc., )  
 )  
Defendants. )

FILED IN THE DISTRICT COURT  
OKLAHOMA COUNTY, OKLA.

Case No. CJ-2006-3311 AUG 24 2006

PATRICIA PRESLEY, COURT CLERK  
by \_\_\_\_\_  
Deputy

**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO RECONSIDER  
ORDER DENYING DEFENDANTS' MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, CERTIFY THE ORDER FOR IMMEDIATE  
INTERLOCUTORY APPEAL**

Plaintiff, Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (Department), respectfully submits this response to Defendants' *Motion to Reconsider Order Denying Defendants' Motion to Dismiss or, in the Alternative, Certify the Order for Immediate Interlocutory Appeal*. The Department hereby incorporates by reference its *Response to Defendants' Motion to Dismiss and Brief in Support* filed in this case on June 22, 2006. The Department requests that this Court deny the Defendants'

pending motion for the following reasons: (1) the Court's initial ruling is correct; and (2) this matter does not qualify for certification for an immediate appeal under the rules of the Oklahoma Supreme Court.

### **Background**

The Department filed this suit alleging the Defendants materially aided and/or participated in a securities fraud committed by Marsha Schubert, individually and doing business as Schubert and Associates (collectively, "Marsha Schubert"), in and/or from Crescent, Oklahoma. The Department brought the action under the Oklahoma Uniform Securities Act of 2004 (Successor 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). Marsha Schubert was enjoined by the district court and ordered to make restitution to the victims of her securities fraud. The Department contends that the Defendants are secondarily liable, jointly and severally, with and to the same extent as Marsha Schubert.

In response to the over 70-page Petition filed by the Department, the Defendants filed a motion to dismiss for failure to state a claim upon which relief can be granted. On August 1, 2006, this Court, in a ruling from the bench, denied the Defendants' motion to dismiss. In making the ruling, the Court stated that a cause of action exists under both the Predecessor Act and the Successor Act against a person who materially participates in or aids a securities law violation. The Court also found that relief is possible under that legal theory or cause of action. Three (3) days later, and prior to the preparation of a journal entry, Defendants filed the pending "motion to reconsider."

## I. Effect of the "Motion to Reconsider"

The Defendants cite no statutory authority for their motion or any case law supporting their position. As stated in various opinions of the Oklahoma Supreme Court, a "motion to reconsider" does not exist under Oklahoma's Pleading Code. *See Halliburton Oil Producing Co. v. Grothaus*, 1998 OK 110, ¶6, 981 P.2d 1244, 1248, n. 6 (so-called "motion to reconsider" is a stranger to the statutory nomenclature in Oklahoma's nisi prius practice and procedure); *McMillian v. Holcomb*, 1995 OK 117, ¶3, 907 P.2d 1034, 1036, n. 3 (a "motion to reconsider" does not exist in the nomenclature of Oklahoma's statutory pleading scheme).

## II. **Appropriate standard of review applied**

The Court in *Halliburton* and *McMillian* also stated that a "motion to reconsider" may be considered a motion for new trial. *Id.* Should this Court choose to construe the Defendants' motion as a motion for new trial, the Court should deny the motion.

In *Indiana Nat'l Bank v. State Dep't of Human Services*, 1994 OK 98, 880 P.2d 371, the Oklahoma Supreme Court stated that "to withstand a motion to dismiss it is not necessary for a plaintiff to either identify a specific theory of recovery or set out the correct remedy or relief to which he/she may be entitled." *Id.* at 375. The Court added: "[w]hen a trial court is considering his ruling on a § 2012(B)(6) motion he should **not** ask whether the petition points to an appropriate statute or legal theory, but whether relief is possible under any set of facts that could be established consistent with the allegations." *Id.* at 375-376 (emphasis in original).

In the instant case, the Department goes to great lengths to state the factual basis for its claim against Defendants. The Department lays out sufficient facts to show that

Defendants knew, or in the exercise of reasonable care could have known, of Marsha Schubert's securities violations and that the Defendants substantially aided the perpetuation of the fraud.

The specific arguments raised by the Defendants in connection with the Administrator's authority under the Predecessor Act were considered by the Iowa Supreme Court in *State ex rel. Goettsch v. Diacide Distributors, Inc.*, 561 N.W.2d 369 (Iowa 1997). That court addressed whether the Iowa Superintendent of Securities (Iowa Regulator) could use aiding and abetting to establish secondary liability for securities fraud, and whether the Iowa Regulator could seek restitution, rescission or disgorgement against aiders and abettors under Iowa's securities laws. The Iowa Supreme Court answered these questions in the affirmative.

The pertinent provisions in the Predecessor Act closely resemble those interpreted by the Iowa court in *Diacide*. When the *Diacide* analysis is applied to the provisions of the Predecessor Act, the only conclusion that may be drawn is that a cause of action exists against a person who materially aids or participates in a securities law violation. This Court correctly ruled upon the Defendants' motion to dismiss. The Defendants' pending motion should be denied.

### **III. Certification not warranted**

While a journal entry reflecting the Court's August 1<sup>st</sup> ruling has not yet been filed, such a journal entry would constitute an interlocutory order not appealable by right. The Defendants are asking this Court to certify to the Oklahoma Supreme Court that an immediate appeal of the August 1<sup>st</sup> ruling may materially advance the ultimate termination of this litigation, the standard required by Okla.Sup.Ct.R. 1.50.

By the Defendants own admissions, an immediate appeal will not materially advance the ultimate termination of this litigation. It is critical to note that the Defendants seek only a *partial* dismissal of the claims set forth by the Department in its Petition. The Defendants clearly admit that the Department has the authority to seek an injunction in connection with the Defendants' alleged activities occurring after July 1, 2004, the effective date of the Successor Act. *See* Defendant's Motion to Dismiss filed on June 5, 2006, pp. 1 and 10; Transcript of August 1, 2006 Hearing attached as Exhibit A hereto, p. 4, lines 1-5; p. 9, lines 23-25; p 10, lines 1-4; and p. 25, lines 10-15; and Defendants' pending motion, p. 4. As this Court correctly opined in making the ruling from the bench, Section 1-603 of the Successor Act authorizes the Administrator of the Department to bring an action in the district court of Oklahoma County if he believes that a person has engaged in an act, practice, or course of business that materially aids a violation of the Successor Act. The statute further provides that the district court may issue a permanent injunction; order rescission, restitution, or disgorgement against a person that has engaged in an act, practice, or course of business constituting a violation of the Successor Act **or the Predecessor Act**; and order such other relief as the court considers appropriate. *See* Section 1-603 of the Successor Act.

No purpose will be served by certifying this matter for immediate appeal. Even if the Supreme Court should determine that the Department is without authority to proceed against the Defendants under the Predecessor Act, or that restitution is not an available remedy, the Department's request for an injunction against the Defendants for the alleged activities occurring after July 1, 2004, will remain. The Department will still present its evidence establishing that the Defendants' materially aided and/or participated in Marsha

Schubert's securities fraud. The Court will still be faced with making a determination about whether to enjoin the Defendants, and/or to order any other remedy or remedies deemed necessary to reach the ends of justice and equity. See *State ex rel. Day v. Southwest Mineral Energy, Inc.*, 1980 OK 118, 617 P.2d 1334, 1338.

Once the Department proves that the Defendants materially aided or participated in Marsha Schubert's fraudulent securities scheme, the Court may properly enter an injunction and/or order any other appropriate relief. At that time, the losing party may choose to appeal the Court's decision.

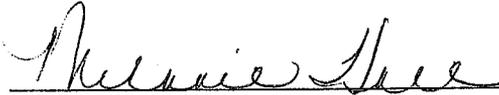
Finally, in a related case, *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator, et al. v. Robert W. Mathews, et al.*, Case No. CJ-2005-3796 ("Relief Defendant Case"), the relief defendants similarly challenged the Administrator's authority under Section 406.1 of the Predecessor Act and Section 1-603 of the Successor Act. Specifically, the relief defendants challenged the Administrator's authority to seek disgorgement from persons who did not violate Oklahoma's securities laws. This Court ruled that the Administrator has such authority and denied the relief defendants' request for certification of the interlocutory order for appeal. The relief defendants took the matter to the Supreme Court on an application to assume original jurisdiction. The Supreme Court declined to assume original jurisdiction and denied the application. A similar result is likely to occur if this matter is certified for immediate appeal.

### **Conclusion**

This Court's August 1<sup>st</sup> ruling was correct and an immediate appeal will not "materially advance the ultimate termination of this litigation", the required standard for certification under the Supreme Court's rules. Oklahoma's appellate courts have

repeatedly warned that “motions to dismiss are generally viewed with disfavor.” See *Miller v. Miller*, 1998 OK 24, ¶ 15, 956 P.2d 887, 894. It follows that the immediate appeal of this Court’s decision to deny the Defendants’ motion to dismiss, under the circumstances discussed above, would be viewed with equal disfavor by the appellate courts. The Defendants’ *Motion to Reconsider Order Denying Defendants’ Motion to Dismiss or, in the Alternative, Certify the Order for Immediate Interlocutory Appeal* should be denied.

Respectfully submitted,



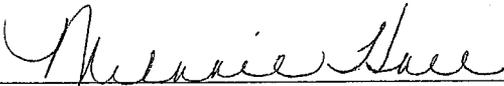
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**CERTIFICATE OF MAILING**

I hereby certify that a true and correct copy of the Plaintiff's Response to Defendants' *Motion to Reconsider Order Denying Defendants' Motion to Dismiss or, in the Alternative, Certify the Order for Immediate Interlocutory Appeal*, was mailed this 24th day of August, 2006, by depositing it in the U.S. Mails, postage prepaid, to the following counsel of record:

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