IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF OKLAHOMA

ROBERT WILLIAM MATHEWS Debtors, OKLAHOMA DEPARTMENT OF SECURITIES *ex rel.* IRVING L. FAUGHT, Administrator, et al., Plaintiff/Appellee, v. ROBERT WILLIAM MATHEWS Defendant/Appellant.	Case No.: CIV-09-185-D APPEAL FROM UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA; CASE NO.: BK 07-10108 BH; CHAPTER 7; ADV 07-1140 BH

APPELLANT'S REPLY BRIEF

APPEAL FROM THE UNITED STATES BANKRUPTCY COURT FOR THE WESTERN DISTRICT OF OKLAHOMA CASE NO.: BK 07-10108 BH; CHAPTER 7; ADVERSARY NO.: 07-1140 BH

The Defendant/Appellant, Robert William Mathews (herein after referred to as "Appellant") herein reply to the Appellee Response Brief.

In the Appellee Response Brief, in its Statement of the Case and Statement of the Facts, Appellee has set forth evidence that Marsha Schubert, individually and d/b/a Schubert and Associates ("Schubert") operated a "Ponzi Scheme." The Appellee also makes it clear that Schubert pled guilty to numerous violations under the Oklahoma

Uniform Securities Act and entered guilty pleas in both Federal and State criminal cases. Schubert was ordered to make restitution to Schubert's investors[1] in the amount of $9,114,744.00. Although, in their Statement of the Case and Statement of Facts, the Appellee was able to show that Schubert is guilty of securities violations, and committed securities fraud. There is nothing in the Appellee Response Brief, which shows that the Appellant in this case, Robert William Mathews, was anything more than an investor with Schubert and a victim of Schubert's Ponzi scheme.

In the Statement of Facts set forth by the Appellee, in the Response Brief, there is no mention of the Appellant other than incorporating the Appellee Motion for Summary Judgment presented to the bankruptcy court. The Appellee Statement of Facts makes it clear that Schubert pled guilty to securities violations; that Schubert ran a Ponzi scheme. In the Appellee Response Brief, in the Statement of the Case, the only mention of the Appellant is that he received profits as an investor of Schubert, and that the district court of Oklahoma County found that the Appellant had been unjustly enriched.

Although, in the Appellee Response Brief the Appellee made numerous references to Schubert's wrongdoings, the record is void of any finding by any court of any wrongdoing by the Appellant in this case, Robert William Mathews. In this regard, the Appellant would adopt in full as part of his reply brief, his Statement of Facts from the Record on Appeal set forth in the Appellant Brief in Chief in this case.

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[1] The Appellant, Robert William Mathews, in this case were investors of Schubert, just like the other investors. There was no evidence presented that the Appellant was in any way a participant in Schubert's fraudulent scheme.

In the Appellee Proposition I of the Response Brief, Appellee argues that the plain language of 11 U.S.C. § 523(a)(19) does not require that a violation securities law be conducted by the debtor. The case Appellee cites for this Proposition is, In re Civiello 348 B.R. 459 (Bkrtcy. N.D. Ohio, 2006). Appellee cites the Civiello case for the Proposition that "the plain language of 523(a)(19) indicates that its coverage broad." [2] Response Brief, page 6. A review of the Civiello case, however, shows that the case is more supportive of the Appellant position than that of the Appellee.

In the Civiello case, the bankruptcy debtor whose discharge was denied was the wrongdoer under the securities law of the State of Ohio. The Ohio Division of Securities, in December 2003, entered a cease and desist order against Civiello finding that Civiello had participated in sales of securities that were unregistered and that Civiello had violated Ohio securities laws. See In re Civiello, 348 B.R. at 461. The court in Civiello, stated as follows:

> Section 523(a)(19) is a relatively recent addition to the bankruptcy code, added as part of the Sabnes-Oxley Act of 2002. According to legislative history, the purpose of section 523(a)(19) was to protect investors: Current bankruptcy law may permit such wrongdoers to discharge their obligations under court judgments or settlements based on securities fraud and other securities violations. This loophole in the law should be closed to help defrauded investors recoup their losses and to hold accountable those who violate securities laws after a government unit or private suit results in a judgment or settlement against the wrongdoer.
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> In re Civiello 348 B.R. at 463 (Emphasis added) (Citations omitted).

[2] The Appellee goes on to say that the legislative history of § 523(a)(19) provides that the purpose is to "hold accountable those who violate securities laws" Response Brief, Page 6 (Emphasis added)

The court in Civiello goes on to hold: "By the plain language of the statute, its coverage is broad, aligning with expressed legislative intent. Generous application is also supported by the courts: '[t]o the maximum intent possible, this provision should be applied to existing bankruptcies. The provision applies to all judgments and settlements arising from state and federal securities laws violations entered in the future regardless of when the case was filed.' Gibbons, 289 B.R. at 593 .... The cease and desist order clearly and unequivocally states that Defendant violated O.R.C. § 1707.44(A)(1): .... Further, his act of selling unregistered securities was also found to violate an Ohio securities law: ...." In re Civiello, 348 B.R. at 464 (Emphasis added). The Civiello court goes on to hold: "Therefore, the court concludes that the cease and desist order is a valid adjudication wrought by an administrative agency empowered to enforce Ohio securities law. Plaintiffs have thus satisfied the first element of a § 523(a)(19) action, providing that Defendant did violate Ohio securities law." In re Civiello 348 B.R. at 464. (Emphasis added).

In the Civiello case, it is clearly set forth that it is the defendant or debtor must violate the securities laws in order for the first requirement of § 523(a)(19) to be satisfied. Appellee have failed to cite any cases which would extend the denial of discharge under § 523(a)(19) to a non-wrongdoer. The language of § 523(a)(19) sets forth a two part test in order to deny the debtor a discharge. First, the debtor must violate the securities laws AND then there must be an order ordering some kind of restitution. See 11 U.S.C. § 523(a)(19).

If Schubert was the Debtor, in this case, there would be no question that any discharge would be denied, as Schubert is clearly a violator of securities laws, a wrongdoer and there has been order issued that Schubert make restitution to her investors. However, in this case, Schubert is not a party and there is no evidence of any wrongdoing by the Appellant in this case, which would trigger the first requirement of § 523(a)(19).

In Proposition II of the Appellee Response Brief, Appellee argues that non-violators who receive proceeds of illegal conduct should be required to disgorge the ill-gotten gains the same as the violator. In support of this proposition, Appellee cites the Securities and Exchange Commission v. Clolello, 139 F.3d 674 (1998).[3] The Clolello case, however, does not involve a denial of discharge under § 523(a)(19) but merely stands for the proposition that the Securities and Exchange Commission could sue a nominal defendant to recover fraud proceeds received by an non-wrongdoer. The argument in the Clolello case is not materially different than a finding that the Appellant had been unjustly enriched by the Oklahoma district court. The Appellant may have been unjustly enriched as found by the district court, however, unjust enrichment does not constitute a violation of securities laws in order to trigger a denial of discharge in bankruptcy under § 523(a)(19).

In Proposition II, the Appellee make some vague reference that violators may attempt to hide assets or reward someone who aids there scheme by transferring ill-gotten

[3] Appellee cites two other cases in this section. None of the cited cases, however, involve a denial of discharge under § 523(a)(19).

gains to a family member, a favorite friend, or a close business associate. There is nothing in the record in this court or the bankruptcy court, which shows that Schubert was transferring ill-gotten gains to a family member, favorite friend, or close business associate. Even if those were the facts, however, the question remains whether, or not the first hurdle of § 523(a)(19) can be met since the statute clearly requires a violation of the securities laws by the debtor. Under the Civiello case and other cases cited in the Brief in Chief of the Appellant, to deny a discharge, under § 523(a)(19) there needs to be a violation or wrongdoing by the debtor.

In Proposition III of the Appellee Response Brief, Appellee argues that the culpability of the debtor is not material to the issue before the court. This proposition is devoid of any case citations and really makes the argument that Schuberts securities violations trigger the exception to discharge under § 523(a)(19). The problem with this proposition however, is the fact that the first hurdle that must be climbed in order to deny a discharge under § 523(a)(19). The cases cited by Appellant and Appellee require a violation of securities laws by the debtor. See In re Civiello, 438 B.R. 459 (Bkrptcy. Ohio 2006) and the cases cited in Appellant Brief in Chief.

In Proposition IV of the Appellee Response Brief, Appellee argues that the bankruptcy court did not error in considering the findings of the Oklahoma Court of Civil Appeals. Appellee states that the appealed judgment is not a final judgment for purposes of *res judicata*, but it can be instructive to the bankruptcy court. Additionally, Appellee argues that there are sufficient facts in record on appeal for this court to conclude that the Oklahoma county judgment is for Schubert's violations of the securities laws. The problem with this argument is that Schubert is not the debtor in this case. Also, Schubert was not a party to the Oklahoma County district court case.

The Appellant did not appeal the district court judgment that is the underlying order of disgorgement against the Appellant. While there may have been sufficient evidence, in the record before the bankruptcy court that Schubert committed securities violations, and that Schubert has been required to make restitution, the only evidence that there is any order of disgorgement against the Appellant is the district court judgment finding that the Appellant was unjustly enriched that judgment is not a final order and is still on appeal by some of the defendants by writ of certiorari to the Oklahoma Supreme Court. Without the district court finding of unjust enrichment, there is no order of disgorgement against the Appellant in this case. Furthermore, the district court finding of unjust enrichment against the Appellant does not constitute a finding that Appellant violated any securities laws.

Appellee would like to substitute Schubert for the Appellant in this case, as every brief they write, they go back to the guilty plea of Schubert. There is no question that Schubert committed violations of securities laws, however, Schubert is not the Appellant in this case, and there is absolutely no evidence in any record, which shows any violations of any securities laws by the Appellant. The Appellee interpretation of § 523(a)(19) would allow the Appellee to seek disgorgement of any money ever received by any of the investors of Schubert, who are the same investors who were Schubert's targets. The investors did not run a Ponzi scheme, that was Schubert and it is Schubert that needs to reimburse the investors as per her judgment for restitution and her guilty plea.

CONCLUSION

For the reason set forth in the Appellant Brief in Chief and the holding of the Civiello case cited by the Appellee. Appellant would request that the judgment of the bankruptcy court be reversed and to be remanded with instructions to allow the Appellant discharge in bankruptcy, as there is absolutely nothing in the record, which shows Appellant committed any violations of securities laws. In the alternative, Appellant would ask that the judgment of the bankruptcy court be reversed and remanded to the bankruptcy court for further proceedings.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF SERVICE

I hereby certify that on the 30th day of March 2009, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing and I also served the attached document by Regular U.S. Mail on the following, who are registered participants of the ECF System:

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