

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

IN RE:)
)
ROBERT WILLIAM MATHEWS,) Case No. 07-10108-TMW
) Chapter 7
Debtor,)
)
OKLAHOMA DEPARTMENT OF SECURITIES,)
Ex. Rel. IRVING L. FAUGHT,)
)
Plaintiff,)
)
vs.) Adversary No. 07-01140
)
ROBERT WILLIAM MATHEWS,)
)
Defendant.)

and

IN RE:)
)
MARVIN LEE WILCOX and) Case No. 07-10610-RLB
PAMELA JEAN WILCOX,) Chapter 7
Debtors,)
)
OKLAHOMA DEPARTMENT OF SECURITIES,)
Ex. Rel. IRVING L. FAUGHT,)
)
Plaintiff,)
)
vs.) Adversary No. 07-01226
)
MARVIN LEE WILCOX,)
)
Defendant.)

**RESPONSE TO MOTION FOR SUMMARY JUDGMENT AGAINST DEBTORS
MARVIN AND PAMELA WILCOX AND DEBTOR ROBERT MATHEWS
WITH BRIEF AND EVIDENTIARY MATERIAL ATTACHED**

COMES NOW, the Debtors, Marvin and Pamela Wilcox (Debtors Wilcox), and Debtor, Robert Mathews (Debtor Mathews), and for a Response to the Oklahoma Department of Securities (Department) Motion for Summary Judgment Against Debtors, Marvin and Pamela Wilcox, and Debtor, Robert Mathews, requesting an entry of an Order finding that their debts owed to the Department are non-dischargeable under 11 U.S.C. §523(a)(2) and (19), and for imposition of an equitable lien on certain property of Debtors Wilcox.

FACTUAL BACKGROUND

The Department would have this Court believe that the facts as set forth in their motion are “undisputed” and that “no genuine issue as to any material fact” exist. Debtors Wilcox and Debtor Mathews will set forth specific facts that they contend are disputed and respond to each of the Department’s factual averment, item by item, as the local rule and accepted practice contemplates. *In re Vaughan*, 342 B.R., 342 B.R.. 385. 2006 WL 774665 (10th Cir. BAP (Okla.)).

1. Marsha Schubert (Schubert), **individually**, conducted a securities fraud in and from Crescent, OK., from the period January 2000 through or around October 14, 2004. As part of this scheme Schubert purported to be doing business as Schubert and Associates. Her activities known to the participants as “day trading” was in actuality a cover for a “Ponzi” scheme to benefit Schubert personally. ***Debtors admitted that this is factual correct and so stated in ¶7 of answer filed by Debtors Wilcox and ¶6 of answer by Mathews.***
2. The Department set forth a factual finding that is partially correct, as the securities fraud scheme used by Schubert, known as a “Ponzi” scheme, required the following: 1) monies collected from over 100 persons from Kingfisher, Logan, Canadian, and Oklahoma Counties to be placed into a “day trading” Investment Program under the total control of Schubert.

Then payments were made to the old participants and new prospective participants from the monies collected; and 2) a scheme, known only to Schubert, of moving monies from Schubert's business account into and out of Debtors Wilcox and Debtor Mathews personal checking accounts which according to Schubert were transactions made as "day trading".

Admitted in part and denied in part in ¶7 of answer filed by Debtors Wilcox and ¶6 of answer filed by Mathews. See Debtors' Ex. 1 Affidavit of Mathews and Debtors' Ex. 2 Affidavit of Wilcox. See Debtors' Ex. 4 Wilcox Transcr. 20:9-19 (Sept 2006).

3. As part of the "day trading" scheme, Schubert convinced Debtors Wilcox and Debtor Mathews (Debtors) that it was necessary for Schubert to "purchase investments" daily with the timing of the purchase being critical. Then before the market closed she would "sell these investments". Schubert recommended that each of the Debtors provide her with a supply of "pre-signed" checks that would be used to make the daily investments and that Schubert would complete the amounts invested when the trades were completed. *Admitted in part and denied in part in ¶7 of answer filed by Debtors Wilcox and ¶6 of answer filed by Mathews. See Debtors' Ex. 1 Affidavit of Mathews and Debtors' Ex. 2 Affidavit of Wilcox. See Debtors' Ex. 3 Mathews Transcr. 66:21-25; 67:1-25; and 68:1-25 (June 2007). See Debtors' Ex. 4 Wilcox Transcr. 23:8-25; 24:1-25; and 25:1-9 (Sept 2006).*
4. At the end of each day, Schubert made checks payable to Debtors that were drawn on bank accounts that were controlled by Schubert. Schubert informed Debtors that these monies represented their original daily investment and any profit that she made by "day trading" within their respective investment account. *See Debtors' Ex. 1 Affidavit of Mathews and Debtors' Ex. 2 Affidavit of Wilcox.*

5. Between September 11, 2001, and October 6, 2004 (the “Mathews Relevant Period”), there were over nine hundred and fifty (950) transactions between Schubert and Debtor Mathews. The deposits to Schubert from Debtor Mathews totaled in excess of Eighty-Six Million Dollars (\$86,000,000). Disbursements from Schubert to Debtor Mathews totaled in excess of Eighty-Seven Million Dollars (\$87,000,000). *Admitted in part and denied in part in ¶7 of answer filed by Debtors Wilcox and ¶6 of answer filed by Mathews.*
6. Between December 12, 2002 and October 6, 2004 (the “Wilcox Relevant Period”), there were over six hundred fifty (650) transactions between Schubert and Debtor Marvin Wilcox. The deposits to Schubert from Debtor Marvin Wilcox totaled in excess of Seventy-Seven Million Dollars (\$77,000,000). Disbursements from Schubert to Debtor Marvin Wilcox totaled in excess of Seventy-Eight Million Dollars (\$78,000,000). *Admitted in part and denied in part in ¶7 of answer filed by Debtors Wilcox and ¶6 of answer filed by Mathews.*
7. The transactions described in paragraphs 5 and 6 above were purportedly in connection the “day trading” of securities. Debtors never received confirmation concerning the purchase and sale of such securities on their behalf or saw any other evidence of their “day trading” accounts. *Admitted in part and denied in part in ¶7 of answer filed by Debtors Wilcox and ¶6 of answer filed by Mathews. See Debtors’ Ex. 3 Mathews Transcr. 99:1-18 (June 2007). See Debtors’ Ex. 6 Mathews Transcr. 10:2-25 and 11:1-2 (Oct. 2006).*
8. Debtors received monthly statements related to their legitimate brokerage accounts maintained at AXA Advisors, LLC for which Schubert was their broker. *See Department’s Ex. 1 Wilcox Transcr. 50:10-14 (Sept 2006); see Department’s Ex. 2 Mathews Transcr. 8:3-13 (Oct. 2006).* Debtors never received any statements from their “day trading” accounts

through Schubert, yet, believed that they rarely suffered any losses in their “day trading” accounts. *See Department’s Ex. 1* at 21:7-17 and 68:12-14 (Sept. 2006); *and Department’s Ex. 2* at 10:13-16 (Oct. 2006); *and Department’s Ex. 3* at 102:11-14 (June 2007).

9. Debtor Wilcox and Mathews regularly picked up bundles of checks prepared by Schubert, including the checks made payable to themselves and the other individual involved in the check exchange scheme, and ferried them to the appropriate bank for deposit. *Admitted in part and denied in part in ¶7 of answer filed by Debtors Wilcox and ¶6 of answer filed by Mathews. See Debtors’ Ex. 1 Affidavit of Mathews and Debtors’ Ex. 2 Affidavit of Wilcox.* Debtor Mathews made deposits for Schubert several times over a two or three year period. *See Debtors’ Ex. 3 Mathews Transcr. 99:25; 100:1-25; & 101:1-8 (June 2007).* Debtor Wilcox occasionally made deposits for Schubert, and he was not her employee. *See Debtors’ Ex. 4 Wilcox Transcr. 70:17-25 & 71:1-9. (Sept. 2006). See Debtors’ Ex. 2 Affidavit of Wilcox.*
10. The activity described in paragraph 9 above continued when Schubert was scheduled to be out-of-town. In order to distribute “day trading” profits, Schubert prepared checks drawn on a bank account she controlled for each of the days she would be gone, put the checks in an envelope marked with the pertinent deposit day, and left the envelopes in her office for deposit by her office staff or by Debtors Wilcox or Mathews. *See Department’s Ex. 3* at 103:3-25 (June 2007).

Proof of the Primary Securities Violations by Marsha Schubert

11. On October 14, 2004, the Oklahoma Department of Securities (Department) filed suit against Schubert in the District Court of Logan County, State of Oklahoma, for violations of 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). ***This is public record and Debtors became knowledgeable of the fact when told of the lawsuit.***

12. On November 15, 2004, upon the stipulation and consent of Schubert, the Logan County District Court entered a permanent injunction against Schubert that included an order of restitution, the amount to be determined at the conclusion of the receivership. *Oklahoma Department of Securities ex rel Irving L. Faught, Administrator v. Marsha Schubert, et al.*, CJ 2004-256. ***This is public record. The Debtors' knowledge is limited to what was printed in the papers and what they were told by the lawyers for the state.***
13. On May 5, 2005, Schubert entered a plea of guilty in the United States District Court for the Western District of Oklahoma to one count of money laundering in connection with the Purported Investment Program. She was sentenced to 10 years in prison and ordered to pay restitution in the amount of \$9,114,744. *United States of America v. Marsha Kay Schubert*, CR 05-078. ***This is public record and the Debtors' knowledge is limited to what was printed in the paper and told to them by other investors.***
14. On September 9, 2005, Schubert entered a plea of guilty in the District Court of Logan County, Oklahoma, to fourteen (14) counts of obtaining money by false pretenses in connection with Purported Investment Program. Schubert was sentenced to 25 years in prison and ordered to repay \$9,114,744. *State of Oklahoma v. Marsha Kay Schubert*, No. CF-2004. Marsha Schubert stated as the factual basis for her plea that she obtained money in a "Ponzi" scheme in which she promised that the funds would be invested but instead, used

the funds to pay prior investors involved in the Purported Investment Program. ***This is public record and Debtors' knowledge is limited to what was printed in the paper and told by other investors.***

15. On May 11, 2005, the Department sued Debtors Wilcox and Debtor Mathews and over 100 other persons, who received cash and/or other property from Schubert that were the proceeds of Schubert's unlawful activity ("Relief Defendants") and for which the Relief Defendants gave inadequate or no consideration. ***Admitted in part and denied in part in ¶7 of answer filed by Debtors Wilcox and ¶6 of answer filed by Mathews.***

Debtors' Judgments

16. As a result, Debtor Mathews was ordered to disgorge Five Hundred Twenty-four Thousand Eight Hundred Twenty-Six Dollars and Nineteen Cents (\$524,826.19). ***Admitted in part and denied in part in ¶7 of answer filed by Debtors Wilcox and ¶6 of answer filed by Mathews.***
17. As a result, Debtors Wilcox were ordered to disgorge Five Hundred Nine Thousand Five Hundred Five Dollars (\$509,505). ***Admitted in part and denied in part in ¶7 of answer filed by Debtors Wilcox and ¶6 of answer filed by Mathews.***
18. Debtor Pamela Wilcox had check writing authority on the account used to aid the fraudulent scheme, wrote checks on that account and personally benefitted from the proceeds from the fraudulent scheme. ***Admitted in part and denied in part in ¶7 of answer filed by Debtors Wilcox and ¶6 of answer filed by Mathews. See Debtors' Ex. 2 Affidavit of Wilcox.***
19. For over 35 years, Debtor Marvin Wilcox worked in various capacities for at least two banks. ***See Departments Ex. 1 at 15:6-8 (Sept 2006).*** Debtor Marvin Wilcox earned \$40,000 a year at NBanC in Kingfisher, Oklahoma, and retired in 2002 as a loan officer and a Vice President

of NBanC. *See Department's Ex. 4 Themer Transcr. 30:2-16 (April 2005).*

Debtor Wilcox did not have any investment experience. See Debtors' Ex. 4 Wilcox Transcr. 21:24-25; 22:1-25 and 23:1-7 (Sept. 2006).

20. Debtor Marvin Wilcox did not have a retirement plan through the bank and planned to retire and live on his substantial investment returns. *See Department's Ex. 4 at 30:17-23.*

The Department's Exhibit 4 does not reveal this fact on page 30 of the Themer deposition and Debtors are able to verify that this fact was not true. See Debtors' Ex. 4 Wilcox Transcr. 44:14-25 and 45:1-6(Sept. 2006). See Debtors' Ex. 2 Affidavit of Wilcox.

21. Following Debtor Marvin Wilcox's retirement from NBanC, there was a noticeable change of lifestyle for Debtors Wilcox. Debtors Wilcox built a house after living in a mobile home for many years. Debtors Wilcox previously drove a Ford pickup and upgraded to a fleet of vehicles including a new Ford pickup, Rav 4 and a Cadillac. *See Department's Ex. 4 at 31:17.25 and 32:7-16 (April 2005).*

Department has taken the deposition of a bank employee and assumed that his answer is true. This statement is "hearsay" and inadmissible in this motion or at trial. These facts are incorrect and Debtors have attached an affidavit setting forth the truth to Debtor's Wilcox lifestyle. See Debtor's Ex. 2 Affidavit of Wilcox.

22. Debtors Wilcox were receiving 20-30 percent (20-30%) "returns" on their investments. *See Department's Ex. 4 at 31:7-16 (April 2005).* ***The Department has taken a deposition of an employee of the bank and during the course of this deposition they inquired as to Debtors Wilcox investment earnings. The answer is "hearsay" and inadmissible as evidence for this motion or at trial.***

Material Aid by Debtors to Marsha Schubert

23. Debtor Mathews referred Debtors Wilcox and other investors to Schubert. *See Department's Ex. 1* at 10:18-25; and 11:1-13 (Sept. 2006).

This Court should closely review the Department's Exhibit 1 pages 10 and 11 in their totality. At no place during the testimony of Debtor Wilcox, was there reference to other investors. The Department has presented a fact that is unsupported by the record.

24a. Debtor Marvin Wilcox recommended Schubert to several people for investment purposes. *See Department's Ex. 1* at 77:14-21 and 78:1-4.

This Court should read the Department's Exhibit 1 at pages 77 and 78. It was clearly understood by the Department that Debtor Wilcox only talked with two (2) of his friends.

24b. Debtor Marvin Wilcox introduced his supervisor, Dennis Themer (Themer), President of NBanC in Kingfisher, Oklahoma, to Schubert and encouraged him to open an investment account with her. *See Department's Ex. 4* at 11:8-15 (April 2005).

The Court should closely read Department's Exhibit 4 pages 11 and 12 of the Themer deposition. Upon Marvin Wilcox's recommendation, Mr. Themer opened an investment account with AXA, the brokerage firm. AXA was not a party to the "Ponzi" scheme of Schubert and at the date of the deposition Mr. Themer still has his investment with AXA.

Debtor Wilcox's actions in regard to Mr. Themer are completely without fault. See Debtors' Ex. 5 Themer Transcr. 11:1-15 & 12:1-25 (April 2005).

24c. Themer was aware that Debtors Wilcox and Debtor Mathews were purportedly "day trading" with Schubert and was aware of the activity in their NBanC accounts. *See Department's Ex. 4* at 52:9-25 (April 2005).

24d. Approximately two years later, the check exchange between Schubert and Debtors Wilcox and Mathews involved such large amounts that Themer direct Debtors Marvin Wilcox and Mathews to stop their day trading activity through NBanC so as not to subject the bank to risk based on the uncollected balances in their accounts. *See Department's Ex. 4* at 26:3-23 (April 2005).

25. As a result Debtors Wilcox and Mathews opened accounts at F & M Bank in Crescent, Oklahoma, and the activity continued for a brief time. *See Department's Ex. 4* at 40:2-24 (April 2005).

The Department would have this Court believe that the facts set forth in ¶¶ 23 -25 would show that Debtors were a material aid to Schubert. The Court should note that none of the facts by themselves or taken as a whole violate any federal or state securities act. See Debtors' Ex. 1 Affidavit of Mathews.

Partnership between Debtor Marvin Wilcox and Schubert

26. Debtors considered themselves to be in a partnership with Schubert & Associates. On the Schedule K-1 attached to their federal income tax returns, prepared by Jeffrey C. Trent, Debtors Wilcox reported to the Internal Revenue Service that they were partners in Schubert & Associates. *See Department's Exhibit 5 Wilcox and Mathews tax returns. See Debtors' Ex. 1 Affidavit of Mathews. See Debtors' Ex. 6 Mathews Transcr. 30:13-16 (Oct 2006).*

Genuine Issues of Material Fact that Exist

A. The Debtors were never knowledgeable of the "Ponzi" scheme until the Department filed legal action against Marsha Schubert in Logan County. *See Debtors' Ex. 1 Affidavit of Mathews. See Debtors' Ex. 2 Affidavit of Wilcox.*

- B. The Debtors Wilcox and Mathews were never a partner in the entity known as Schubert and Associates. *See Debtors' Ex. 1 Affidavit of Mathews. See Debtors' Ex. 6 Mathews Transcr. 30:13-16 (Oct 2006).*
- C. The Debtors Wilcox had a retirement plan at the time Marvin Wilcox retired from NBanC. *See Debtors' Ex. 2 Affidavit of Wilcox.*
- D. The Debtors Wilcox owned the various automobiles before any funds were invested with Marsha Schubert. *See Debtors' Ex. 2 Affidavit of Wilcox.*
- E. The Debtors Wilcox paid for their house from the sale proceeds of land owned by Debtors Wilcox prior to investments with Marsha Schubert. *See Debtors' Ex. 2 Affidavit of Wilcox.*

ARGUMENT

Rule 56(c) of the Federal Rules of Civil Procedure and Rule 7056 of the Bankruptcy Code provide that Summary Judgment will be granted if “there is no genuine issue as to any material fact and that the movant is entitled to judgment as a mater of law.” The burden shifts to the party opposing the motion and the Debtors must raise specific facts evidencing the need for a trial. *In re Vaughn*, 342 b.r. 385, (10th Cir. BAP 2006).

The Department would have this court believe that the facts are undisputed and summary judgment should be granted. While the Department has stated in its motion under “Factual Background” items 1 - 18 that Debtors “Admitted in ¶7 of answer filed by Debtors Wilcox and ¶6 of answer filed by Mathews”, this Court is required to closely review the Debtors’ Answer in ¶7 filed by Debtors Wilcox and ¶6 filed by Debtor Mathews. *Stepanischen v. Merchants Despatch Trans. Corp.*, 722 F.2nd 922. The Department’s statement that Debtors agreed with all of the facts listed in items 1 - 26 is totally incorrect, and so noted at the end of each paragraph, as the Debtors

specifically stated in their answer, “at no time was Debtor knowledgeable of her (Marsha Schubert) activities and it was only after the Department closed down Marsha Schubert, did Debtor have any knowledge of wrongdoings.”

On motion for summary judgment a court must determine whether the evidence shows there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Factual disputes invoked to resist summary judgment must be both material in the sense of bearing on an essential element of the plaintiff's claim and genuine in the sense that a reasonable jury could find in favor of the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S.242 (1986).

The Debtors have presented genuine issues of material facts in question from the pleadings, depositions, and the affidavits attached to Debtors' objection. The Debtors have specifically presented the fact that the Department has misstated the issues in depositions attached to their motion. A genuine issue of a material fact is present when a reasonable trier of fact, viewing all of the record evidence, could rationally find in favor of the non-moving party in light of his burden of proof. *Doe v Abington Friends School*, 480 F.3rd 252. C.A. 3 (Pa.), 2007.

The *Lujan* Court held that when ruling on summary judgment, courts must resolve any factual issues of controversy in favor of the non-movant only in the sense that, where facts specifically averred by non-movant contradict facts specifically averred by movant, then the motion must be denied. *Lujan v National Wildlife Federation*, 497 U.S. 871, 110 S.Ct. 3177. U.S. Dist. Col., 1990. The attached affidavits by Debtors meet the requirement of Rule 56(e) in that they set forth specific facts showing that there is a genuine issues of material fact for trial. *Celotex Corp. V. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 2.

11 U.S.C. § 523(a)(2)(A)

_____The Department has brought this action against Debtors under 11 U.S.C. § 523(a)(2)(A) which provides that a debt is non dischargeable for money, or property, to the extent obtained by “actual fraud”.

Debtors in their answer to the petition set forth the facts that at no time did Debtor have any knowledge of the “Ponzi” scheme that was being conducted by Marsha Schubert. *Answer ¶6 and ¶7 filed in this case. See Debtors’ Ex. 1 Affidavit of Mathews and Debtors’ Ex. 2 Affidavit of Wilcox.* Actual fraud must be proven beyond a reasonable doubt, non dischargeability of debt does not reach constructive fraud. *McClellan v. Cantrell*, 217 F.3d 890.

Fraud is the “knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment”. In the Department’s deposition of Debtor Mathews, taken on October 17, 2006, Mathews stated that he had no “investment experience” and no “understanding” of the investing done by Marsha Schubert on his behalf. *See Debtors’ Ex. 6 Mathews Transcr. 5:16-23 (Oct 2006).*

Under oath Debtor Mathews stated that he did not “understand” the investing that Marsha Schubert was doing, and that she told him she was “conducting options trading”. *See Debtors’ Ex. 6 at 9:14-24 and 10:2-5 (Oct 2006).* Debtor Mathews allowed Marsha Schubert to use checks signed on his personal account because Marsha Schubert told him when “she found a deal, she needed to buy it.” *See Debtors’ Ex. 6 at 13:5-18 (Oct 2006).*

When the Department asked Debtor Mathews, “did you believe you were involved in any kind of partnership with Schubert and Associates”, his reply was “No.” *See Debtors’ Ex. 6 at 30:13-16 (Oct 2006).*

Fraud as defined by the *McClellan* court “is not limited to misrepresentations and misleading omissions, but embraces all of the multifarious means which human ingenuity can devise and which are resorted to by one individual to gain advantage over another by false suggestions or by suppression of truth”. *McClellan* at 894. At no time did Debtor Mathews fraud any of other investors, and fraud is a “state of mind” issue that must be proven by a jury.

The False Claims Act defines “knowing” and “knowingly” as including a defendant’s “actual knowledge”. 31 U.S.C. § 3759(b). When a court applies these standards it must heed the basic rule that a defendant’s state of mind typically should not be decided on summary judgment. *U.S. ex rel Erdem I Cantekin v. University of Pittsburgh*, 192 F.3d 402. C.A.3 (Pa.), 1999; *Hunt v. Cromartie*, 526 U.S. 541, 119 s.Ct. 1545, 143 L.Ed.2d 731 (1999).

Debt which arose from fraud of innocent partner’s associate, and for which innocent partners were vicariously liable under state partnership law, was non-dischargeable in a Chapter 7 case. The *Winkler* court held that the innocent partner in a partnership was the agent of the partnership and it imputed fraud by one partner to the innocent partners. *In re M.M. Winkler & Associates*, 239 F.3rd 746, C.A.5 (Miss.), 2001.

The Department would have this Court believe that Debtors were active accomplices in a partnership known as Schubert and Associates . There is no partnership agreement in existence for Schubert and Associates and the depositions taken by the Department of the Debtors expressly state that Debtors were not a partner in Schubert and Associates. The Internal Revenue Service has confirmed that no partnership return was filed for Schubert and Associates and the K-1 form given to the Debtors’ tax accountant was handwritten by Martha Schubert and was a false document prepared for the purpose of allowing her to continue her “Ponzi” scheme.

Debtors can not have knowledge of or be actively participating in a **business that did not exist**, therefore, the holding of the *Taite* court, whereby an individual who had prior knowledge and actively participated in the ongoing business is liable for the debt of said business does not apply to this case. *In re Taite*, 76 B.R. 764, Bkrtcy. C.D. Cal., 1987.

The *Taite* court further held that a state court judgment rendered after full litigation on issues may be offered to establish prima facie case elements of non-dischargeability. *Id.* In the case at bar, the judgment was rendered upon motion for summary judgment and not rendered after full litigation on the issues.

11 U.S.C. § 523(a)(19)

The Department would have this court hold that the summary judgments against Debtors in the Oklahoma County Court case, *Oklahoma Department of Securities v. Robert W. Mathews, et al*, CJ 2005-3796 falls under the exception to discharge provisions of 11 U.S.C. § 523(a)(19).

The pertinent part of this bankruptcy statute is that the debt must be for a violation of any federal or state security law, or order issued under such federal or state securities law. The Department cites *In re Civiello*, 348 B.R. 459, Bkrtcy N.D. Ohio, 2006, indicating that the coverage is broad. However, the *Civiello* court held that the “primary focus is on the fact that award generates from a securities violation and not the underlying nature of the order or award.” *Id. at 461.*

The *Civiello* court specifically addressed the history of this Section 523(a)(19) and held that “in order to be excepted from discharge, **two conditions must be met:**

(1) The debt is for the violation of certain federal securities laws, state securities laws or regulations under the federal or state securities laws or is for “common law fraud, deceit, or manipulation in connection with the purchase or sale of any security”; **and**

(2) The debt results from a judgment, order, consent order or decree in a federal or state judicial or administrative proceeding or any settlement agreement entered by the debtor or any court or administrative order for the payment of damages, a fine, penalty, citation, restitutionary payment, disgorgement payment, attorney fee cost or other payment owed by the debtor.” (*Emphasis added*) *Id at 464.*

The Department would have this Court believe that the Guilty Plea and Conviction of Schubert would make the summary judgment against the Debtors fall within the exception to discharge of 523(a)(19)(A). The Debtors, in the case at bar, were not a party to the criminal proceedings against Schubert, therefore, her pleas and convictions for securities violation do not accrue to the Debtors, and the summary judgments against the Debtors in the Oklahoma County case, *Oklahoma Department of Securties v. Robert W. Mathews, et al.*, CJ 2005-3796, does not fulfill the required **two prong test** set forth by the *Civiello* court.

The Department would also have this Court believe that the Debtors provided material aid to Schubert’s “Ponzi” scheme, and that they had knowledge of or should have known that she was conducting a fraudulent scheme. The depositions of the Debtors clearly stated that the Debtors had no knowledge of Schubert’s “Ponzi” scheme, and they believed that the “day trading” activities of Schubert required that the Debtors use their personal funds on a daily basis to make “day trades” and that at the end of each day the proceeds would be returned to their personal checking accounts.

Depositions and affidavits of Debtors show that the Debtors did not have knowledge of “day trading” activities and they relied completely on the investment advise of Schubert. While Debtor Wilcox had banking experience, he was not involved in any investments within the banking industry nor did he have investment experience on a personal level. The Debtors knew Schubert and her

family for most of their lives and trusted that she was advising them correctly in all aspects of the transactions surrounding their investment activities.

The Department proposes that this Court find that by allowing Schubert to use Debtors' personal bank accounts to conduct the check exchange scheme, that Debtors materially aided Schubert in conducting the "Ponzi" scheme and have therefore themselves incurred liability. In support of this position, the Department sets forth the Oklahoma Securities Act and stated that the *Prince* court established the test for secondary liability of persons who 1) violate the securities statute, and 2) material assistance or aid by secondary persons in connection with the violation. *Prince v Brydon*, 307 Or.146, 764 P.2d 1370 (Or. 1988). The *Prince* court made it clear that statute should not be taken literally, but the drafters of the bill "makes it clear that person who does not know of violation is not liable." *Id* at 1372. It is clear from this holding that ignorance by the Debtors as to the actions of Schubert is a defense to this provision of the Act.

The *Rendler* court in deciding the issue of "materially aiding" in the securities violation clearly held that an individual must knowingly assist directly in soliciting and performing acts that violate the Act before they become liable to the same extent as the person who violated the act. *Rendler v. Markos*, 154 Wis. 2d 420, 453 N.W. 2d 202 (Wis.App., 1990).

The Debtors clearly believed that Schubert was "day trading". The record is clear that even after Debtor Wilcox no longer worked for NBanC, that the activity in Debtors' individual checking accounts were continually reviewed by Mr. Themer, President of NBanC, and the bank's internal auditor. For the two year period beginning in 2002 and ending in late 2004 the employees of NBanC did not find any reason to advise the Debtors of the possibility of a check scheme or a "Ponzi" scheme. *See Debtors' Ex. 5 Themer Transcr. 33:1-25; 34:1-25; 35:1-25; 36:1-24 (April 2005)*.

The Department has requested that this Court impose an equitable lien on the homestead of Debtors Wilcox. The Department has offered no legal argument, case law, or statutory provisions in support of this request. Debtors are unable to find any case law on which this Court could impose an equitable lien on the homestead of Debtors Wilcox. When the Debtors filed their Petition for Bankruptcy, they exempted their homestead in accordance with the Oklahoma bankruptcy statutes. The Department did not file its objection to this exemption within the time provided by the current bankruptcy statutes, and since the time has now elapsed, this Court is unable to grant their request.

CONCLUSION

At no time did Debtors have knowledge that Schubert was conducting a “Ponzi” scheme. They were not partners in the entity known as Schubert and Associates and Debtors, even their banker, Mr. Themer, believed that Schubert was “day trading” and that it was necessary for Schubert to make daily withdrawals and deposits from Debtors’ personal accounts to cover these “day trades”. There is no part of the record that will support the Departments position that Debtors “were keenly aware that without their aid, the “Ponzi” scheme would have collapsed and with that collapse, their “gravy train” was over.

The Debtors respectfully request that this Court deny the Department’s Motion for Summary Judgment against Debtors Wilcox and Debtor Mathews.

Respectively Submitted.

s/ Jeffrey C. Trent
Jeffrey C. Trent, OBA 11598
915 W Main Street
Yukon, OK 73099
405-354-4879 Office
405-354-1252 Fax

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of June, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing. Based on the records currently on file, the Clerk of court will transmit a Notice of Electronic Filing to the following ECF registrants:

Gerri Stuckey
Oklahoma Department of Securities
First National Center, Suite 860
120 N. Robinson
Oklahoma City, OK 73102
Attorney for Plaintiffs

s/Jeffrey C. Trent