

SEPT. 8, 2006 @ 9AM
JUDGE PARRISH

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

AUG - 4 2006

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

PATRICIA PRESLEY, COURT CLERK
by _____
Deputy

OKLAHOMA DEPARTMENT OF SECURITIES)
ex rel. Irving L. Faught, Administrator,)
)
Plaintiff,)

vs.)

Case No. CJ-2006-3311
Honorable Patricia G. Parrish

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.)

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

Defendants Farmers & Merchants Bank ("FMB"), Farmers & Merchants Bancshares ("Bancshares"), John V. Anderson and John Tom Anderson (collectively referred to as "Defendants") respectfully move this Court to reconsider its Order of August 1, 2006, denying Defendants' motion to dismiss various claims brought by Plaintiff Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator ("ODS"), for failure to state a claim for which relief can be granted pursuant to 12 O.S. § 2012 for the reasons set forth below. Alternatively, Defendants request the Court certify its Order denying Defendants' Motion to Dismiss for immediate interlocutory appeal.

1. ODS cannot bring a claim under 71 O.S. §§ 1-509 or 408 (the civil liability provisions of the present and former Oklahoma Securities Acts) because it is not a person who was harmed by fraudulent practices relating to the purchase or sale of securities, as required under the plain language of the statutes. *Motion to Dismiss*, p. 4-5, 9-10; *Reply*, p. 2-3.¹ Rather it is provided a specific civil enforcement mechanism, separate and distinct from the civil liability provision, by which it may pursue claims against primary actors. 71 O.S. §§ 1-603 and 406.1. ODS seeks to “have the benefit of any theory of liability available to individual purchasers,” *Response*, p. 9, thereby selectively blending the two statutorily distinct procedural and substantive mechanisms. As discussed during the oral argument on the Motion to Dismiss, this approach obviously creates issues with double recovery. Apparently recognizing this problem, ODS stated during the hearing that it does not intend to use this litigation to seek portions of the \$9 million recovered through the contemporaneous receiver action. However, a very real problem remains with regard to individual investors who have or may sue Defendants during the pendency of this action or following settlement or trial of the action. Thus double recovery is a very real issue and is particularly troublesome should the parties ever enter into meaningful settlement negotiations.

2. Without this selective blending (which violates the plain language of the Act), ODS has no means to bring an enforcement action against one who materially aids or abets under the prior Oklahoma Securities Act. *See* 71 O.S. § 406.1 (no material aider

¹ Allowing ODS to bring a claim pursuant to the civil liabilities provisions also leads to additional questions, including whether Defendants can join additional parties, seek contribution, demand a jury trial, etc.

and abettor liability included in the civil enforcement statute). The distinction is further confirmed under the new Oklahoma Securities Act, where restitution and other equitable means are specifically limited to primary violators of the Act, despite inclusion of aiders and abettors for injunctive and other similar relief. *See* 71 O.S. § 1-603(c); *see also Motion to Dismiss*, p. 5-8.

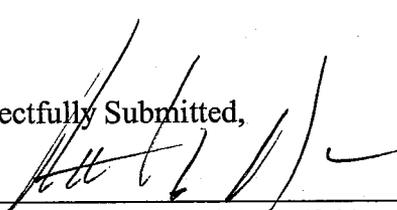
3. Under Oklahoma law, restitution is limited to the recovery of unjust benefits where one has received a benefit to which another is justly entitled. *See Motion to Dismiss*, p. 8-9; *Reply*, 4-5. Here, ODS is clearly seeking, not to recover the amounts which Defendants have purportedly received at the expense of the victims, but rather damages far in excess of any benefits Defendants allegedly received. A plain reading of the Oklahoma Securities Act confirms this understanding of the remedy of restitution. Under the civil liabilities provision (71 O.S. §§ 408 and 1-509), aider and abettor liability is tied to a specific damages scheme—the aider and abettor is liable to the same extent he or she would be under the prior statutory subsections, which provide express damages (and not equitable recovery). Moreover, as discussed above, aiders and abettors are not included as persons subject to the remedy of restitution available under the civil enforcement statutes (71 O.S. §§ 406.1 and 1-603).

4. In the event the Court denies this Motion to Reconsider, Defendants respectfully request the Court certify its Order of August, 1, 2006, denying Defendants' Motion to Dismiss for interlocutory appeal pursuant to 12 O.S. § 952(b)(3) and Rule 1.50 of the Oklahoma Supreme Court Rules, as this Order affects a substantial part of the merits of the controversy and immediate appeal for the order will materially advance the ultimate termination of the litigation. This Motion to Dismiss relies wholly on statutory

construction and the Court's determination greatly affects the remainder of this litigation, in both scope and amount in question. The Court's Order necessarily rejects the express statutory language and implies terms and construction beyond the plain language of the statutes. Without resolution of these issues at this stage of the litigation, enormous time and energy of the parties, counsel and this Court will be expended. The parties will be hard pressed to engage in meaningful settlement negotiations. Thus certification of the order will further judicial economy and aid in the ultimate termination of this litigation.

WHEREFORE, Defendants Farmers & Merchants Bank Farmers & Merchants Bancshares, John V. Anderson and John Tom Anderson respectfully request the Court grant their Motion to Reconsider and dismiss all aspects of the ODS claim (1) arising before July 1, 2004, based on acts or omissions prior to that date, as 71 O.S. § 406.1 does not provide a civil enforcement mechanism against those "materially aiding" in the securities violation; or (2) relying on the civil liability scheme (71 O.S. §§ 1-509 and/or 408), as this case has been brought pursuant to a civil enforcement mechanism. Further, Defendants request an order stating that restitution is not an available remedy against Defendants for any part of the ODS claim. Alternatively, Defendants request the Court certify its Order denying Defendants' Motion to Dismiss for immediate interlocutory appeal.

Respectfully Submitted,



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***ATTORNEYS FOR DEFENDANTS
FARMERS & MERCHANTS BANK, FARMERS
& MERCHANTS BANCSHARES, INC., JOHN
V. ANDERSON and JOHN TOM ANDERSON***

CERTIFICATE OF SERVICE

I hereby certify that on this the 4th day of August 2006, a true and correct copy of the above and foregoing instrument was mailed, via U.S. First Class Mail, postage prepaid, to the following counsel of record:

Melanie Hall, Esq.
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