

**IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA**

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

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.)

APR 13 2009

PATRICIA PRESLEY, COURT CLERK
by _____
DEPUTY

Case No. CJ-2006-3311

**DEFENDANTS' BRIEF IN SUPPORT OF JURY TRIAL OF
OKLAHOMA DEPARTMENT OF SECURITIES' CLAIMS**

COME NOW Defendants Farmer & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson and John Tom Anderson ("Defendants") and respectfully submit their Brief in Support of Jury Trial of Oklahoma Department of Securities' ("ODS") Claims. As discussed below, Defendants are entitled to a jury trial on the claims brought by ODS.

I. Defendants Have a Right to Jury Trial On the Issue of Material Participant/ Aider Liability.

The Oklahoma Constitution, Article 2, Section 19 expressly provides in pertinent part:

“The right of trial by jury shall be and remain inviolate, except in civil cases wherein the amount in controversy does not exceed One Thousand Five Hundred Dollars (\$1,500.00), or in criminal cases wherein punishment of the offense charged is by fine only, not exceeding One Thousand Five Hundred Dollars (\$1,500.00).

Although Section 19 only carves out an exception for cases which do not exceed \$1,500, Oklahoma courts have long held a second exception exists for “questions of purely equitable cognizance.” *See I.C. Gas Amcana, Inc. v. Hood*, 1992 OK 119, 855 P.2d 597, 599.

The instant litigation involves issues sounding in both law and equity. ODS is expressly seeking certain equitable remedies, such as injunctive relief and restitution. ODS contends that “Marsha Schubert was enjoined by the district court and ordered to make restitution to the victims of her securities fraud.” *See Response to Defendants’ Motion to Reconsider*, p. 2. As recognized by *Amcana*, such equitable remedies do not generally provide for jury trial. However, ODS then argues that “Defendants are secondarily liable, jointly and severally, with and to the same extent as Marsha Schubert.” *Id.* Unlike the claim against Ms. Schubert, this statutorily created joint and several liability is a distinctly legal issue.

The Court has expressly found that any liability attributable to Defendants is authorized by 71 O.S. § 1-509 (and its predecessor 71 O.S. § 408). *See Journal Entry* (2/17/09). To establish “joint and several liability” under this “civil liability” statute, there must be a finding that Defendants “materially aid[ed]” (§ 1-509) or “materially participate[ed] or aid[ed]” (§ 408) in the fraudulent sale of securities. While the

statute permits suits in law or equity with regard to the primary actor,¹ it makes no such provision in the “material aiding” subsection (§ 1-509(G)(5) or § 408(b)). Rather, the Oklahoma Supreme Court has discussed the litigation premised on the statute as “a law action.” *Nikkel v. Stifel, Nicolaus & Co., Inc.*, 1975 OK 158, 542 P.2d 1305, 1308. (Emphasis added). Moreover, “the legislative intent is that joint and several liability as it relates to contracts was intended because of the statutory phrase, ‘contribution (shall be) as in cases of contract.’” *Waugh v. Heidler*, 1977 OK 78, 564 P.2d 218, 221 (emphasis added). Clearly, cases of contract are legal, not equitable, in nature.

Such a finding is consistent with the holding in *Lapkin v. Garland Bloodworth, Inc.*, 2001 OK CIV APP 29, 23 P.3d 958, 963, wherein the Oklahoma Court of Civil Appeals examined the distinction between liability imposed based upon the existence of a legal relationship and unjust enrichment. The court first considered and rejected plaintiff’s argument that the defendants were jointly and severally liable, which required a finding that the defendants were members of a joint venture. *Id.* When this

¹ Indeed, the statute makes it clear that the primary actor may be sued in law or equity only for “consideration paid for the security, together with interest at ten percent (10%) per year from the date of payment, costs, and reasonable attorneys’ fees, less the amount of any income received on the security, upon the tender of the security, or for damages if he no longer owns the security.” § 1-509; *see also* § 408 (similar language). Restitution is not an authorized method of recovery under the statute. *Id.* Thus, Defendants respectfully maintain that the material aider/participant joint and several liability of § 1-509 (or § 408) cannot be properly applied to a claim brought by ODS for restitution (which properly arises under 71 O.S. § 1-603 or its predecessor § 406.1).

legal relationship was determined not to exist, the court examined whether an equitable remedy could be applied:

Unjust enrichment requires restitution of funds based in equity. It is inequitable to hold [one defendant] liable for restitution of the full [amount] when [he] was only enriched [by a third of that] amount...

Id. Thus, under the present circumstances, equity does not permit an award against Defendants in excess of the amount that they were unjustly enriched at the expense of the Short Investors, and the only possible basis for imposing liability is through application of a legal, non-equitable relationship, such as the one provided in § 1-509 and § 408.

Oklahoma securities cases involving § 1-509 or § 408 have implicitly acknowledged the right to a jury trial, as these cases have required, utilized or waived trial by jury and/or waiver of trial by jury. *See, e.g., South Western Oklahoma Development Authority v. Sullivan Engine Works, Inc.*, 1996 OK 9, 910 P.2d 1052, 1059 (remanding case which involved determination of material aider liability to jury); *Bane v. Anderson, Bryant & Co.*, 1989 OK 140, 786 P.2d 1230, 1235-1237 (discussing variety of issues relating to the jury's determinations regarding material aider liability); *Nikkel*, 542 P.2d at 1308 (case was "a law action, wherein jury was waived"). Indeed, at the Scheduling Conference, the Intervenors specifically agreed their claims were subject to trial by jury and Defendants have tendered the jury fee to the Court.

II. Defendants Have the Right to Jury Trial on the Civil Penalties Sought by ODS.

As quoted above, Article 2, Section 19 of the Oklahoma Constitution specifically provides that “the right of trial by jury shall be and remain inviolate.” A civil penalty does not fall into the two exceptions discussed above (a civil action for less than \$1,500 or a purely equitable action). Thus, the right to a jury trial exists here.

While not binding on state courts, federal jurisprudence provides a well-reasoned explanation of why the right to jury trial attaches to actions seeking civil penalties. In *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987), the United States Supreme Court began its analysis with a review of the Seventh Amendment, which provides in pertinent part: “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved...” The Supreme Court then examined the common law to determine that “[a] civil penalty was a type of remedy at common law that could only be enforced in courts of law. Remedies intended to punish culpable individuals...were issued by courts of law, not courts of equity.” *Id.* at 422. Thus, the Seventh Amendment preserved the right to a jury trial where civil penalties were sought.

In *Securities Exchange Commission v. Kopsky*, 537 F.Supp.2d 1023, 1026 (E.D. Mo. 2008), the district court examined *Tull* in the context of an action by the Securities Exchange Commission for violations of the Securities Exchange Act of

1934. The district court found: (1) “the SEC has requested the imposition of civil penalties under Section 21A of the [Act], in addition to the equitable remedies of injunction and disgorgement”; and (2) “civil penalties imposed as a fine rather than mere disgorgement are unquestionably legal remedies for which there is a Seventh Amendment right to a jury trial.” As a result, the district court determined that the right to a jury trial existed and dismissed the pending motion to strike the jury demand. *See also, Securities Exchange Commission v. Lipson*, 278 F.3d 656, 662 (7th Cir. 2002) (holding SEC’s claims for civil penalties, along with certain equitable relief, entitled the defendant to a jury trial).²

Here, ODS is expressly seeking civil penalties in addition to the equitable remedies of injunction and restitution (although, as discussed above, the determination of material aider/participator joint and several liability is a legal question). As the Oklahoma Constitution and jurisprudence carve out very limited circumstances where there is no right to a jury trial (and civil penalties are not one of them) and in light of the common law tradition that civil penalties entitle parties to a jury trial, Defendants should be granted a jury trial in the instant litigation.

III. The Court Should Exercise Its Discretion and Submit All the Issues in this Litigation to the Jury for a Determination on the Merits.

“[W]hen an equity cause of action and law claim are involved in one suit, the trial court at its discretion may submit the equity case to the jury, but it is its duty to

² Notably, the Seventh Circuit found that the jury should decide the issue of liability, but the judge, consistent with the jury’s determination, would impose other equitable relief and appropriate amount of the civil penalty. *Id.* at 662.

submit the law case to the jury for determination.” *Amcana*, 855 P.2d at 559.³ Given Defendants’ right to jury trial on the central issue of material aider/participator status, as well as the right to a jury trial on the civil penalties, the Court may exercise its discretion and submit the remaining issues to a jury for a final determination. For example, a determination regarding the requested injunctive relief requires a finding that Defendants violated the Securities Act, a question which is wholly predicated on a determination that Defendants materially aided/participated in the fraudulent sale(s). Without such a finding, there is simply no basis for injunctive relief. Thus submitting this question to the jury, along with the other questions of fact, serves judicial economy and promotes a consistent outcome on all issues. In short, the Court may choose between exercising its discretion to submit all issues to a jury or risk denying Defendants a constitutional right by determining Defendants are not entitled to a jury trial on all of ODS’ claims. Alternatively, the Court could potentially retain discretion as to equitable relief, so long as the determination was consistent with the jury’s verdict. *See Lipson*, 278 F.3d at 662.

³ There is an exception to the rule where “the equitable issues are paramount or the legal issues incidental to or dependent upon the equitable issues.” In such circumstances, the court should examine the “nature of the issues...and not alone by the form in which the action is brought or by the prayer for relief.” *Id.* Undoubtedly, ODS will argue that it is seeking injunctive relief and restitution and perhaps even jettison its civil penalty claim in an attempt to deny Defendants their right to a jury trial. However, the legal issue – whether Defendants materially aided or participated in the fraudulent sales – is not incidental to the equitable issue regarding Ms. Schubert’s restitution owed to investors. Rather, the legal determination regarding joint and several liability is the only issue which allows for any potential liability on the part of Defendants.

CERTIFICATE OF SERVICE

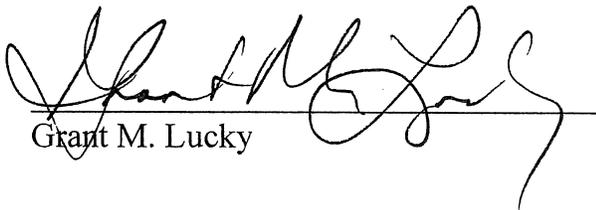
I hereby certify that on this 13th day of April, 2009, a true and correct copy of the above and foregoing instrument was mailed, via U.S. Mail, first-class, postage prepaid, to the following attorneys of record:

Melanie Hall
Amanda Cornmesser
Gerri Stuckey
Oklahoma Department of Securities
120 North Robinson Avenue, Suite 860
Oklahoma City, OK 73102

Ann L. Hoover
5611 S.W. Barrington Ct. S., Suite 100
Topeka, KS 66614-2489

Joseph H. Bocock
Spencer F. Smith
Lauren E. Barghols
McAfee & Taft
A Professional Corporation
Tenth Floor, Two Leadership Square
211 N. Robinson Avenue
Oklahoma City, OK 73102-7102

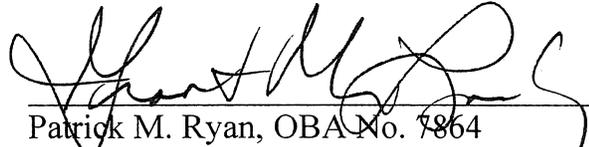
Kurtis J. Ward
Law Offices of Kurtis J. Ward
East Wharf Plaza
9225 Lake Hefner Pkwy., Suite 101
Oklahoma City, OK 73120


Grant M. Lucky

CONCLUSION

Based upon the foregoing brief, Defendants respectfully request that the Court submit all of ODS' claims to the jury for a determination on the merits.

Respectfully submitted,



Patrick M. Ryan, OBA No. 7864

Daniel G. Webber, Jr., OBA No. 16332

Matthew C. Kane, OBA No. 19502

Grant M. Lucky, OBA No. 17398

RYAN WHALEY COLDIRON SHANDY PC

900 Robinson Renaissance

119 North Robinson

Oklahoma City, Oklahoma 73102

Telephone: (405) 239-6040

Facsimile: (405) 239-6766

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