

IN THE DISTRICT COURT OF OKLAHOMA ~~FILED IN~~ THE DISTRICT COURT
STATE OF OKLAHOMA 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.,)
)
 Intervenor.)

JUN 25 2008
 PATRICIA PRESLEY, COURT CLERK
 by _____
 Deputy

Case No. CJ-2006-3311

**DEFENDANTS' REPLY TO PLAINTIFF'S RESPONSE
 TO DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT**

COME NOW Defendants, Farmers & Merchants Bank, Farmers & Merchants Bancshares, Inc., John V. Anderson, and John Tom Anderson (collectively, "Defendants") and, pursuant to the requirements of Local Rule 37, respectfully submit their Reply to Plaintiff's Response to Defendants' Motion for Partial Summary Judgment. In support hereof, Defendants would show the Court as follows:

I.

Under either the Predecessor Act (71 O.S. § 406.1) or the Successor Act (71 O.S. § 1-603) (sometimes collectively referred to as the "Oklahoma Securities Act"), ODS has the burden of proof in this proceeding to establish, among other things, that: (1) Defendants committed a violation of Oklahoma's securities laws; and (2) based upon that violation, restitution is an appropriate equitable remedy to be ordered against Defendants. *See Day v. Southwest Mineral*

Energy, Inc., 1980 OK 118, 617 P.2d 1334, 1338 (noting that an equitable remedy may only be granted under the Oklahoma Securities Act “where the facts of the case show such relief is appropriate”); *McCubbins v. Simpson*, 1939 OK 561, 97 P.2d 81, 83 (the right to an equitable remedy such as restitution must be clearly established and may only be ordered where the “elements, conditions, and incidents . . . essential to its mode of relief” have been met).¹ Contrary to ODS’s position, Defendants do not dispute that ODS may *request* restitution from this Court. However, the purpose of summary judgment is “to look beyond the pleadings and determine if there is any genuine issue of material fact.” *Hamilton v. Allen*, 1993 OK 46, 852 P.2d 697, 699. In moving for summary judgment, Defendants submitted evidentiary material demonstrating that the equitable remedy of restitution is an inappropriate remedy to be applied to the undisputed facts of this case since, under the applicable law, Defendants were not unjustly enriched at the expense of the Loser Investors.

In response, ODS has not filed *any* evidentiary material which shows that Defendants were unjustly enriched at the expense of the Loser Investors. Rule 13(b) of the Rules for District Courts requires that “[a]ny party opposing summary judgment or summary disposition of issues shall file with the court clerk within fifteen (15) days after service of the motion a concise written statement of the material facts as to which a genuine issue exists . . .” Importantly, “[a]ll material facts set forth in the statement of the movant which are supported by acceptable evidentiary material shall be deemed admitted for the purpose of summary judgment or summary disposition unless specifically controverted by the statement of the adverse party which is supported by acceptable evidentiary material.” Because ODS has not submitted any evidentiary materials to controvert the material fact that Defendants were *not* unjustly enriched at the

¹ “The substantive prerequisites for obtaining an equitable remedy . . . depend on traditional principles of equity jurisdiction.” *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 318-319, 119 S.Ct. 1961, 1968 (1999).

expense of the Loser Investors, it is deemed admitted. *See Hamilton*, 852 P.2d at 699 (“All material facts offered by movant which are not controverted are deemed confessed”). Thus, ODS has confessed that Defendants were not unjustly enriched at the expense of the Loser Investors, thereby entitling Defendants to summary adjudication on that discrete issue.

II.

The purported reason for ODS’s confession of this material fact is that ODS wrongly believes that “whether or not Defendants were unjustly enriched is immaterial to a determination of the appropriateness of the remedy of restitution.” *See ODS’s Response brief*, p. 9. In reality, nothing could be further from the truth and such an erroneous statement of the law ignores the fixed and long-standing meaning attached to restitution by the common law of Oklahoma, *see, e.g., Stites v. Duit Construction Company, Inc.*, 1997 OK 69, 903 P.2d 293, 301 n.28 (“Restitution is an equitable remedy that generally will be available whenever one has received a benefit to which another is justly entitled The object of restitution is to put the parties back into the position in which they were before unjust enrichment occurred”) which comports with the common law of other states as well as leading treatises on the remedy of restitution. Put simply, if there is no basis in fact for a claim that Defendants were unjustly enriched at the expense of the Loser Investors, there is no basis in law for an award of restitution against Defendants.²

III.

As a final point, it cannot go unrecognized by this Court that ODS has failed to offer any countervailing arguments in response to Defendants’ position that ODS is essentially requesting

² Contrary to ODS’s assertions, Defendants did not “fill several pages in their brief with an argument that restitution and disgorgement have one and the same meaning.” *Response brief*, p. 8. A simple reading of Defendants’ brief demonstrates that the legal meaning of disgorgement forms no part of Defendants’ motion for partial summary judgment.

that the Court order Defendants to pay for the Loser Investors' damages.³ ODS does not even argue this point. While ODS states that they are seeking the equitable remedy of restitution, the uncontroverted facts of the case and governing law demonstrate otherwise. Suits seeking to compel a "defendant to pay a sum of money to a plaintiff are suits for money damages, as that phrase has traditionally been applied, since they seek no more than compensation for loss resulting from the defendant's breach of a legal duty." *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204, 210, 122 S.Ct. 708, 713 (2002) (citation and quotations omitted). Of course, "[m]oney damages . . . are the classic form of *legal* relief [not equitable relief]." *Id.*

In contrast to a damages claim, "[F]or restitution to lie in equity, the action must generally seek not to impose personal liability on the defendant, but to restore to plaintiff particular funds or property in defendant's possession." *Great-West*, 122 S.Ct. at 715-715. For this reason, when an administrator of a governmental agency (such as ODS) seeks restitution, "he does not request the court to award statutory damages to the purchaser [of a security] . . . Rather he asks the court to restor[e] the status quo [by] ordering the return of that which rightfully belongs to the purchaser . . ." *Porter v. Warner Holding Co.*, 328 U.S. 395, 402, 66 S.Ct. 1086, 1091 (1946). In this case, the undisputed facts demonstrate that ODS is not requesting that Defendants return funds to the Loser Investors that are in Defendants' possession; rather ODS seeks to compensate the Loser Investors for the damages they suffered due to Defendants' alleged violations of Oklahoma's securities laws. Such an action meets the

³ Oklahoma law defines damages as follows: "Any person who suffers detriment from the unlawful act or omission of another, may recover from the person in fault a compensation therefor in money, which is called damages." 23 O.S. § 3

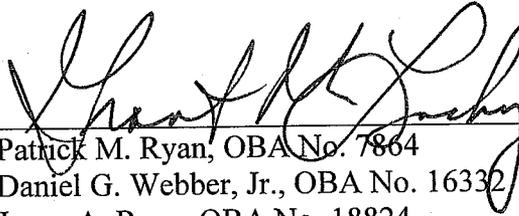
quintessential definition of an action at law for the recovery of money and entitles Defendant to summary judgment on the issue of whether restitution is an appropriate remedy in this case.⁴

The reason ODS refuses to acknowledge that it is seeking damages is simple: they have neither plead it nor do the securities laws identify civil damages as a remedy that may be ordered by the court in a civil enforcement action brought by ODS. The only way to find such a remedy, if ODS chose to openly pursue it, is to read it into Oklahoma's Securities Act. "Yet it is an elemental canon of statutory construction that where a statute expressly provides a particular remedy or remedies, a court must be chary of reading others into it." *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 19, 100 S.Ct. 242, 247 (1979). "The presumption that a remedy was deliberately omitted from a statute is strongest when [the legislature] has enacted a comprehensive legislative scheme including an integrated system of procedures for enforcement." *Massachusetts Mutual Life Insurance Company v. Russell*, 473 U.S. 134, 147, 105 S.Ct. 3085, 3093 (1985) (citation omitted).

Finally, if ODS was permitted to seek civil damages against a defendant for violating the Oklahoma Securities Act, such an interpretation would run afoul of Defendants' constitutional and statutory right to a jury trial. "The right of trial by jury in civil cases is guaranteed by Article 2, § 19 of the Oklahoma constitution . . . [Further,] Title 12 O.S. § 556 provides for issues of fact arising in actions for the recovery of money . . . to be tried to a jury." *I.C. Gas Amcana, Inc. v. Hood*, 1992 OK 119, 855 P.2d 597, 599. In contrast, the civil enforcement provisions of the Oklahoma Securities Act speak only in terms of the court awarding relief, not a jury. Thus, a claim for legal damages cannot be read consistently with the provisions of the securities laws.

⁴ As further proof that ODS is seeking civil damages – rather than restitution – against Defendants, ODS cites to Section 408 of the Predecessor Act and Section 1-509 of the Successor Act for the proposition that Defendants are jointly and severally liable with Marsha Schubert. The statutes referenced by ODS relate solely to joint and several liability between seller and material participant for legal damages, not equitable restitution. See *South Western Oklahoma Development Authority v. Sullivan Engine Works, Inc.*, 1996 OK 9, ¶ 29, 910 P.2d 1052.

Respectfully Submitted,



Patrick M. Ryan, OBA No. 7864

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

Jason A. Ryan, OBA No. 18824

Matthew C. Kane, OBA No. 19502

Grant M. Lucky, OBA No. 17398

Of the Firm:

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***

CERTIFICATE OF SERVICE

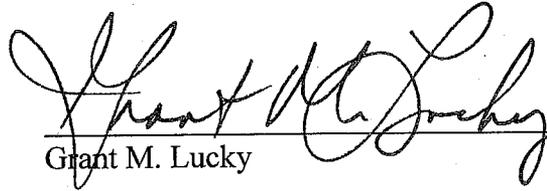
I hereby certify that on this 25th day of June 2008, a true and correct copy of the above and foregoing instrument was mailed, via U.S. First Class Mail, postage prepaid, to the following counsel of record:

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

Joseph H. Bocoock
Spencer F. Smith.
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

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



Grant M. Lucky