

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
 OKLAHOMA COUNTY, OKLA.

JUN - 6 2008

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.)

PATRICIA FRESLEY, COURT CLERK
 by _____
 DEPUTY

Case No. CJ-2006-3311

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR SUMMARY
JUDGMENT

Plaintiff, Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator
 (Plaintiff), respectfully submits this response to Defendants' motion for partial summary
 judgment filed on May 20, 2008.

BACKGROUND

Between January of 2000, and October 14, 2004, Marsha Schubert, individually and
 doing business as Schubert and Associates, (collectively, "Marsha Schubert"), orchestrated a
 securities fraud in and from Crescent, Oklahoma. Marsha Schubert, promising large financial
 returns, accepted funds in excess of Two Hundred Million Dollars (\$200,000,000) for purported
 investment (the "Purported Investment Program"). The majority of the investment proceeds
 were deposited into Farmers & Merchants Bank (F&M) accounts controlled by Marsha Schubert

(F&M Accounts). Approximately 100 persons lost in excess of Nine Million Dollars (\$9,000,000) in the Purported Investment Program.

The securities fraud had two components: 1) a "Ponzi" scheme in which most of the money entrusted to Marsha Schubert by participants in the Purported Investment Program was not invested in a legitimate venture, but instead, was paid out as purported returns to other participants in the Purported Investment Program; and 2) a check exchange scheme. The check exchange scheme involved a continual movement of funds primarily between the bank accounts of three individuals and one of the F&M Accounts. The scheme created a "float" that Marsha Schubert used to pay fictitious investment returns thereby perpetuating the "Ponzi" scheme.

On May 5, 2005, Marsha 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. *United States of America v. Marsha Kay Schubert*, CR 05-078.

On September 9, 2005, Marsha Schubert entered a plea of guilty in the District Court of Logan County, State of Oklahoma, to fourteen (14) counts of obtaining money by false pretenses in connection with the Purported Investment Program. *State of Oklahoma v. Marsha Kay Schubert*, No. CF-2004-391. 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.

On October 14, 2004, the Administrator of the Department (Administrator) filed suit against Marsha Schubert in the District Court of Logan County, State of Oklahoma, for violations of the Oklahoma Uniform Securities Act of 2004 (Successor 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). The Administrator alleged, *inter alia*, that Marsha Schubert committed fraud in connection with the offer, sale, or purchase of securities. On November 15, 2004, upon the stipulation and consent of Marsha Schubert, the Logan County District Court entered a permanent injunction against Marsha Schubert. *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator v. Marsha Schubert, et al.*, CJ 2004-256. The Logan County Court also ordered that Marsha Schubert pay restitution to the defrauded investors. The amount of that restitution is still to be determined by the Logan County judge.

CASE HISTORY

On April 21, 2006, the Administrator filed this suit alleging the Defendants and their agents materially aided Marsha Schubert's fraudulent conduct by: a) clearing checks written on uncollected funds, thereby providing Marsha Schubert with millions of dollars in unsecured loans and the financial ability to extend the life of the Purported Investment Program and the "Ponzi" scheme; b) making loans to Marsha Schubert for purported purchases of cattle, vehicles, equipment, a mobile home, and real estate, and then depositing the loan proceeds into Schubert's primary business account at F&M; c) requesting deposits from Marsha Schubert to cover overdrafts when, in fact, Marsha Schubert did not have the financial means and ability to cover overdraft payments, other than by misappropriating the monies of others; d) preventing the discovery of the truth and bolstering Marsha Schubert's credibility through the illusion of a prospering and legitimate investment venture; e) referring bank customers and other individuals to participate in the Purported Investment Program; and f) assisting bank customers in participating in the Purported Investment Program.

On June 5, 2006, Defendants moved to dismiss this action arguing the Administrator failed to state a claim upon which relief can be granted and challenging the Administrator's authority to pursue a civil action for restitution against any person alleged to have materially aided another person in a securities fraud. The Court denied that motion.

On August 4, 2006, Defendants requested that this Court reconsider its ruling on their motion to dismiss. That request was denied. Defendants now bring a partial summary judgment motion based on the same arguments unsuccessfully presented to this Court in their previous motions. Further, while the issues were appropriately raised in Defendants' motion to dismiss, the issues are not appropriate for a summary judgment motion.

STANDARD OF REVIEW

The summary judgment procedure is established in the Rules of the District Courts of Oklahoma. Rule 13 provides that when a party demonstrates to the court that no controversy exists as to any material facts, and the moving party is entitled to judgment as a matter of law, summary judgment is proper. Rule 13, Rules for the District Courts of Oklahoma, OKLA. STAT. ANN. TIT. 12, Ch.2, App. (Rule 13); *Valley Vista Development Corp., Inc. v. City of Broken Arrow*, 1988 OK 140, 766 P.2d 344; *Flanders v. Crane Co.*, 1984 OK 88, 693 P.2d 602. While Defendants claim there to be no material facts in dispute as to the issue of restitution, Defendants are not entitled to partial summary judgment as a matter of law.

PLAINTIFF'S STATUTORY AUTHORITY

The present action was brought by the Department pursuant to Sections 406.1 and 408 of the Predecessor Act and Sections 1-509 and 1-603 of the Successor Act. Section 406.1 of the Predecessor Act, the provision relating to civil actions by the Department, provides in pertinent part as follows:

(a) Upon a showing by the Administrator that a person has violated or is about to violate the Oklahoma Securities Act, except under the provisions of Section 202.1 or 305.2 of this title, or a rule or order of the Administrator under the Oklahoma Securities Act or that a person has engaged or is about to engage in dishonest or unethical practices in the securities business, **the Administrator**, prior to, concurrently with, or subsequent to an administrative proceeding, **may bring an action in the district court of Oklahoma County** or the district court of any other county where service can be obtained on one or more of the defendants and **the district court may grant or impose one or more of the following appropriate legal or equitable remedies:**

(1) Upon a showing of a violation of the Oklahoma Securities Act or a rule or order of the Administrator under the Oklahoma Securities Act or conduct involving dishonest or unethical practices in the securities business:

(i) a temporary restraining order, permanent or temporary prohibitory or mandatory injunction, or a writ of prohibition or mandamus;

(ii) a civil penalty up to a maximum of Five Thousand Dollars (\$5,000.00) for a single violation or of Fifty Thousand Dollars (\$50,000.00) for multiple violations in a single proceeding or a series of related proceedings;

(iii) a declaratory judgment;

(iv) **restitution to investors;**

(v) the appointment of a receiver or conservator for the defendant or the defendant's assets; and

(vi) **other relief the court deems just.**

Section 408 of the Predecessor Act provides in pertinent part as follows:

(a) Any person who:

(1) offers or sells a security in violation of Sections 201(a), 301, or 404(b) of this title, or of any rule or order under Section 402 of this title, or of any condition imposed under Sections 304(d), 305(f), or 305(g) of this title; or

(2) offers or sells or purchases a security by means of any untrue statement of a material fact or any omission to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they are made, not misleading . . . is liable:

(A) in the case of an offer or sale of a security, to the person buying the security from him, who may sue either at law or in equity to recover the 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.

* * *

(b) **Every person who materially participates or aids** in a sale or purchase made by any person liable under paragraph (1) or (2) of subsection (a) of this section, or who directly or indirectly controls any person so liable, **shall also be liable jointly and severally with and to the same extent as the person so liable**, unless the person who so participates, aids or controls, sustains the burden of proof that he did not know, and could not have known, of the existence of the facts by reason of which liability is alleged to exist. There shall be contribution as in cases of contract among the several persons so liable.

Comparable language to that of the Predecessor Act appears in Sections 1-509 and 1-603 of the Successor Act. Section 1-509 provides in pertinent part as follows:

B. A person is liable to a purchaser if the person sells a security in violation of Section 10 of this act [Section 1-301 of this title], or by means of an untrue statement of a material fact or an omission to state a material fact necessary in order to make the statement made, in light of the circumstances under which it is made, not misleading, the purchaser not knowing the untruth or omission, and the seller not sustaining the burden of proof that the seller did not know and, in the exercise of reasonable care, could not have known of the untruth or omission.

* * *

G. The following persons are **liable jointly and severally with and to the same extent as persons liable** under subsections B through F of this section:

* * *

5. **Any other person who materially aids in the conduct giving rise to the liability** under subsections B through F of this section, unless the person sustains the burden or proof that the person did not know and, in the exercise of reasonable care could not have known, of the existence of the conduct by reason of which liability is alleged to exist.

Section 1-603 of the Successor Act provides in pertinent part as follows:

- A. **If the Administrator believes** that a person has engaged, is engaging, or is about to engage in an act, practice, or course of business constituting a violation of this act or a rule adopted or order issued under this act or constituting a dishonest or unethical practice or that **a person has, is, or is about to engage in an act, practice, or course of business that materially aids a violation of this act** or a rule adopted or order issued under this act or a dishonest or unethical practice, the Administrator may, . . . maintain an action in the district court of Oklahoma County or the district court of any other county where service can be obtained to enjoin the act, practice, or course of business and to enforce compliance with this act or a rule adopted or order issued under this act.

- B. In an action under this section and on a proper showing, the court may:
 - 1. Issue a permanent or temporary **injunction**, restraining order, or declaratory judgment;

 - 2. **Order other appropriate or ancillary relief, which may include:**

* * *

c. imposing a civil penalty . . . ; an order of rescission, **restitution, or disgorgement** directed to a person that has engaged in an act, practice, or course of business **constituting a violation of this act or the predecessor act** or a rule adopted or order issued under this act or the predecessor act . . . , and

* * *

- 3. **Order such other relief as the court considers appropriate.** (Emphasis added.)

ARGUMENTS

In its previous rulings in this case, the Court ruled that the Department may seek restitution from Defendants. The Court should reject Defendants' argument a third time in considering their summary judgment motion. In its enforcement of the securities laws of Oklahoma, including the various suits related to the Marsha Schubert matter, the Department has

consistently interpreted there to be a distinction between the terms “restitution” and “disgorgement.” Historically, the Department has considered the purpose of restitution as making the damaged persons whole, and the purpose of disgorgement as depriving the wrongdoer of ill-gotten gains.

The Oklahoma Supreme Court has said: “[t]he long-continued construction of a statute by a department of government charged with its execution is entitled to great weight and should not be overturned without cogent reasons.” *Atlantic Refining Co. v. Oklahoma Tax Comm’n*, 1959 OK 168, 360 P.2d 826, 831, citing *Lincoln National Life Ins. Co., v. Read*, 1944 OK 317, 156 P.2d 368, 369. As set forth below, there are no cogent reasons for this Court to overturn the Department’s construction of its available statutory remedies.

I. Plaintiff is authorized to seek “restitution” against Defendants.

When interpreting a statute, the Court must first look to the language of the statute itself. *Baughman v. Weicker*, 1929 OK 136, 276 P. 208 (Okla. 1929). The provisions of the Predecessor and Successor Acts cited above authorize the Administrator to seek, and the district courts to fashion, appropriate remedies against any person who violates this state’s securities laws or materially aids such violations. As set forth in Section 1-603 of the Successor Act, those remedies specifically include “rescission, restitution, or disgorgement.”

In spite of the plain language adopted by the Oklahoma Legislature, Defendants fill several pages in their brief with an argument that restitution and disgorgement have one and the same meaning. The Department construes the terms as having distinct meanings in connection with securities laws violations, thus, eliminating the relevance of whether or not a defendant is unjustly enriched.

The Oklahoma Supreme Court previously recognized that judicial interpretations of the federal securities laws are instructive in interpreting this state's securities statutes. *State ex rel. Day v. Southwestern Mineral Energy, Inc.*, 1980 OK 118, 617 P.2d 1334. That the words "restitution" and "disgorgement" have two distinct meanings is supported by the interpretive history of federal cases relating to the offer and sale of securities. For example, the United States District Court for the Southern District of New York, the venue for much of the federal securities litigation, clearly distinguished between the two terms. The court in *S.E.C. v. Drexel Burnham Lambert, Inc.*, 956 F. Supp. 503, 507 (S.D.N.Y. 1997), opined that the purpose of disgorgement in connection with securities law violations is to act as a deterrent by depriving the violator of the amount by which he was unjustly enriched. The *Drexel* court continued: "[Restitution and disgorgement] are distinct in that restitution aims to make the damaged persons whole, while disgorgement aims to deprive the wrongdoer of ill-gotten gains. *Id.*"

Statutory construction rules require that "significance and effect shall if possible, be accorded to every section, clause [or] word." (Emphasis added.) *Baughman*, 276 P. at 214. No word shall be considered inoperative or worthless. *Baughman*, 276 P. at 213. Further, Oklahoma courts have said that each word must be given intelligent effect to establish the Legislature's expressed intention. *Eason Oil Co. v. Corporation Commission*, 535 P.2d 283 (Okla. 1975); *Failing Co. v. Watkins*, 14 P.3d 52 (Okla. 2000). In construing the civil enforcement provisions in Oklahoma's securities laws, this Court must deem the words "restitution" and "disgorgement" to have two distinct meanings. To do otherwise, would render the word "disgorgement," as used in Section 1-603(B)(2)(c), superfluous or useless. As a result, whether or not Defendants were unjustly enriched is immaterial to a determination of the appropriateness of the remedy of restitution in the case at hand.

II. Defendants are equally as liable as Marsha Schubert.

Based on the facts relating to the Defendants' action, or inaction, Defendants materially aided Marsha Schubert in the perpetuation of her investment fraud. In addition to imprisonment on criminal charges, Marsha Schubert is subject to a Logan County order to pay restitution to the defrauded investors.

Returning to the plain language of Section 408 of the Predecessor Act and Section 1-509 of the Successor Act, anyone who materially aids another person who has violated the securities laws is "liable jointly and severally with and to the same extent as the [violator]." This means that Defendants are liable "in the same, identical way, and to the same extent and degree," as Marsha Schubert. *Barsch v. Mullins*, 1959 OK 2, 338 P.2d 845, 856. Based on the decision of the Supreme Court in *South Western Oklahoma Development Authority v. Sullivan Engine Works, Inc.*, 1996 OK 9, 910 P.2d 1052, 1058, joint and several liability arises between the primary violator and the material participant. In this matter, Marsha Schubert and Defendants may collectively be held accountable for the securities violations perpetrated by Schubert. *Id.* Following the Supreme Court's opinions in *Barsch* and *Southwestern*, Defendants are liable with Marsha Schubert for the full amount of restitution as determined by the Logan County Court. Consequently, a restitution order against Defendants is proper.

III. The Department is a real party in interest.

Defendants alternatively propose that the Department cannot seek restitution from them because the Department is not a real party in interest. The Department, however, is a real party in interest as 12 O.S. 2017(A) specifically provides that "a party authorized by statute may sue in his own name without joining with him the party for whose benefit the action is brought."

Section 1-603 of the Act clearly authorizes the Department, when in the public interest, to sue persons who materially aid a securities fraud and to request relief in the form of restitution. Defendants cite selected portions from Oklahoma cases in an effort to piece together their position, but the courts have clearly recognized the plain language of 12 O.S. 2017(A), and held that a real party in interest is someone who has a legal right to bring an action under substantive law. *Mainord v. Sharp Oklahoma*, 569 P.2d 546, 548 (Okla. 1977).

Defendants express two concerns in their argument that do not affect the Department's status as a real party in interest since that issue is clearly settled by statute. The two issues are not properly raised by a summary judgment motion.

First, in connection with their outstanding discovery requests, Defendants complain of incomplete responses by the Department and allege the Department has "disavowed" that it is seeking restitution for the defrauded investors. The Department is acting as a governmental agency promoting public policy and is not acting on behalf of the defrauded investors. This issue should be addressed by a motion to compel, a motion Defendants have not yet chosen to do.

Second, Defendants fear multiple, vexatious lawsuits by defrauded investors based on the conduct described by the Department in its petition. The statutory scheme of the Act specifically provides that the Department, in addition to the victims, has the right to sue persons who aid a securities fraud for restitution. However, that the victims may also sue for the same conduct does not negate the Department's statutory authority or limit its remedies. In *S.E.C. v. Penn Central Co.*, 425 F. Supp. 593, the SEC sued violators of federal securities laws after private litigants sued on the same allegations. The court stated that even though individual victims may benefit from a successful suit by the government for restitution, "[t]he fact that one consequence

of the action may be to benefit private parties does not detract from the “public purpose of effectuating the goals of the securities laws.” *Id.* at 599. Furthermore, Defendants’ concerns about multiple lawsuits are completely unfounded because the statutes of limitation have run for actions brought under the Act and for common law fraud.¹ 71 O.S. 1-509(J)(2) and 12 O.S. 95(A)(2).

CONCLUSION

As this Court previously found, it is appropriate for the Department to seek and for the Court to grant equitable relief. In their basic argument to the Court, the Defendants mistakenly rely on a narrow definition of “restitution” and a limited interpretation of the Court’s powers. However, the Oklahoma Supreme Court in *Day*, citing *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946), said:

“Unless otherwise provided by statute, all the inherent equitable powers of the District Court are available for the proper and complete exercise of that jurisdiction. And **since the public interest is involved** in a proceeding of this nature, **those equitable powers assume an even broader and more flexible character** than when only a private controversy is at stake.”

Day 617 P.2d at 1336. (Emphasis added.)

Section 406.1 of the Predecessor Act and Section 1-603 of the Act specifically authorize the district courts to fashion whatever relief the court deems appropriate in connection with securities laws violations. Relying on several federal cases, including United States Supreme Court decisions, the Court in *Day* held that Oklahoma’s district courts “are empowered to do equity in actions brought under the Oklahoma Securities Act. Once the equity jurisdiction of the

¹ The Schubert “Ponzi” scheme concluded in October 2004 upon the issuance of the temporary restraining order by the Logan County District Court and the appointment of the receiver. The Department filed this suit in April 2006, effectively putting all of the defrauded investors on notice of the facts constituting the securities violations.

District Court has properly been invoked, the Court possesses the necessary power to fashion appropriate remedies.” *Id.* at 1338.

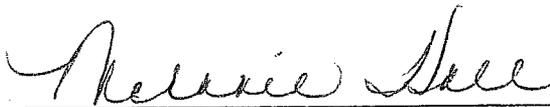
In the present case, the equity jurisdiction of this Court has properly been invoked. Based on the arguments presented herein, the Court should again find the payment of restitution by Defendants, who materially aided Marsha Shubert in her “Ponzi” scheme, to be an appropriate remedy. The Department respectfully requests the Court to deny Defendants’ motion for summary judgment.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF
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CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the Plaintiff's Response to Defendants' Motion for Summary Judgment and Brief in Support, was mailed this 6th day of June, 2008, by depositing it in the U.S. Mails, postage prepaid, to the following counsel of record:

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A handwritten signature in cursive script, appearing to read "Matthew Kane", is written over a horizontal line.