

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

AUG 23 2010

PATRICIA PRESLEY, COURT CLERK
by _____
DEPUTY

OKLAHOMA DEPARTMENT OF SECURITIES)
ex rel. IRVING L. FAUGHT, Administrator, et al.,)
)
Plaintiffs,)
v.)
)
ROBERT W. MATHEWS, et al.,)
)
Defendants.)

Case No. CJ-2005-3796

**HEARING SET FOR
OCTOBER 1, 2010
@ 9:00 A.M.**

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANT,
KENNETH LARUE, AND BRIEF IN SUPPORT**

Plaintiffs, Douglas L. Jackson, in his capacity as Court-Appointed Receiver for the benefit of creditors and claimants of Marsha Schubert and Schubert and Associates, and the Oklahoma Department of Securities, *ex rel.* Irving L. Faught, Administrator, move the Court for summary judgment against Defendant Kenneth LaRue ("Defendant. LaRue"), pursuant to Rule 13 of the Rules for District Courts of Oklahoma, Okla. Stat Ann. Tit. 12, Chapter 2, Appendix 1. There is no dispute that Defendant LaRue has received funds from Marsha Schubert d/b/a Schubert and Associates ("Schubert and Associates") for which he gave no reasonably equivalent value and which represent an unreasonably high dividend. Furthermore, there is no dispute that the funds Defendant LaRue received represent a benefit to him and came at the expense or to the detriment of others who were drawn into the Schubert and Associates Ponzi scheme. Based on the undisputed facts and legal authority set forth herein, summary judgment should be granted in favor of Plaintiffs and against Defendant LaRue.

**STATEMENT OF MATERIAL FACTS AS TO WHICH
THERE IS NO GENUINE ISSUE**

1. Marsha Schubert operated a fraudulent scheme in violation of federal and state laws including the Oklahoma Uniform Securities Act of 2004 (Act), Okla. Stat. Ann. Tit. 71, §§1-101 through 1-701 (Supp. 2003), and the Oklahoma Securities Act (Predecessor Act), Okla. Stat. Ann. Tit. 71 §§1-413, 501, 701-703 (1991 & Supp. 2003). *See* Order of Permanent Injunction attached as Exhibit "A", *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator v. Marsha Schubert, et al.*, CJ-2004-256; Marsha Schubert's federal plea agreement attached as Exhibit "B", *United States of America v. Marsha Kay Schubert*, CR 05-078; Marsha Schubert's state guilty plea attached as Exhibit "C", *State of Oklahoma v. Marsha Kay Schubert*, CF-2004-391, wherein 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 (¶24, p. 4).

2. Marsha Schubert's fraudulent scheme began as early as April 2000, and continued until October 2004. *See* Affidavit of Dan Clarke, Exhibit "D", ¶¶4 and 5. Marsha Schubert, promising large financial returns, accepted funds in excess of Two Hundred Million Dollars (\$200,000,000.00) for purported investment (Schubert Investment Program). *See* Affidavit of Dan Clarke, Exhibit "D", ¶5. Marsha Schubert did not make the investments that she represented that she would make, but instead, used most of the money to make distributions to other persons ("Ponzi" scheme). *See* Affidavit of Dan Clarke, Exhibit "D", ¶7 and Exhibit "C", ¶24. Approximately 87 persons lost in excess of Nine Million Dollars (\$9,000,000.00) in the Ponzi scheme (short investors). *See* Affidavit of Dan Clarke, Exhibit "D", ¶8. Over

150 persons made approximately Six Million Dollars (\$6,000,000.00) in the Ponzi scheme (Relief Defendants). *See* Affidavit of Dan Clarke, Exhibit "D", ¶9.

3. At all times material hereto, Marsha Schubert owned and/or controlled several bank accounts including account number 34-7477 at Farmers & Merchants Bank (F&M Bank) in Crescent, Oklahoma (hereinafter "Schubert F&M account"), account number 35-9424 at F&M Bank (hereinafter "Kattails account"), the Richard Schubert farm account at BancFirst in Kingfisher, Oklahoma (farm account) and a Schubert and Associates account at BancFirst in Kingfisher, Oklahoma (hereinafter "Schubert BancFirst account"). *See* Affidavit of Dan Clarke, Exhibit "D", ¶¶3 and 4. The majority of the proceeds obtained through the Schubert Investment Program were deposited into the Schubert F&M account where the proceeds were commingled with the proceeds of bank loans and Marsha Schubert's personal funds, such as commissions and royalty checks. A portion of the proceeds was deposited in the Kattails account, the farm account or the Schubert BancFirst account and commingled with other funds in those accounts. *See* Affidavit of Dan Clarke, Exhibit "D", ¶6. All of the funds deposited into the Schubert F&M account, the Kattails accounts, the farm account and the Schubert BancFirst accounts shall hereinafter be referred to as the "Commingled Funds".

4. Defendant LaRue paid no money into the Schubert Investment Program. *See* Affidavit of Dan Clarke, Exhibit "D", ¶ 11.

5. Between October 10, 2002 and September 4, 2004, Marsha Schubert transferred a total of \$108,361.93, including wire fees, to Defendant LaRue directly, or to various banks on his behalf, by (30) checks and (7) wires drawn on the Schubert F&M and BancFirst Accounts as follows:

<u>DATE</u>	<u>AMOUNT</u>
10/11/2002	\$ 2,010.00*
3/12/2003	\$ 700.00
4/04/2003	\$ 1,000.00
4/18/2003	\$ 5,000.00
4/24/2003	\$ 1,000.00
05/03/2003	\$ 4,000.00
05/30/2003	\$ 2,000.00
06/30/2003	\$ 2,000.00
07/28/2003	\$ 2,000.00
08/25/2003	\$ 3,000.00
10/01/2003	\$ 1,000.00
10/27/2003	\$ 1,500.00
12/01/2003	\$ 1,500.00
	\$ 5,000.00
02/12/2004	\$ 541.18
	\$ 1,510.00*
	\$ 1,500.00
03/03/2004	\$ 4,100.00
03/08/2004	\$ 524.68
03/08/2004	\$ 277.99
03/25/2004	\$ 1,500.00
03/30/2004	\$ 524.68
04/19/2004	\$ 4,000.00
04/26/2004	\$ 2,510.00*
	\$ 524.68
05/25/2004	\$ 1,510.00*
06/01/2004	\$ 524.68
	\$ 1,510.00*
07/06/2004	\$ 6,000.00
07/09/2004	\$ 524.68
	\$ 1,510.00*
07/24/2004	\$ 524.68
07/30/2004	\$ 15,000.00
08/11/2004	\$ 15,000.00
08/26/2004	\$ 1,510.00*
09/01/2004	\$ 524.68
09/03/2004	<u>\$ 15,000.00</u>

* includes a \$10.00 wire fee assessed by F&M Bank

TOTAL \$ 108,361.93

See Affidavit of Dan Clarke, Exhibit D, ¶ 12; see also activity sheet and accountant's compilation report prepared by BKD, LLP for transactions pertaining to Defendant LaRue (Accountant's Compilation Report) attached as Exhibit "E", see also (30) checks and (7) wires attached collectively as Exhibit "F"; see also Defendant's Supplemental Response to Interrogatory No. 18, Exhibit "G".

6. The wire transfers and checks described in paragraph 5 above were paid from Commingled Funds. See Affidavit of Dan Clarke, Exhibit "D", ¶ 13.

7. Defendant LaRue received One Hundred Eight Thousand Three Hundred Sixty-One Dollars and Ninety-Three Cents (\$108,361.93) from Marsha Schubert for which he gave nothing of value in exchange. See Affidavit of Dan Clarke, Exhibit "D", at ¶ 14.

FUNDS PAID TO DEFENDANT LARUE HAVE UNJUSTLY ENRICHED HIM AT THE EXPENSE OF THE SHORT INVESTORS IN THE PONZI SCHEME

Defendant LaRue was unjustly enriched by the payments he received from the Commingled Funds. The Supreme Court of Oklahoma has held that "a right to recovery through unjust enrichment is essentially equitable, its basis being that in a given situation it is contrary to equity and good conscience for one to retain a benefit which has come to him at the expense of another." See *McBride v. Bridges*, 1950 OK 25, 215 P.2d 830; *N.C. Corff Partnership, Ltd., et al. v. Oxy U.S.A., Inc.*, 1996 OK CIV APP 92, 929 P.2d 288, 295.

The facts of this case pertaining to Defendant LaRue satisfy all of the elements of a cause of action for unjust enrichment. For example, Defendant LaRue received a pecuniary benefit through payments made to him from the Commingled Funds in the amount of \$108,361.93. These funds came out of the bank accounts identified above, the sources of which were individuals who actually participated in the Schubert Investment Program. Despite receiving the sum of \$108,361.93 from the Commingled Funds, Defendant LaRue

never paid any money into the Schubert Investment Program, nor was any money attributable to Defendant LaRue ever deposited into any of the bank accounts identified above. See Affidavit of Dan Clarke, Exhibit “D”, at ¶¶ 11 and 14; see also Accountant’s Compilation Report, Exhibit “E”. In short, Defendant LaRue did not pay any money into the Schubert Investment Program, but received \$108,361.93 out of the Commingled Funds, at the expense of and detriment to those persons who participated in the Schubert Investment Program.

In the Oklahoma Supreme Court’s recent decision on the appeal of summary judgments previously entered in this case, *Oklahoma Department of Securities, et al. v. Blair, et al.*, 2010 OK 16, the Court ruled that Plaintiffs are acting within their right to seek recovery from persons who received money in a Ponzi scheme such as Defendant LaRue. See 2010 OK 16, at ¶¶ 30 and 38. The Court further determined that equitable recovery against an “innocent investor” must be based upon that investor’s receipt of an “unreasonably high dividend” or an “artificially inflated” profit on his or her investment. *Id.* at ¶¶ 29, 30 and 56. In addition, the Court stated that “[i]nnocent investors ignorant of the Ponzi scheme may not hide behind their ignorance when unreasonably high dividends are paid to them and then claim that their high dividends are insulated from equity.” *Id.* at ¶ 56.

With respect to Defendant LaRue, it is undisputed that he did not pay any money into the Schubert Investment Program for an investment or any other purpose, and therefore, he cannot even be considered an investor, much less an innocent investor. The funds he received out of the Commingled Funds were completely unearned, *i.e.*, the payments were a windfall and cannot be deemed a dividend or return at all.

If receipt of \$108,361.93 by Defendant LaRue, who paid no money into the Schubert Investment Program, does not constitute an “unreasonably high dividend” under the standard

recently created by the Oklahoma Supreme Court, then nothing ever will. The monetary benefit conferred upon Defendant LaRue at the expense of those who did monetarily participate in the Schubert Investment Program constitutes unjust enrichment.

CONCLUSION

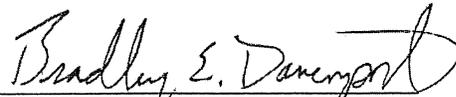
Plaintiffs are entitled to summary judgment against Defendant LaRue pursuant to the Oklahoma case law cited above that recognizes a cause of action for unjust enrichment. Similarly, Plaintiffs are entitled to summary judgment upon application of the standard recently created by the Oklahoma Supreme Court in *Oklahoma Department of Securities et al. v. Blair, et al.*, 2010 OK 16. Where Defendant LaRue paid no money whatsoever into the Schubert Investment Program, he could have no expectation of any dividend, and any funds that he received must be characterized as an “unreasonably high dividend”, if it could fairly be called a dividend at all. Otherwise, no amount of money or percentage return would ever be considered an “unreasonably high dividend” when applying the Court’s new test. The benefit to Defendant LaRue came at the expense of others, who lost money and were unwitting participants in the Schubert Investment Program. Equity and good conscience demands that the Court not allow this unjust enrichment to stand.

The material facts pertaining to Plaintiffs’ unjust enrichment cause of action against Defendant LaRue are undisputed. Therefore, this Court should grant summary judgment in favor of Plaintiffs and against Defendant LaRue in the amount of \$108,361.93, plus prejudgment and post-judgment interest at the statutory rate, and costs of this action.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of August, 2010, I mailed a true and correct copy of the above and foregoing instrument, postage pre-paid to:

G. David Bryant
Julie Brower
Kline, Kline, Elliott & Bryant, P.C.
720 N.E. 63rd Street
Oklahoma City, OK 73105
Attorneys for Defendant Kenneth LaRue

A handwritten signature in black ink, appearing to read "Amanda C", written over a horizontal line.

Amanda Cornmesser