

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 DEFENDANTS MARVIN AND PAMELA WILCOX
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 Defendants Marvin and Pamela Wilcox ("Defendants Wilcox"), pursuant to Rule 13 of the Rules for District Courts of Oklahoma, Okla. Stat. Ann. tit. 12, Ch. 2, App. 1.

There is no dispute that Defendants Wilcox received funds from Marsha Schubert d/b/a Schubert & Associates ("Schubert") for which no reasonably equivalent value was exchanged. The funds represent an artificially and unreasonably high dividend. Furthermore, there is no dispute that the funds Defendants Wilcox received represent a benefit that came to them at the expense or to the detriment of others who were drawn into Schubert's Ponzi scheme. Based on the undisputed facts and the legal authority set forth herein, summary judgment should be entered against Defendants Wilcox.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. From May of 1992 to April of 2004, Marsha Schubert was registered as a broker-dealer agent and an investment adviser representative of AXA Advisors, LLC (AXA). *See* Exhibit “A”, Affidavit of Carol Gruis, ¶ 3.

2. Defendants Wilcox maintained an investment account at AXA for which Marsha Schubert was the agent of record. *See* Exhibit “B”, Marvin Wilcox Transcr. 12:16-23 (Sept. 2006).

3. Defendants Wilcox received monthly statements for their AXA account. *See* Exhibit “B” Marvin Wilcox Transcr. 14:11-22 (Sept. 2006).

The Ponzi Scheme

4. Separate and apart from her activities as a registered agent of AXA, Marsha Schubert operated a fraudulent scheme, as Schubert and Associates, in violation of federal and state laws including the Oklahoma Uniform Securities Act of 2004 (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). *See* Exhibit “C”, Order of Permanent Injunction; *Oklahoma Department of Securities ex rel. Irving L. Faught, Administrator v. Marsha Schubert, et al.*, CJ 2004-256; *see also* Exhibit “D”, Marsha Schubert’s Federal Plea Agreement, *United States of America v. Marsha Kay Schubert*, CR 05-078; Exhibit “E”, Marsha Schubert’s State Guilty Plea, *State of Oklahoma v. Marsha Kay Schubert*, No. 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).

5. Defendants Wilcox reported to the Internal Revenue Service that they were partners with Schubert in Schubert & Associates. *See* Exhibit "F", Schedule E, Wilcox 2002 and 2003 tax returns.

6. Approximately 87 persons lost in excess of Nine Million Dollars (\$9,000,000) in the Ponzi scheme (short investors). *See* Exhibit "G", Affidavit of Dan Clarke, ¶ 8. Over 150 persons made approximately Six Million Dollars (\$6,000,000) in the Ponzi scheme (Relief Defendants). *See* Exhibit "G", Affidavit of Dan Clarke, ¶ 9, *see also* Exhibit "C", Schubert's State Guilty Plea, ¶ 24.

7. At all times material hereto, Marsha Schubert owned and/or controlled several bank accounts including account number 34-7477 at Farmers and 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 (hereinafter "Farm account") and a Schubert & Associates account at BancFirst in Kingfisher, Oklahoma (hereinafter "Schubert BancFirst account"). *See* Exhibit "G", Affidavit of Dan Clarke, ¶¶ 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 commission 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* Exhibit "G", Affidavit of Dan Clarke, ¶ 6. All of the funds deposited into the Schubert F&M account, the Kattails account, the Farm

account and the Schubert BancFirst account shall hereinafter be referred to as the “Commingled Funds”.

The Check Exchange

8. Schubert’s Ponzi scheme was supported by a long-running check exchange primarily between the accounts of three individuals, to include Defendant Marvin Wilcox, and the accounts of Schubert. *See* Exhibit “G”, Affidavit of Dan Clarke, ¶ 11. The check exchange involved a consistent movement of funds between the accounts of the three individuals and Schubert’s bank accounts. *See* Exhibit “G”, Affidavit of Dan Clarke, ¶ 11. The scheme created a “float” that Schubert utilized to pay purported investment returns. *See* Exhibit “G”, Affidavit of Dan Clarke, ¶ 11.

9. In exchange for a check drawn on an account of Defendant Marvin Wilcox, Schubert wrote a check from one of her bank accounts, in most cases for a greater dollar amount, payable to Defendant Marvin Wilcox. *See* Exhibit “G”, Affidavit of Dan Clarke, ¶ 12.

10. Defendant Marvin Wilcox was in the banking industry for his whole adult life, last serving as Vice President of NBanC in Kingfisher. *See* Exhibit “B”, Marvin Wilcox Transcr. 5:18-25 and 7: 3-6 (Sept. 2006). Yet, Defendant Marvin Wilcox gave Schubert physical control of multiple checks from his bank accounts that were blank except for his signature. *See* Exhibit “B”, Marvin Wilcox Transcr. 23:15-25; 24:1-12; and 25:3-9.

11. Defendants Wilcox received monthly bank account statements for their personal checking accounts, but did not review or reconcile them. *See* Exhibit “B” Marvin Wilcox Transcr. 25:10-21 (Sept. 2006).

12. Between December 12, 2002 and October 6, 2004, there were over six hundred fifty (650) transactions between Schubert and Defendants Wilcox involving the check exchange. *See* Exhibit “G”, Affidavit of Dan Clarke, ¶ 13. In this regard, the deposits to Schubert from Defendants Wilcox totaled in excess of Seventy-Seven Million Dollars (\$77,000,000). *See* Exhibit “G”, Affidavit of Dan Clarke, ¶14. Disbursements from Schubert to Defendants Wilcox totaled in excess of Seventy-Eight Million Dollars (\$78,000,000). *See* Exhibit “G”, Affidavit of Dan Clarke, ¶14.

13. Defendants Wilcox netted \$509,505 in fictitious investment profits. *See* Exhibit “G”, Affidavit of Dan Clarke, ¶ 15.

14. The \$509,505 in net returns (“Net Amount”) were paid by Schubert to Defendants Wilcox from the Commingled Funds. *See* Affidavit of Dan Clarke, Exhibit “G”, ¶¶ 15-16.

15. Defendants Wilcox purportedly believed their “profits” were from day trading. *See* Exhibit “B”, Wilcox Transcr. 17: 7-9 (Sept. 2006).

16. Defendant Marvin Wilcox never saw any record of or relating to a day trading account. *See* Exhibit “B”, Wilcox Transcr. 50: 10-14 (Sept. 2006).

17. Defendant Wilcox never received any statements relating to a “day trading” account. *See* Exhibit “B”, Wilcox Transcr. 21:11-15 (Sept. 2006).

18. Defendant Marvin Wilcox recommended Schubert to several people for investment purposes. *See* Exhibit “B”, Marvin Wilcox Transcr. 77:14-21 and 78:1-4.

ARGUMENTS AND AUTHORITIES

I. PLAINTIFFS ARE ENTITLED TO SUMMARY JUDGMENT BECAUSE THERE IS NO SUBSTANTIAL CONTROVERSY AS TO MATERIAL FACTS

The summary judgment procedure authorized by Rule 13 of the Rules of the District Courts of Oklahoma provides a method to dispose of cases where no genuine issue exists for any material fact, or where only a question of law is involved. 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, the Court has a duty to enter summary judgment in favor of that party. Rule 13, Rules for the District Courts of Oklahoma, Okla. Stat. 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.

II. DEFENDANTS WILCOX WERE UNJUSTLY ENRICHED AT THE EXPENSE OF THE SHORT INVESTORS IN THE PONZI SCHEME

Defendants Wilcox were unjustly enriched by the Net Amount they 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 USA, Inc.*, 1996 OK CIV APP 92, 929 P.2d 288, 295. The facts of this case pertaining to Defendants Wilcox satisfy all of the elements of a cause of action for unjust enrichment.

Specifically, Defendants Wilcox received a pecuniary benefit through the Net Amount paid to them from the Commingled Funds (\$509,505). The short investors, that

is, those who did not receive the return of their principal investment amounts, in whole or in part, lost over \$9,000,000 in the Ponzi scheme. Defendants Wilcox received \$509,505 in Commingled Funds at the expense of and to the detriment of the short investors.

III. THE PROFITS DEFENDANTS WILCOX RECEIVED ARE NOT INSULATED FROM EQUITY BECAUSE THEY WERE NOT RECEIVED IN SATISFACTION OF AN ANTECEDENT DEBT

In the Oklahoma Supreme Court's recent decision on the appealed summary judgments previously entered in this case, *Oklahoma Department of Securities, et al. v. Blair, et al.*, 2010 OK 16, the Court ruled the Plaintiffs are acting within their right to seek recovery from certain persons who received money in the nature of purported profits from a Ponzi scheme - persons such as Defendants Wilcox. *See* 2010 OK 16, at ¶¶30 and 38. The Oklahoma Supreme Court held that whether a profit in a Ponzi scheme constitutes unjust enrichment is a mixed question of fact and law. *Id.* at ¶21. *Blair* directs this Court to focus, not on the Ponzi scheme as a whole, but on the significance or consequence of the transactions between the investors and Schubert and whether "reasonably equivalent value" was exchanged for the profit received by the investors. *Id.* at ¶¶26-27.

In *Blair*, the Oklahoma Supreme Court adopted the reasoning laid out in a line of cases embodied by *Carrozzella & Richardson*, 286 BR 480, 488-490 (D.Conn. 2002), wherein the court declined to allow recovery of Ponzi scheme proceeds where the Ponzi schemer's payment of the funds served to extinguish an antecedent debt. *Blair* at ¶¶26-27. Courts following this line of cases look at whether the "innocent investor received the funds for satisfaction of an antecedent debt and if the funds received by the investor were based upon a reasonable contractual interest." *Blair* at ¶26. *See also Carrozzella &*

Richardson at 490-491 (investors loaned money to promoter in exchange for reasonable interest rates); *Lustig v. Weisz & Associates (In re Unified Commercial Capital)*, 2002 WL 32500567, *8 (W.D.N.Y. 2002)(the contracted for annual interest rate of 12% on a loan was reasonable in the mid 1990s); *Balaber-Strauss v. Sixty-Five Brokers (In re Churchill Mortgage Investment Corp.)*, 256 B.R. 664, 681-682 (S.D.N.Y. 2000)(brokers who provided services to debtor gave value in exchange for commissions paid); and *Solow v. Reinhardt (In re First Commercial Management Group, Inc.)*, 279 B.R. 230,239 (N.D. Ill. 2002)(brokers provided a service to the Ponzi schemer that was of reasonably equivalent value to the commissions paid).

However, the *Carrozzella & Richardson* court recognized a difference where there is no antecedent debt to be extinguished:

Regardless of the Debtor's business, legitimate or otherwise, so long as the Debtor received 'reasonably equivalent value' in exchange for the transfer of property, there has been no diminution in the Debtor's estate and the remaining creditors have not been damaged by the transfer. Had the insolvent Debtor simply given away money without an extinguishment of underlying debt, the situation would be different.

Carrozzella & Richardson at 491. See also *Rieser v. Hayslip (In re Canyon Systems Corp.)*, 343 B.R. 615, 645-646 (S.D. Ohio 2006)(no reasonably equivalent value exchanged for implausibly high return); and *Bayou Superfund v. WAM Long/Short Fund II (In re Bayou Group, LLC)*, 362 B.R. 624, 635 (S.D.N.Y. 2007)(distinguished cases involving contractual right to interest and determined that investors had no contractual right to fictitious profits).

Defendants Wilcox did not loan Schubert money or otherwise contract with Schubert for a particular interest rate. An antecedent debt was not extinguished by Schubert's payment of the purported profits to Defendants Wilcox. Rather, these

investors gave Schubert money with the expectation that they would reap the profits produced through her conduct of day trading. The hope for profits in an investment enterprise that may or may not result in profits does not create an antecedent debt.

IV. THE NET AMOUNT RECEIVED BY DEFENDANTS WILCOX WAS AN UNREASONABLY HIGH DIVIDEND AND AN “ARTIFICIALLY INFLATED” PROFIT AND CANNOT BE INSULATED FROM EQUITY

The *Blair* Court 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.

Under the facts of this case, any money received over the return of the investors’ principal investment amounts is an artificially high dividend. This is so because these investors gave Schubert money with the expectation that they would reap the profits produced through her conduct of options and/or day trading. In this case, there were no profits to share. The payments made by Schubert were “simply payments of non-existent profits”. *See In re Unified Commercial Capital* at *8, wherein the court recognized a distinction between investors who contract for a reasonable rate of interest and those who expect to share in the “hoped for” profits of an enterprise. That court said:

If a person invests money with the understanding that he will share in the profits produced by his investment, and it turns out that there are no profits, it is difficult to see how that person can make a claim to receive any more than the return of his principal investment. The false representation by the Ponzi schemer that he is paying the investor his share of the profits, which are nothing more than funds invested by other victims, cannot alter the fact that there are no profits to share.

Id. Likewise, the *Blair* court held that Plaintiffs “may not seek relief against Ponzi investors who received profits that are artificially high dividends.” *Blair* at ¶ 30.

The *Blair* court adopted the *Unified Commercial Capital* distinction between investors who expect to share in “hoped for” profits and those who expect to receive a contracted for reasonable rate of interest. *Blair* at ¶¶ 27, 30, and 56. The Court went on to hold that Plaintiffs “may seek relief against Ponzi investors who received profits that are artificially high dividends” but may not seek relief against “innocent Ponzi-scheme investors who received their investment with a reasonable interest thereon.” *Blair* at ¶30. Defendants Wilcox were expecting only to share in “hoped for” profits

Finally, in a case such as this, there are no comparable market indicators upon which this Court could rely to establish a “reasonable” dividend. Because options trading and day trading are so highly speculative and dependent on the trader’s luck and skill at timing market fluctuations, it would be impossible to compare one trader’s returns to another’s in determining a reasonable investment profit. As previously explained, Defendants Wilcox were merely hoping to share in the profits of purported day trading, of which there were none. They did not contract for any rate of interest. The Court should not step in to restructure the investment agreement or contract, particularly in a situation such as this where the speculative nature of the fictitious enterprise would prohibit the formulation of an obvious, equitable and objective rate of return.

With respect to Defendants Wilcox, it is undisputed that Defendants Wilcox received net fictitious profits of \$509,505 that were paid from the Commingled Funds. Furthermore, the funds that Defendants Wilcox received constitute an “unreasonably high dividend” under the standard recently created in *Blair*.

IV. DEFENDANTS WILCOX ARE NOT VICTIMS AND ARE NOT INNOCENT INVESTORS

The *Blair* majority clearly defined the issue of the case as whether Plaintiffs may proceed against “*innocent* victims of a Ponzi scheme” to recover the difference between the amounts they received from the Ponzi scheme and the principal amounts they invested in the scheme. [Emphasis added.] Defendants Wilcox cannot be considered “innocent victims” for a variety of reasons.

Marsha Schubert conducted a Ponzi scheme, doing business as Schubert and Associates, wherein she promised that investor funds would be invested, but instead used those funds to pay purported returns to other investors. Defendants Wilcox admit that they were partners with Marsha Schubert in Schubert and Associates. Defendants Wilcox cannot be described as victims as they profited quite handsomely from their partnership with Schubert.

Defendants Wilcox acted with reckless disregard as to the legitimacy of Schubert’s scheme, particularly in light of the long-term banking industry experience of Defendant Marvin Wilcox. This is not a case where Schubert opened a bank account without the knowledge of Defendants Wilcox or otherwise diverted information about the account activity away from Defendants Wilcox. Defendants received copies of their bank statements monthly.

Defendants Wilcox materially aided Schubert’s “Ponzi” scheme by allowing Schubert to use their bank accounts to create a float by which she was able to pay purported returns to investors in her scheme. More than \$150,000,000 ran through the bank accounts of Defendants Wilcox. In addition, Defendant Marvin Wilcox actively recruited others to invest in Schubert’s nonexistent securities program. Defendant

Marvin Wilcox recommended Schubert to other potential investors despite his not receiving any statements or other records documenting or otherwise relating to his purported day trading activities.

Defendants Wilcox knew, or should have known with the exercise of reasonable care to include a review of their own bank statements, that their actions were contributing to a fraudulent scheme. Defendants Wilcox were not victims or innocent participants and should be required to return their net “profits” of \$509,505.

CONCLUSION

Plaintiffs are entitled to summary judgment against Defendants Wilcox 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 *Blair*. Defendants Wilcox received \$509,505 in funds that must be characterized as an “unreasonably high dividend”. This financial benefit to Defendants Wilcox came to them 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 Plaintiff’s unjust enrichment cause of action against Defendants Wilcox are undisputed. Therefore, this Court should grant summary judgment in favor of Plaintiffs and against Defendants Wilcox in the amount of \$509,505, plus pre-judgment and post judgment interest at the statutory rate, and costs of this action.

Respectfully submitted,

By: Melanie Hall

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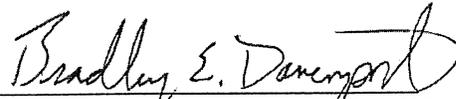
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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing motion was mailed this 23rd day of August 2010, with postage prepaid, to:

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