FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.
AUG 23 2010
PATRICIA PRESLEY, COURT CLERK
by _____ DEPUTY

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

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| OKLAHOMA DEPARTMENT OF SECURITIES *ex rel.* IRVING L. FAUGHT, Administrator, et al., | ) | |
| Plaintiffs, | ) | |
| v. | ) | Case No. CJ-2005-3796 |
| ROBERT W. MATHEWS, et al., | ) | **HEARING SET FOR OCTOBER 1, 2010 @ 9:00 A.M.** |
| Defendants. | ) | |

**PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS, ROD AND WANDA MARTIN, 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, Rod and Wanda Martin ("Defendants Martin"), 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 Defendants Martin have received funds from Marsha Schubert d/b/a Schubert and Associates ("Schubert") for which they gave no reasonably equivalent value and which represent an unreasonably high dividend. Furthermore, there is no dispute that the funds Defendants Martin received represent a benefit to them and came at the expense or to the detriment of others who were drawn into the Schubert Ponzi scheme. Based on the undisputed facts and legal authority set forth herein, summary judgment should be granted in favor of Plaintiffs and against Defendants Martin.

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

1. 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, 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, Exhibit "B", *United States of America v. Marsha Kay Schubert*, CR 05-078; Marsha Schubert's state guilty plea, Exhibit "C", *State of Oklahoma v. Marsha Kay Schubert,* CF-2004-391, wherein 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. 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. 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. 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 Schubert's State Guilty Plea, 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, 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. On or about October 30, 2002, Schubert wrote a check payable to Defendant Wanda Martin in the amount of $5,043.11. At that time, Defendants Martin had not invested in the Schubert Investment Program. *See* Affidavit of Dan Clarke, Exhibit "D", ¶11 and copy of check number 1825, dated 10/30/02, on the account of Schubert and Associates, Exhibit "E".

5. On or about August 1, 2003, Defendant Wanda Martin wrote a check from the joint checking account of Defendants Martin payable to Schubert in the amount of $30,000 that became a part of the Commingled Funds. *See* Affidavit of Dan Clarke, Exhibit "D", ¶12(a); *see also* a copy of check number 3572, dated 8/01/03, on the account of Rodney and Wanda Martin, payable to Schubert, amount $30,000, Exhibit "F".

6. On or about March 3, 2004, Defendant Wanda Martin endorsed over to Schubert a check in the amount of $8,143.09 that became a part of the Commingled Funds. *See* Affidavit

of Dan Clarke, Exhibit "D", ¶12(b); *see also* a copy of the endorsed check and corresponding deposit slip referencing $8,143.09 from Wanda Martin, Exhibit "G".

7. Schubert did not make the investments she represented she would make on behalf of Defendants Martin, but instead used the money to pay fictitious profits to other persons in furtherance of the Ponzi scheme. *See* Affidavit of Dan Clarke, Exhibit "D", ¶7 and Schubert's State Guilty Plea, Exhibit "C", ¶24.

8. Between August 29, 2003 and October 5, 2004 (14-month period), Schubert paid a total of $67,142 to Defendants Martin by eight checks drawn on the Schubert F&M account. *See* Affidavit of Dan Clarke, Exhibit "D", ¶13; *see also* activity sheet and accountant's compilation report prepared by BKD, LLP for transactions pertaining to Defendants Martin attached as Exhibit "H"; *see also* eight checks, Exhibit "I"; *see also* an excerpt of Defendants Martins' Supplemental Responses to Interrogatory numbers 18 and 19, Exhibit "J".

9. The funds referenced in paragraphs 4 and 8 above were paid to Defendants Martin from the Commingled Funds. *See* Affidavit of Dan Clarke, Exhibit "D" at ¶14.

10. Defendants Martin gave nothing of reasonably equivalent value for the amount they received from Schubert that was over and above the amounts Defendants Martin paid to Schubert (the "Net Amount"). The Net Amount totaled $34,042.02. *See* Affidavit of Dan Clarke, Exhibit "D", ¶15.

11. The fictitious rate of return that Defendants Martin actually received, bearing in mind there was no actual investment of their funds, equated to 89%. *See* Affidavit of Carol Gruis, Exhibit "K", at ¶ 11.

## 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 MARTIN WERE UNJUSTLY ENRICHED AT THE EXPENSE OF THE SHORT INVESTORS IN THE PONZI SCHEME

Defendants Martin 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 Martin satisfy all of the elements of a cause of action for unjust enrichment.

Specifically, Defendants Martin received a pecuniary benefit through the Net Amount paid to them from the Commingled Funds ($34,042.02). 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 Martin received $34,042.02 in Commingled Funds at the expense of and to the detriment of the short investors.

## III. THE PROFITS DEFENDANTS MARTIN 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 persons who received money in a Ponzi scheme - persons such as Defendants Martin. *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 "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 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 and 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 Martin did not loan Schubert money or otherwise contract with Schubert for a particular interest rate that would create an antecedent debt for the use of their money. Rather, these investors gave Schubert money with the expectation that they would reap the profits produced through her conduct of options and/or day trading. The hope for profits in an investment enterprise that may not result in profits does not create an antecedent debt.

## IV. THE NET AMOUNT RECEIVED BY DEFENDANTS MARTIN 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 would be 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 *Lustig v. Weisz & Associates* (*In re Unified Commercial Capital*), 2002 WL 32500567, *8 (W.D.N.Y. 2002), 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 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 Martin 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, these investors were merely hoping to share in the profits of a scheme, of which there were none. They did not contract for a commercially reasonable 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 Martin, it is undisputed that they paid $38,143.09 into the Schubert Investment Program and the money was never invested on their behalf. It is also undisputed that Defendants Martin received $34,042.02 from the Commingled Funds that would appear to create a net fictitious profit of $34,042.02. It is unreasonable to believe that those funds would legitimately generate a return of $72,185.11. *See* Affidavit of Carol Gruis, Exhibit "K", at ¶ 10. That would equate to an "artificially inflated" rate of return of 89%.

*See* Affidavit of Carol Gruis, Exhibit "K", at ¶ 11. The funds that Defendants Martin received constitute an "unreasonably high dividend" under the standard recently created in *Blair*.

## CONCLUSION

Plaintiffs are entitled to summary judgment against Defendants Martin 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 Martin received $34,042.02 in funds that must be characterized as an "unreasonably high dividend", if the money received before they invested could be characterized as a dividend at all. This financial benefit to Defendants Martin came to them at the expense of others, who lost money through their participation 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 Martin are undisputed. Therefore, this Court should grant summary judgment in favor of Plaintiffs and against Defendants Martin in the amount of $34,042.02, plus pre-judgment interest and post-judgment interest at the statutory rate(s), and costs of this action.

Respectfully submitted,

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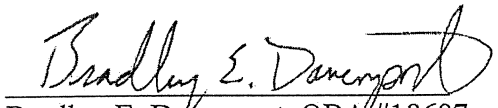

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CERTIFICATE OF SERVICE

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:

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