

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

FILED IN THE DISTRICT COURT
OKLAHOMA COUNTY, OKLA.

APR 20 2009

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.,)
)
 Interveners.)

PATRICIA PRESLEY, COURT CLERK
 by _____
 DEPUTY

Case No. CJ-2006-3311

PLAINTIFF'S REPLY TO DEFENDANTS' BRIEF IN SUPPORT OF JURY TRIAL OF OKLAHOMA DEPARTMENT OF SECURITIES' CLAIMS

Plaintiff, Oklahoma Department of Securities *ex rel.* Irving L. Faught, Administrator (Department), respectfully submits this reply to *Defendants' Brief in Support of Jury Trial of Oklahoma Department of Securities' Claims* (Defendants' Brief). Plaintiff continues to rely on the arguments and authorities cited in its motion and previous memorandum of law and submits this reply to address Defendants' brief.

ARGUMENTS AND AUTHORITIES

I. Defendants are not entitled to a jury on basis of joint and several liability.

Defendants concede that the remedies of injunction and restitution sought by the Department are equitable in nature. See p. 2 of Defendants' Brief. However, Defendants argue that they are entitled to a jury trial because the Department is seeking to hold them

jointly and severally liable for materially aiding a securities fraud pursuant to the Oklahoma Uniform Securities Act of 2004, 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).

To support their position, Defendants rely on several cases for the proposition that cases brought under the Act are actions in law and hence should be tried to a jury. See *Nikkel v. Stifel*, 1975 OK 158, 542 P.2d 1305, 1308; *South Western Oklahoma Development Authority v. Sullivan Engine Works, Inc.*, 1996 OK 9, 910 P.2d 1052, 1059; and *Bane v. Anderson, Bryant & Co.*, 1989 OK 140, 786 P.2d 1230, 1235-1237.¹ These cases were brought by private investors to recover damages. *Nikkel* at 1307; *South Western Oklahoma Development Authority* at 1055; and *Bane* at 1232. As with the Intervenors' damages claim, there is no dispute that private investors seeking damages under the Act is a "law action" that entitles the parties to a jury trial.

The Department is not seeking damages, but rather, is seeking equitable remedies to protect the public from those who would commit and aid securities fraud. Cases brought by the Department, in its enforcement capacity to protect the public interest, are considered equitable in nature. *SEC v. Petrofunds, Inc.* 420 F.Supp. 958, 960 (S.D.N.Y. 1976).

The Department has not brought a contract case. Yet, Defendants cite *Waugh v. Heidler*, 1977 OK 78, 564, to suggest that joint and several liability cases should be treated as if they were cases sounding in contract and are, therefore, legal in nature. *Waugh*, however, does not support this conclusion and has no bearing on whether the issue of imposing joint and several liability in this case warrants a jury trial.

¹ Interestingly, none of the cited cases involve the question of right to a jury trial.

The *Waugh* court's reference to contract came in its recitation of Section 408(b) of the Predecessor Act that provides for joint and several liability between persons who commit securities fraud and those who provide material aid to the persons committing the fraud. *Id.* Section 408(b) of the Predecessor Act provides that "there shall be contribution as in cases of contract among the several persons so liable."² Defendants incorrectly suggest that this reference to contract causes any matter concerning the imposition of joint and several liability to become a legal rather than equitable matter.

Contribution is an equitable remedy that apportions the loss between those liable for harm caused to a third person. *Radford-Shelton and Associates Dental Laboratory, Inc. v. Saint Francis Hospital, Inc.*, 1976 OK CIV APP 41, 569 P.2d 506, 511. A claim for contribution accrues when a judgment is rendered against a person who shares liability for the debt with another who is jointly and severally liable. *Stotts v. Church of Jesus Christ of Latter Day Saints*, 1994 OK CIV APP 134, 882 P.2d 1106. The right to seek contribution belongs to a person who discharges more than his share of the liability for the joint debt. *Radford-Shelton and Associates Dental Laboratory* at 511.

Any right of contribution that the Defendants may have in no way impacts the Department's case against the Defendants or the relief the Department is seeking. The Department is entitled to pursue recovery from any party found to be jointly and severally liable until its judgment is satisfied. *Founders Bank and Trust Company v. Upsher*, 1992 OK 35, 830 P.2d 1355, 1364-1365.

² Section 1-509(H) of the Act similarly provides that a person who is jointly and severally liable with another person "has a right of contribution as in cases of contract against any other person liable under this section for the same conduct."

II. Civil penalties do not warrant a jury trial.

Citing *Tull v. United States*, 481 U.S. 412, 107 S.Ct. 1831, 95 L.Ed.2d 365 (1987), Defendants argue that under common law tradition, a request for civil penalties entitles parties to a jury trial. However, Defendants' fail to state the court's holding that "a determination of a civil penalty is not an essential function of a jury trial, and that the Seventh Amendment does not require a jury trial for that purpose in a civil action." *Id.* at 427.

Courts traditionally assess the amount of any civil penalties. This type of calculation is performed by judges rather than a jury, and, therefore, does not require a jury trial. *State of Vermont v. Irving Oil Corporation*, 955 A.2d 1098 (2008); see also *SEC v. Lipson*, 278 F.3d 656 (7th Cir. 2002) (court held that the judge decides not only the equitable relief but the amount of civil penalty). The holding in *Irving Oil Corporation* is consistent with other state enforcement actions that civil penalties are equitable in nature. The Connecticut Supreme Court held that *Tull* did not mandate a jury trial in a state environmental action for injunctive relief and civil penalties because the mission of the legislature was to preserve the status quo which is equitable in nature. See *Comm'r of Env'tl. Protection v. Conn. Bldg. Wrecking Co.*, 227 Conn. 175, 629 A.2d 1116, 1123 (1993). Additionally, the California Supreme Court held that civil penalties are not damages at law, but are a form of equitable relief that is incidental to enforcement statutes and does not entitle the plaintiff to a jury trial. See *DiPirro v. Bondo Corp.*, 153 Cal.App. 4th 150, 62 Cal.Rptr.3d 722, 748 (Ct. App. 2007).

Defendants cite to *SEC v. Kopsky*, 537 F. Supp. 2d 1023, for the premise that civil penalties are issues of law. However, the *Kopsky* court distinguished between civil penalties that punish culpable individuals, which were issues at law, from those that are intended to restore the status quo, which are calculated by courts of equity. *Id.* at 1026. The Department has consistently maintained its position of restoring the status quo for the investors who lost money in Marsha Schubert's fraudulent scheme.

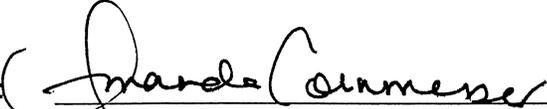
Furthermore, the civil penalties requested by the Department are incidental to the other remedies sought in this matter. In Oklahoma, "the presence of joined legal and equitable issues does not require a jury trial if the equitable issues are paramount or the legal issues incidental to or dependent upon the equitable issues." *Oklahoma Oil & Gas Exploration Drilling Program 1983-A v. W.M.A. Corporation* at 612.

Conclusion

The Department has sought equitable remedies that do not entitle the Defendants to a jury trial. To the extent that the Court finds the civil penalties to be a legal remedy, they are incidental to the other requested remedies and do not warrant a jury trial. The Defendants are, therefore, not entitled to a jury trial in connection with the Department's case.

Respectfully submitted,

OKLAHOMA DEPARTMENT OF SECURITIES
Irving L. Faught, Administrator

By:  _____

Amanda Cornmesser, (OBA #20044)
Melanie Hall, (OBA #1209)
Gerri Stuckey, (OBA #16732)
Oklahoma Department of Securities
120 North Robinson, Suite 860
Oklahoma City, Oklahoma 73102
(405) 280-7700 phone number
(405) 280-7742 facsimile number
Attorneys for Oklahoma Department of
Securities

CERTIFICATE OF MAILING

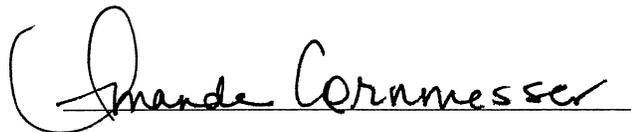
I hereby certify that a true and correct copy of the *Plaintiff's Reply to Defendants' Brief in Support of Jury Trial of Oklahoma Department of Securities' Claims*, was mailed this 20th day of April, 2009, by depositing it in the U.S. Mails, postage prepaid, to the following counsel of record:

Matthew C. Kane, Esq.
Grant M. Lucky, Esq.
Patrick J. Ryan, Esq.
Daniel G. Webber, Jr., Esq.
Ryan, Whaley & Coldiron
119 N. Robinson, Ste. 900
Oklahoma City, OK 73102

Ann L. Hoover
5611 SW Barrington Ct. S, Ste. 100
Topeka, KS 66614-2489

Joseph H. Boccock, Esq.
Spencer F. Smith, Esq.
McAfee & Taft, A Professional Corporation
211 N. Robinson Ave, 10th Fl.
Oklahoma City, OK 73102-7102

Kurtis Ward, Esq.
Nantucket Office Building
3232 W. Britton Rd., Suite 170
Oklahoma City, OK 73120



A handwritten signature in black ink, reading "Amanda Cornmesser", is written over a horizontal line. The signature is cursive and includes a large, stylized initial "A" on the left.